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S. N. Das
Advocate High Court
Jammu & Kashmir
Srinagar.

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EDITOR:

S. D. CHAUDHRI, B.A., LL. B.,

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INDIAN CASES

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VOLUME LXVII.

PRIVY COUNCIL.

APPEAL FROM THE MADRAS HIGH COURT.

December 19, 1921.

Present:—Lord Buckmaster, Lord Carson, Sir John Edge and Mr. Ameer Ali.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—DEFENDANT—APPELLANT

versus

Sri Sri Sri MEERJA *Sri* PUSAPATI VIZIARAMA GAJAPATHIRAJU MAHARAJAH MANYA SULTAN BAHADUR, RAJA OF VIZIANAGARAM AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Alluvial accretions—Title—"Gradual, slow and imperceptible," meaning of—English rule—Bengal Alluvion and Diluvion Regulation XI of 1825, *s* 4, *applicability of to Madras.*

The recognition of title by alluvial accretion is largely governed by the fact that the latter is due to the normal action of physical forces and the different conditions of Indian and English rivers are such that what would be abnormal and almost miraculous in the latter is normal and commonplace in the former. [p. 3, col. 1.]

Even if the test of "gradual, slow and imperceptible" according to the English rule is applied to such accretions, it should be borne in mind that slow and imperceptible are only qualifications of the word 'gradual' and this word with its qualifications only defines a test relative to the conditions to which it is applied. [p. 3, col. 1.]

Quære.—Whether the law as to accretions promulgated in the Bengal Alluvion and Diluvion Regulation coincides with the law as to accretions in the Presidency of Madras or elsewhere in India. [p. 3, col. 1.]

Appeal from a decree of the High Court at Madras reported as 40 Ind. Cas 896, affirming a decree of the Temporary Subordinate Judge, Cocanada.

FACTS.—The subject-matter of the dispute is an island or *lanka* formed in the Godavari river. The *lanka* has been in possession of the respondents. The appellant levied penal assessment which was paid under protest by the respondents. The suit was brought by the respondents for a declaration of their title to the *lanka* and the refund of the amount paid under protest. The appellant contended that the island was formed on the bed of a tidal and navigable river and as such belonged to the Government. The Trial Judge found that the suit lands were an accretion to the respondents' lands, that they were not a vertical accretion to the bed of the river, and that the appellant had no title to them.

On appeal, the High Court (Ayling and Srinivasa Aiyangar, JJ.) confirmed the findings of the Subordinate Judge and dismissed the appeal.

Hence the present appeal.

Mr. *DeGruyther, K.C.* and Mr. *Brown*, for the Appellant.—The documentary evidence in the case clearly shows that the formation of the suit lands was very rapid and not gradual, solw and imperceptible as is required by law to give title to the respondents. There is no specific rule of accretions applicable to Madras but the rule of justice, equity and good conscience is to be applied, *i. e.*, the rule of English Law.

Wegheln Rayaji v. *Masludin* (1). The rule in English Law is well-established that a title by accretion is acquired only where the accretion is "gradual, slow and imperceptible."

Rex v. *Yarborough* (2), *Attorney-General of Southern Nigeria* v. *Holt & Co.* (3). The accretion in this case does not satisfy the test. Bengal

(1) 14 I. A. 89 at p. 96; 11 B. 551; 11 Ind. Jur. 815; 5 Sar. P. C. J. 16; 6 Ind. Dec. (N. S.) 334 (P. C.).

(2) (1824) 3 B. & C. 91; 2 L. J. K. B. 196; 107 E. R. 638; 27 R. R. 292, affirmed in (1828) 2 Bligh (N. S.) 147; 1 Dow. & Cl. 175; 5 Bing. 163; 4 D. & R. 790; 4 E. R. 1087.

(3) (1915) A. C. 599 at p. 613; 84 L. J. P. C. 98; 112 L. T. 955.

SECRETARY OF STATE FOR INDIA v. RAJA OF VIZIANAGARAM.

Alluvion and Diluvion Regulation XI of 1825 refers to "gradual accession." It only applies to cases of *incrementum latens*. *Nogender Chunder Ghose* v. *Mahomed Enaff* (4). There is no distinction between the English rule and the Indian rule. The High Court relied too much on the observations in *Srinath Roy* v. *Dinabandhu Sen* (5).

Mr. *Upjohn*, *K. C.*, Sir *George Lowndes*, *K. C.*, and Mr. *Raikes*, for the Respondents.—It is not open to the appellant to argue the question now raised. No issue was framed on this question nor was any evidence called. The facts found by the Courts show that the lands were formed as a gradual accretion. The test laid down in the Bengal Alluvion and Diluvion Regulation applies to Madras. *Sri Balusu Ramalakshmamma* v. *Collector of Godavari District* (6).

The true test, whether in India or in England, is that the accretion must be due to the ordinary and natural action of the river. What may be considered abnormal in an English river may be normal in the large Indian rivers. The onus was on the appellant and it was not discharged.

Haider Khan v. *Secretary of State for India* (7).

Mr. *De Gruyther*, *K. C.*, replied.

JUDGMENT.

LORD CARSON.—The question in dispute in this action is as to the ownership of a certain *lanka* formed by alluvion in the bed of the river Godavari. It consists at the present time of an island being surrounded on all sides by the river, and in extent consists of about 1000 acres. At the place where this *lanka* is situated the Godavari is both navigable and tidal, and it is not disputed that the bed of the river at that place belongs to the Government of India. The extent of the river and the operation of its currents in forming alluvial tracts during the flood season must be borne in mind with reference to questions arising in this case. A description of this river will be found in *Sri Balusu Ramalakshmamma* v. *Collector of Godavari District* (6).

The Maharajah of Vizianagaram, the first respondent, has for some years been in possession of this property; the other respondent is a trustee of the Vizianagaram estates.

The defendant (appellant), as representing the Government of India, treating the Maharajah and his tenants as being in unlawful occupation of the lands in question, proceeded to levy penal assessment in respect of them amounting to Rs. 9,029. This sum the Maharajah paid under protest and has brought the present action claiming a declaration of title to the said lands and re-payment of this penal assessment.

The main questions raised by the pleadings and issues, and to which the evidence was directed in the Trial Court before the Temporary Subordinate Judge, were whether the *lanka* in question was an accretion, formed laterally as an adjunct to or in continuity with any *lanka* or other property belonging to the Maharajah and became his property, or was formed vertically as an island in the bed of the Godavari and was, therefore, the property of the Government.

The Subordinate Judge before whom the action was tried held that the *lanka* in question was formed by alluvion in contiguity with the Maharajah's land and was subsequently separated therefrom by the river, and gave a decree for the respondents.

On appeal the High Court of Judicature at Madras, on the 15th November 1 16, confirmed the decree of the lower Court and dismissed the appeal, concurring with the finding of the Temporary Subordinate Judge that the land in dispute was formed as a lateral extension of the Maharajah's *lanka*, or at least of the site of his *lanka*.

There are, therefore, concurrent decisions upon this the main question raised, and their Lordships see no reason for dissenting from the conclusion arrived at. The further question, however, and indeed the main one argued on behalf of the appellant before this Board, was that even if the lands in question were accretions to lands of the Maharajah the process of accretion was not such as to give him title to them.

In dealing with the great rivers in India and comparing them with the rivers in this country, it is necessary to bear in mind the comparative rapidity with which formations and additions take place in the former.

(4) 10 B. L. R. 406; 18 W. R. 113; 3 Sar. P. C. J. 151.

(5) 25 Ind. Cas. 467; 41 I. A. 221; 18 C. W. N. 1217; (1914) M. W. N. 65; 1 L. W. 733; 16 M. L. T. 319; 12 A. L. J. 1193; 20 C. L. J. 385; 16 Bom. L. R. 901; 42 C. 489 (P. C.).

(6) 26 I. A. 107; 22 M. 464; 3 C. W. N. 777; 1 Bom. L. R. 696; 7 Sar. P. C. J. 534; 8 Ind. Dec. (N. S.) 332 (P. C.).

(7) 1 Ind. Cas. 182; 36 C. 1 at p. 17; 8 C. L. J. 436; 12 C. W. N. 1095; 35 I. A. 195 (P. C.).

It was claimed by the appellant's Counsel that by the settled law of England, which, he argued, was the law applicable to Madras, land to be an accretion must be formed by gradual, slow and imperceptible degrees as laid down in the case of *Rex* v. *Yarborough* (2), and other English authorities, and he alleged that the accretions in the present case were not formed by "gradual, slow and imperceptible degrees." On the other hand, the Board were referred to section 4 of Bengal Regulation XI of 1825, the only requirement of which is that this accretion should be "gradual"—not that it should be slow or imperceptible. That Regulation was promulgated to be in force throughout the Provinces subject to the Presidency of Fort William, and did not apply to the Presidency of Madras. It has, however, been contended that this Regulation embodies the law of accretion as applicable generally to the rivers of India. Their Lordships do not find it necessary to decide whether the law as to accretions promulgated in the Bengal Regulation coincides with the law as to accretions in the Presidency of Madras or elsewhere in India, nor to discuss the exact meaning of the word "perceptible" in the English rule which provides that all accretions must be "gradual, slow and imperceptible," for, assuming the applicability of the English rule, "slow" and "imperceptible" are only qualifications of the word "gradual," and this word with its qualifications only defines a test relative to the conditions to which it is applied. In other words the actual rate of progress necessary to satisfy the rule when used in connection with English rivers is not necessarily the same when applied to the rivers of India. The application of the rule is, in their Lordships' opinion, correctly laid down in the judgment of Mr. Justice Ayling in the present case when he says :—

"It seems to me the recognition of title by alluvial accretion is largely governed by the fact that the latter is due to the normal action of physical forces; and the different condition of Indian and English rivers is such that what would be abnormal and almost miraculous in the latter is normal and commonplace in the former, as pointed out by their Lordships of the Privy Council in *Srinath Roy* v. *Dinabandhu Sen* (5)."

Their Lordships observe that neither in the plaint nor in the defendants' written statement, or what is still more important in the issues as settled, is there any question raised as to the accretions being "gradual," "slow" or "imperceptible."

Further, in their memorandum of appeal to the High Court, the Government did not make the decision on this point a ground of objection. An examination of the evidence given before the Trial Judge shows that although several of the witnesses proved that the said *lankas* or parts of them "arose gradually" (page 219 of record), are increased "gradully" (page 229), or "gradually extended" (page 240), or "had been gradually growing in size" (page 232), no question challenging this evidence was put upon cross-examination, nor was any evidence given on behalf of the appellant to attempt to displace such evidence.

Some attempt was made to show by a comparison of farm leases and accounts of different years (which were put in evidence on behalf of the Maharajah to prove contiguity) that there must have been extensive accretions at a particular date, but such a comparison does not, when examined, show the contents of the *lanka* but only what land in the place was cultivated in each year.

Further, the judgment of Mr. Justice Srinivasa Aiyangar has pointed out that throughout the long dispute which has led to the present suit the Government had never suggested that the land in question "was not an accretion in the sense of a gradual formation." Their Lordships doubt whether, under these circumstances, it is open to the appellant to raise the contention under consideration, but assuming that it is, their Lordships see no reason to doubt that, applying the principles already explained, the accretion must be held to have been "gradual, slow and imperceptible," and to be the property of the Maharajah. The order appealed for must, therefore, be confirmed, and this appeal dismissed with costs.

Their Lordships will humbly advise His Majesty accordingly.

N. H. *Appeal dismissed.*

Solicitor for the Appellant.—*Solicitor, India Office.*

Solicitor for the Respondents.—*Mr. Douglas Grant.*

GULAB CHAND *v.* KAMAL SINGH.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL NO. 529 OF 1920.
March 2, 1922.
Present:—Mr. Justice Gokul Prasad and Mr. Justice Stuart.
Lala GULAB CHAND—PLAINTIFF—APPELLANT
versus
KAMAL SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), s. 72—Forbearance to sue or to enforce claim, whether valid consideration.

If an intending litigant *bona fide* forbears a right to litigate a question of law or fact which it is not vexatious or frivolous to litigate, he does give up something of value and that is good consideration for a contract. [p. 5, cols. 1 & 2.]

Second appeal from a decree of the District Judge, Agra, dated the 3rd February 1920.

Mr. *S. K. Dar*, for the Appellant.

The Hon'ble Mr. *N. P. Asthana*, for the Repondentes.

JUDGMENT.

GOKUL PRASAD, J.—This was a suit to recover certain amount on the basis of a *hundi* executed by defendants Nos. 1 and 2, Debi Singh and Dan Sahai, on the 18th of June 1914. The defendants pleaded that they executed the *hundi* but that it was without consideration and was obtained through undue pressure.

The Trial Court came to the conclusion that the defendants had failed to prove that the *hundi* was executed under undue influence or without consideration. It accordingly decreed the suit against defendants Nos. 1 and 2, the executants of the *hundi*.

The defendants went up in appeal. They abandoned the plea of undue influence but contended that the consideration alleged by the plaintiff was no consideration in law. The learned Judge gave effect to this contention of the defendants-appellants and dismissed the suit.

The plaintiff comes here in second appeal and challenges the correctness of the finding of the lower Appellate Court.

The facts are shortly as follows. On the 5th of August 1903 the defendants, Debi Singh and Dan Sahai, with their two brothers borrowed a sum of Rs. 21,000 carrying interest at six per cent. per annum from the plaintiff and made a usufructuary mortgage of certain property in his favour for 18 years. On the same date two of the mortgagors took a lease of the mortgaged property for 18 years, that is to say, for the period of the mortgage, at Rs. 1,900 per annum. The mortgage was to end after 18 years without any further payment being made by the mortgagors, the principal and interest being satisfied by the plaintiff's possession for 18 years as aforesaid. The lease is specifically mentioned in the mortgage and certain conditions about the increase and decrease in revenue were to take effect only in case the lessees were ejected for non-payment of rent. As I have stated above, the mortgage was to be satisfied simply by possession for 18 years, there was no account to be made and nothing to be paid by one party to the other under ordinary circumstances, or, to put it in other words, the lease and the mortgage were agreed upon simultaneously and the plaintiff was to receive Rs. 1,900 per annum for 18 years in full satisfaction of the principal money and the interest due thereon. It, however, so happened that the defendants-respondents failed to pay the lease money and the result was that the plaintiff had them ejected on the 30th of March 1911. According to the plaintiff, notwithstanding the assessment of rent on the ex-proprietary holding of the mortgagors, the total income from the village became less by Rs. 563 from the amount of Rs. 1,900 per annum which he was to receive. In lieu of the aforesaid deficiency for two years that is for 1319 and 1320 Fasli which the plaintiff claimed, the defendants executed the *hundi* in question.

The argument on behalf of the plaintiff strenuously urged by his learned Vakil is that the Court below has erred in holding that this amount of deficiency did not form a legal consideration for the *hundi*. The learned Judge has, in my opinion, erred in doing so. The principle applicable to cases in which forbearance to sue or to enforce a claim in Court does or does not amount to a valid consideration has been very clearly laid down by Bowen, L. J. in *Miles* v. *New Zealand Alford Estate Company* (1): "It seems to me that if an intending litigant *bona fide* forbears a right to litigate a question of law or fact which it is not vexatious or frivolous to litigate, he does give up something of value. It is a

(1) (1886) 32 Ch. D 266 at pp. 291, 292; 54 L. J. Ch. 1035; 53 L. T. 219; 34 W. R. 669.

mistake to suppose it is not an advantage, which a suitor is capable of appreciating, to be able to litigate his claim, even if he turns out to be wrong. It seems to me it is equally a mistake to suppose that it is not sometimes a disadvantage to a man to have to defend an action even if in the end he succeeds in his defence; and I think, therefore, that the reality of the claim which is given up must be measured, not by the state of the law as it is ultimately discovered to be, but by the state of the knowledge of the person who at the time has to judge and make the concession. Otherwise you would have to try the whole cause to know if the man had a right to compromise it, and with regard to questions of law it is obvious you could never safely compromise a question of law at all ....Now that being the law which I think has to be applied to the present case, I come next to the facts. Was there here forbearance of a *bona fide* claim?" Then he went on to deal with the facts of that particular case.

There is no doubt that if the plaintiff's allegations in this case are correct, he was likely to lose Rs. 865 per annum for a large number of years and was at the same time bound to give up possession of the property after the lapse of the period of the mortgage, there being no express provision in the motgage for the recovery of such deficiency.

Under these circumstances in my opinion the plaintiff believed that he had a *bona fide* claim to enforce and his forbearance from trying to put that claim in Court, and to have it decided was good consideration for the *hundi* in dispute. In my opinion the decision of the Trial Court was correct. I would, therefore, allow the appeal and set aside the decree of the lower Appellate Court. As Dan Sahai, one of the defendants-respondents, has died and his heirs have not been brought on the record, the appeal as against him abates. I would, therefor, decree the claim against the defendant-respondent Kamal Singh with costs in all Courts including in this Court fees on the higher scale. In other respects the decree of the First Court is confirmed.

STUART, J.—I have little to add to the judgment of my learend brother. The first question that we had to decide was whether the *hundi* in question had been executed in consideration of Gulab Chand forbearing his right to sue the executants of the *hundi* for damages in respect of their acts, whereby he had been confined to the recovery from them of rent as ex-proprietary tenants, instead of being able to enforce against them the rent fixed by the lease. The point was not brought out very clearly in the Courts below, but there can be no doubt as to the fact that the *hundi* was executed in consideration of Gulab Chand forbearing to sue. I am clear in my mind that the question which he had a right to litigate was neither vexatious nor frivolous. Whether he would or would not have succeeded had he instituted a suit on this cause of action it is unnecessary for me to attempt to decide. I am not as confident as the learned District Judge was that he would have had no chance of success. Applying the test laid down by Bowen, L J. I have to look at the state of knowledge of Gulab Chand who at that time had to judge and make the concession. I am satisfied that the cause of action was neither vexatious nor frivolous and that Gulab Chand believed at the time that he had a good cause of action. On these findings the appeal must succeed, for there was clearly forbearance of a *bona fide* claim and such forbearance is a good consideration in law.

I concur in the order proposed.

BY THE COURT.—The order of the Court is that the appeal is allowed, the decree of the Court below is set aside and the plaintiff's claim is decreed against the defendant-respondent Kamal Singh. Kamal Singh shall pay his own costs and those of Gulab Chand in all Courts including in this Court fees on the higher scale.

J. P.

Appeal allowed.

JAMINIBALA DEBI v. KARALI PRASAD MUKHERJEE.

CALCUTTA HIGH COURT.
CIVIL RULE No. 414 OF 1921.
August 24, 1921.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Panton.

JAMINIBALA DEBI—PETITIONER

versus

KARALI PRASAD MUKHERJEE—OPPOSITE PARTY.

Provincial Small Cause Courts Act (IX of 1887), s. 27—Decree or order of Small Cause Court—Transfer to ordinary Court for execution—Order in execution, whether appealable.

Ordinarily, the decree or order of a Small Cause Court is final, under section 27 of the Provincial Small Cause Courts Act, but when such a decree is transferred to the ordinary Court for execution as if it were a decree made by that Court, the orders made in execution are appealable in the same way as orders made in the execution of decrees passed by that Court, although under section 102 of the Civil Procedure Code a second appeal would be barred. [p. 6, col. 2; p. 7, col. 1.]

Rule against an order of the District Judge, Burdwan, dated the 6th May, 1921, affirming that of the Munsif, Burdwan, dated the 26th April 1921.

Babu *Jyotis Chandra Pal*, for the Petitioner.
Babu *Narendra Krishna Bose*, for the Opposite Party.

JUDGMENT.—We are invited in this Rule to set aside an order of refusal of a District Judge to hear an appeal on the ground that no appeal lay, inasmuch as the order of the Court of first instance was made in the course of proceedings in execution of a decree made by a Court of Small Causes.

It appears that on the death of one Bhabadeb Bhutta his creditor Karali Prasad Mukherjee instituted a suit against his three infant sons and his widow. The claim was based as against the sons on the ground that they were the legal representatives of the deceased debtor and as against the widow on the ground that she had taken possession of the moveables which formed part of the estate left by the deceased. The suit, which was instituted in a Court of Small Causes, was decreed against the infant sons, but was dismissed as against the widow because she was not proved to be in possession of the moveables of the estate. The judgment of the Small Cause Court Judge states that as the widow was not an heir, she was not a necessary party, but for the reason that she was alleged to be in possession of a portion of the assets left by the deceased debtor. The suit was thus not dismissed against the widow on the ground that she was not a necessary party; it was tried on the merits against her and was decided in her favour, because the allegation that she was in possession of the moveables of the estate was not established by the evidence. This decree was transferred to the Court of the Munsif for execution by attachment and sale of the immoveable properties left by the deceased debtor. This order of transfer was made under section 39, Civil Procedure Code, in view of the provisions of Order XXI, rule 82 that an attachment of immoveable property cannot be effected by a Court of Small Causes. When the immoveable properties were attached, the widow appeared and objected on the ground that she had acquired good title thereto under a conveyance from her husband dated the 23rd January 1919. This objection was registered as a case under section 47, Code of Civil Procedure. There was a regular investigation and the Court came to the conclusion that the objection was not sustainable. The widow thereupon preferred an appeal to the District Judge. The District Judge has refused to entertain the appeal on the ground that no appeal lay inasmuch as the decree under execution had been passed by a Court of Small Causes. This view is clearly erroneous.

Section 27 of the Provincial Small Cause Courts Act is in these terms: "Save as provided by this Act, a decree or order made under the foregoing provisions of this Act by a Court of Small Causes shall be final." The orders thus made final are orders made by a Court of Small Causes; so that if this decree had been executed by the Court of Small Causes itself, the order in execution would have been final: *Raj Kumar Lal* v. *Fulaki Miyan* (1), *Alagamuthu Pillai* v. *Devasagaya Fernandez* (2). When, however, the decree has been transferred to the ordinary Court to be executed as if it were a decree made by that Court, the orders made in execution are

(1) 42 Ind. Cas. 467; 8 P. L. W. 146.
(2) 32 Ind. Cas. 484; 19 M. L. T. 146; 3 L. W. 34; (1916) 1 M. W. N. 78.

appealable in the same way as orders made in execution of decrees passed by that Court; this is in accordance with the view adopted in *Atwari* v. *Moi'u Lal* (3), although a second appeal would be barred under section 102, Code of Civil Procedure. We hold accordingly that the ground assigned by the District Judge in support of his order of refusal to entertain the appeal cannot be upheld.

It has been argued, however, that the appeal preferred to the District Judge was incompetent, because the order was made not under section 47, but under Order XX, rule 58 of the Code. In our opinion this contention is not well-founded. The Explanation to section 47 of the Code provides that for the purposes of the section a plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed are parties to the suit. This Explanation was inserted in view of the divergence of judicial opinion which had prevailed under the Code of 1882. Under that Code it had been held by the Allahabad High Court in *Kalka Prasad* v. *Basant Ram* (4), *Sheo Pargas Singh* v. *Nawab Singh* (5) and by this Court in *Rahimuddi Sircar* v. *Loll Veah* (6) and *Ram Pershad* v. *Jagannath Ram* (7) that the plaintiff whose suit had been dismissed and the defendant against whom a suit had been dismissed could not be considered as parties to the suit. On the other hand, the Madras High Court had held in *Rameswami Sastrulu* v. *Kameswaramma* (8), that such a plaintiff and such a defendant must be regarded as parties to the suit; see also *Gowri* v. *Vigneshvar* (9). The present Code gives effect to the view taken in the Madras decision and the widow must consequently be deemed a party to the suit, even though the suit was dismissed as against her. We are not unmindful that it has been ruled in the case of *Krishnappa Mudaly* v. *Periaswamy Mudaly* (10) and *Sham Lal Sahu* v. *Amar Prasad* (11), that the Explanation does not apply to a case where a suit has been dismissed against a person on the ground of misjoinder of parties, as in such an event, it cannot be appropriately said that, that person is a party to the suit. The decision in *Krishnappa Mudaly* v. *Periaswamy Mudaly* (10) was, however not followed in *Medisetti Venkatasami* v. *Kunchalla Chidambaram* (12) and *Vaddadi Sannamma* v. *Bodaganti Radhabhoyi* (13) and cannot be reconciled with *Abdul Kasim* v. *Thambusami Pillai* (14) and *Venkatachella Reddy* v. *Muthialu Reddy* (15). The present case is, plainly, not affected by this conflict of judicial opinion in Madras. Here although the opinion was expressed that the widow was not a proper party because she was not one of the heirs of the deceased debtor, yet she was treated as a proper party by reason of the allegation against her that she was in possession of the moveables of the estate. On this basis, the suit was tried against her and she succeeded on the merits. We must consequently hold that she was a party to the suit within the meaning of section 47, Code of Civil Procedure. Consequently the objection raised by her to the attachment of the properties covered by the conveyance executed in her favour by her husband, was rightly treated by the Court of first instance as comprehended within the scope of section 47, the decision of such a question operates as a decree under section 2, Civil Procedure Code, and is appealable in the same manner as other decrees under section 96, Civil Procedure Code.

The result is that the Rule is made absolute and the case returned to the District Judge in order that he may proceed to hear the appeal. The petitioner is entitled to the costs of this Rule—one gold *mohur*.

N. H.

Rule made absolute.

(3) 1 Ind. Cas. 553; 31 A. 1; A. W. N. (1908) 254; 5 A. L. J. 612.
(4) 23 A. 346; A. W. N. (1901) 92.
(5) 5 Ind. Cas. 496; 32 A. 321; 7 A. L. J. 264.
(6) 29 C. 696; 6 C. W. N. 727.
(7) 30 C. 134; 6 C. W. N. 10.
(8) 23 M. 361; 10 M. L. J. 126; 8 Ind. Dec. (N. S.) 653 (F. B.).
(9) 17 B. 49; 9 Ind. Dec. (N. S.) 32.
(10) 38 Ind. Cas. 297; 40 M. 961; 21 M. L. T. 121; L. W. 369; 32 M. L. J. 532.
(11) 39 Ind. Cas. 656; 2 P. L. J. 219; 3 P. L. W. 422.
(12) 45 Ind. Cas. 671; 23 M. L. T. 206.
(13) 43 Ind. Cas. 935; 41 M. 418; 22 M. L. T. 532; 34 M. L. J. 17; (1918) M. W. N. 23; 7 L. W. 234 (F. B.).
(14) 37 Ind. Cas. 673; (1917) M. W. N. 93; 5 L. W. 701.
(15) 54 Ind. Cas. 536; 37 M. L. J. 624.

MANNI LAL v. RAJA PARTAB BAHADUR SINGH.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 408 OF 1920.

May 26, 1921.

Present :—Mr. Dalal, A. J. C.

Lala MANNI LAL—PLAINTIFF—APPELLANT

versus

Raja PARTAB BAHADUR SINGH, C. I. E., TALUQDAR OF PARTABGARH—DEFENDANT—RESPONDENT.

Will, interpretation of—Construction of document—Absolute estate—Restraint on alienation—Hindu testator—Bequest opposed to Hindu Law.

If in a Will there is an absolute bequest, a restriction as to alienation will fail to have effect. [p. 8, col. 2.]

Tagore case [*Jotendro Mohun Tagore* v. *Ganendromohun Tagore*], 18 W. R 359 at p 365; 9 B. L. R. 377; I. A. Sup Vol. 47: 2 Suth. P. C. J. 692; 3 Sar. P. C. J. 82 (P. C.), referred to

Where an absolute interest in the entire property of the testator is given to the legatee before the testator starts in the Will to impose conditions, one of which is to the effect that none of the testator's successors will have a right to transfer the property and that the owner of the time who transfers any property will be liable to be removed from ownership by the next successor, the legatee takes an absolute estate under the Will. [p. 9, cols. 1 & 2.]

Intention of a testator which contravenes any recognised rules of Hindu Law will not be given effect to by a Court of Law. [p. 9, col. 1.]

Appeal from a decree of the Third Additional District Judge, Lucknow, dated the 8th November 1920, upholding that of the Subordinate Judge, Unao, dated the 17th April 1920.

Mr. *Ram Chandra*, for the Appellant.

Mr. *Niamatullah*, for the Respondent.

JUDGMENT.—The sole point raised in this second appeal turns upon the rule of law applicable to a Will of Raja Ajit Singh Taluqdar of Partabgarh under which the defendant has inherited a certain property. The property in the Unao district was contracted to be sold to the plaintiff, Lala Manni Lal, for a certain sum and he deposited Rs. 2,000 with the defendant, Raja Partab Bahadur Singh, as earnest-money with a condition that the money would be forfeited in case the contract of sale was not completed. In this Court the condition cannot be questioned and there is no ground of appeal relating to it. The plaintiff, Lala Manni Lal, sued for the recovery of the sum deposited by him with the defendant on the ground that the contract failed for a valid reason because of the want of title in the defendant to transfer the property. The lower Appellate Court held that there was no such want of title; and in appeal from the decree of the lower Appellate Court the only question raised is whether the defendant has full title to transfer the property or not. Another issue that the plaintiff purchased with full knowledge of the Will under which the defendant had inherited the property was not referred to by the lower Appellate Court and has not been pressed in argument here by the learned Pleader of the defendant-respondent. The one and the only point, therefore, for decision depends on the construction of the Will under which the defendant has succeeded to the Partabgarh estate.

The Will, of which construction is sought here, opens with a description of the property of which the testator was in possession and a declaration of the fact that the testator had no child of his body. He then goes on to declare the necessity he is under for the above reason to publish his desire by means of a Will together with certain conditions and restrictions so that his wishes may be given effect to in accordance with the document after his death. He then declares what his desire is. He directs that after his death his entire property, whether in his possession at the time or acquired afterwards, shall be taken by the defendant Lal Partab Bahadur Singh because of his good qualities of conduct and religion and "Lal Partab Bahadur Singh shall be my heir and successor (*waris wa janoshin*), and after he becomes my heir (*bad waris hone ke*) the above-mentioned heir shall carry out the under mentioned conditions." It is clear from the preamble that the entire estate was vested absolutely in Lal Partab Bahadur Singh. The words as to the fulfilment of conditions are significant in so far that the conditions shall be carried into effect after Lal Partab Bahadur Singh has become heir of the property. The conditions are, no doubt, in derogation of full ownership. The first condition is that none of the testator's successors shall have a right to

transfer the property, the second declares succession in perpetuity without declaring the heir in remainder. The fifth condition lays down a line of descent in conflict with section 22 of the Oudh Estates Act (I of 1869) and in paragraph 8 a further condition of succession of male heirs according to the arbitrary wishes of the testator is laid down. The seventh condition declares that the owner of the time who transfers any property would be liable to be removed from ownership by the next successor in case any transfer was made. The question here is whether having regard to the language of the Will the defendant is precluded from transferring property which he inherited under the Will. The learned Pleader for the appellant desired the Court to give effect to the intention of the testator. It is not possible to do so, because the intention of the testator in one part of the document is in conflict with his declared intention in another part of the document. After making Lal Partab Bahadur Singh absolute owner to fill the seat occupied by himself (*jinashin*), the testator has imposed conditions to narrow down the estate granted at the commencement of the Will. It may also be noted that the intention of a testator which contravenes any recognised rules of Hindu Law could not be given effect to by a Court of Law. It was argued by the appellant's learned Counsel that whatever may happen to future successors, the defendant at least takes only a life-interest under the Will. He relies upon the passage in Trevelyan's Law relating to Hindu Wills, 2nd Edition, at page 43: "When the testator has attempted to create any estate heritable otherwise than in accordance with law, unless there is something in the context to the contrary, the first taker takes for life, because the giver has at least that intention." Obviously this opinion of the learned Jurist is based on a deduction from the Privy Council ruling in the case of Jotendromohun Tagore. The language of the Will here, however, is different from the language of the Will in that celebrated case. There was a definite direction in Tagore's Will bequeathing property "Unto and to the use of the said Jotendromohun Tagore for and during the terms of his natural life." There was a definite direction of life-interest to the next heir and their Lordships of the Privy Council held that this particular direction for subsequent successors being in conflict with the tenets of the Hindu Law could not operate. In the present case an absolute interest in the entire property of the testrator is given to the defendant before the testator starts in the Will to impose conditions. The passage which follows the one quoted by the appellant's learned Counsel at page 48 is, in my opinion, more pertinent to the present case. "If there be an absolute bequest, the expression by the testator of a restriction in the mode of inheritance such as the exclusion of female heirs will not affect such a gift." Similarly, if there is an absolute bequest, a restriction as to alienation will also fail to have effect. A passage from their Lordships' judgment in the *Tagore case*, *Jotendro-Mohun Tagore* v. *Ganendromohun Tagore* (1)] may be quoted here: "If, again, the gift were in terms of an estate inheritable according to law, with superadded words, restricting the power of transfer which the law annexes to that estate, the restriction would be rejected as being repugnant, or, rather, as being an attempt to take away the power of transfer which the law attaches to the estate, which the giver has sufficiently shown his intention to create, though he adds a qualification which the law does not recognise." The appellant's learned Counsel drew the Court's attention to the observations of their Lordships at pages 370 and 371 of the report and to the final conclusion at page 372 that their Lordships were thus of opinion that a life-interest had been created in Jotendromohun Tagore and that the estate of inheritance and subsequent estate or interest attempted to be created by the Will had failed. I have already drawn a distinction between the language of the Will at present before the Court and Tagore's Will and in my opinion, the observations to which the learned Counsel has drawn the Court's attention have no application here. There is a judgment of the Allahabad High Court reported as *Bageshri Kunwar*

(1) 18 W. R. 359 at p. 365; 9 B. L. R. 377; I. A. Sup. Vol. 47; 2 Suth. P. C. J. 692; 3 Sar. P. C. J. 82 (P. C.).

v. *Santnarain Singh* (2). In interpreting a Will in which there was a condition similar to the seventh condition of the Will here providing that if the legatee or his heir alienated the village it should revert to the heirs of the testator, the learned Judges held in that case that it was not a case of a gift over but of forfeiture or resumption by the heir of a testator on a violation of a condition forbidding alienation and refused to give effect to that condition. The judgment in the Allahabad case was based on a Madras ruling of *Anantha Tirtha Chariar* v. *Nagamuthu Ambalagaren* (3). There may be some doubt as to the application of section 10 of the Transfer of Property Act to a bequest made under a Will but the principles of law enunciated in the Allahabad judgment appear to be otherwise sound. I hold that under the Will the defendant took an absolute estate.

It was suggested by the appellant's learned Counsel that the case may be referred to a Bench but I do not see any necessity to do so. This decision will govern the parties to the suit, which is of a comparatively small value, and will not have operation against people who have no connection with this suit.

I dismiss this appeal with costs.

N. H. *Appeal dismissed.*

(2) A. W. N. (1897) 104.
(3) 4 M. 200; 1 Ind Dec. (N. S.) 974.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 163 OF 1919.

August 24, 1921.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Panton.

PULIN BIHARI ROY AND OTHERS—PLAINTIFFS—APPELLANTS

versus

MAHENDRA CHANDRA GHOSAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 151, O. XLI, rr. 20, 33, O. XXX, r. 4 (2)—Appellate Court—Respondent, addition of—Suit by or against a firm in the firm-name—Names of partners disclosed—Death of a partner—Legal representative, whether must be added as party—Determination of partnership—Notice—Continuance of partnership—Presumption—Partner carrying on business of same nature without consent of other partners—Contract Act (IX of 1872), ss. 257, 259—Obligation of partner to render true accounts—Notice to produce accounts—Non-compliance—Presumption—Evidence Act (I of 1872), ss. 58, 114 (g), 164.

Apart from all questions as to the scope of Order XLI, rule 20 and Order XLI, rule 33, the Court, in a proper case, has inherent power to add a respondent to an appeal. [p. 2, col. 2.]

A suit of the description contemplated by Order XXX of the Code of Civil Procedure may be brought by or against a firm in the firm-name even though the firm may have been dissolved before the date of the suit provided the cause of action arose before the date of dissolution. This may be done, notwithstanding the position that a firm is not recognised as an artificial or juristic person. The proceedings in a suit so brought continue in the name of the firm, even though the names of the partners are disclosed. From this standpoint no valid objection can be taken to the competence of an appeal even if the representatives of a deceased appellant are not added as parties. [p. 13 cols. 1 & 2.]

Where no fixed term has been agreed upon for the direction of a partnership, any partner may determine the partnership at any time on giving notice of his intention so to do to all the other partners. But the dissolution takes place as from the date of communication of the notice. [p. 14, col. 2.]

Where the evidence discloses that a partner who intended to retire from the partnership did in fact continue to associate with its work, a presumption may legitimately be drawn in favour of the continuance of the partnership. [p. 14, col. 2.]

If a partner, without the consent of the other partners, carries on any business of the same nature and competing with that of the firm, he must account for and pay over to the firm all profits made by him in such business, and he must also make compensation to the firm for any loss occasioned thereby. [p. 15, col. 1.]

PULIN BIHARI ROY v. MAHENDRA CHANDRA GHOSAL.

Section 257 of the Contract Act makes it obligatory upon each partner to render true accounts and full information of all things affecting the partnership to any partner or his legal representatives. The occasion for this in a suit for accounts upon dissolution of partnership will, however, arise after the preliminary decree is made. At that stage each partner should be served with the notice contemplated by section 66 of the Indian Evidence Act to produce such accounts and papers as may be in his custody. If he omits to produce the books and the books are proved to be at the time in his custody or under his control, the presumption recognised in Illustration (g to section 4 of the Indian Evidence Act may be applied. In such circumstances secondary evidence will become admissible and the party who has withheld the document will not be able to use the original document as evidence at a later stage without the consent of the other party or the order of the Court, as provided in section 164 of the Evidence Act. [p. 15, col 2.]

Appeal against a decree of the Subordinate Judge, Chittagong, dated the 30th April 1919.

Dr. *Dwarka Nath Mitter*, Babus *Manindra Nath Banerjee* and *Rama Prasad Mookerjee*, for the Appellants.

Babus *Bipin Behary Ghose* and *D. L. Khastgir* for Third Party Defendant-Respondent.

Babu *Narendra Kumar Das*, for Second Party Defendant-Respondent.

Babu *Parkas Chandra Pakrasi*, for the First Party Defendant Respondent.

JUDGMENT.—This is an appeal by the plaintiffs in a suit for recovery of money due on adjustment of accounts upon dissolution of a partnership business, called the Joint Salt Bond Business, and carried on by them and the three sets of defendants at Sadarghat, Chittagong. The plaintiffs constitute a firm styled Krishnadas Sanatan Brajendra Kumar Ray. The first party defendants are members of a firm known as Krishna Kumar Ghosal; the second party defendants are members of a firm styled Ramkamal Radhaballabh Saha; the third party defendants are members of a firm named Gangadas Seal. In the salt business, the Rays claim a five-annas nine-pies share, the Ghosals four-annas share, the Sahas four annas six-pies share and the Seals one-anna nine-pies share. The business was managed by the different sets of partners during the four quarters of the year by turns, namely, the Ghosals during the first quarter, the Seals during the second quarter, the Sahas during the third quarter and the Rays during the fourth quarter. The partnership was started in 1306 B. E. for the purpose of importing salt from foreign ports and selling it in Chittagong. The Rays had a firm in Calcutta which ordinarily purchased salt for the joint business, and the purchase-money had to be paid by the defendant partners to them at Chittagong. If there was delay in payment on the part of any set of partners, it became liable to the set which made the payment on its behalf. There was a book kept called the order-book in which the price for sale of salt as fixed by the partners from time to time was recorded. Each set of partners could sell as much salt as it liked out of the joint stock, but was liable for the excess taken by it over that due for its share to the set or sets of partners who might have taken less than a proportionate share. There used to be a periodical adjustment of accounts generally at the end of each quarter which is described in these proceedings as a Bantan. The term literally signifies division. The Bantan, it is said, was intended to remove inequalities in the appropriation of salt by the partners and to settle the amont of money due among the partners *inter se* by reason of such inequality. In addition to the Bantan, there was a Nikash which was intended to be held annually, but in fact took place at irregular intervals. The term Nikash signifies final adjustment of accounts, and one of the points in controversy in the Court below was, how far a Bantan might be treated as a final settlement. The business was carried on in this manner, according to the plaintiffs, to the end of 1320 B. E. and they claim accounts from 26th Sraban 1320 up to 30th Chaitra, 1320, as according to them the Bantan had taken place for the antecedent period. The defendants urged, on the other hand, that the Nikash which alone constitutes final accounts had not been held for the period subsequent to 1316 B E and that the partnership did not terminate till the end of 1321 B. E. The defendants consequently claimed that accounts might be taken for the entire period between the commencement of 1317 B.E, and the termination of 1321 B. E. The Subordinate Judge has given effect to the contention of

the defendants in this respect. To appreciate the full significance of the claim of the defendants that accounts might be taken for the longer instead of the shorter period, it is essential to bear in mind that some of the plaintiffs had, during the year 1321 B. E. if not also during 1320 B. E., engaged in another salt business, and the question consequently arose whether they had rendered themselves liable to account to their partners for the profits of such separate business. The plaintiffs retorted that other partners had acted in a similar manner, specially, with respect to salt imported in S. S. Baron Balfour. The Subordinate Judge has held that the partners who had engaged in rival salt business before the dissolution of the partnership were liable to render mutual accounts. The plaintiffs have appealed against the decree of the Subordinate Judge and have assailed his decision upon every material point. The grounds which emerge for consideration may, however, be concisely enumerated, namely, first, that the Bantens which covered the period up to 25th Sraban 1320 B. E. were final adjustments and could not be re-opened; secondly, that the salt bond business was dissolved at the end of 1320 B. E. and not at the end of 1321 B. E; thirdly, that even if the partnership business be not deemed to have been dissolved at the end of 1320 B. E., each partner was entitled to have separate dealings in salt and could not be called upon to account for the profits of such transactions; fourthly, that if such separate dealings in salt were improper, the defendants could at most get compensation to the extent of Rs. 5,000; fifthly, that the Court should not, at this stage, have gone into the question of the custody of the account-books, and that, in any event, the investigation has been inadequate and the conclusion incorrect.

Before we deal with these grounds, it is necessary to refer to a preliminary objection to the competency of the appeal. In the plaint, although the suit was described as a suit by a firm against three other firms—each of them partners in the salt business—the names of the members of the firms were disclosed. During the pendency of the appeal, Brajendra Kumar Ray, one of the members of the plaintiff firm, died on the 20th June 1920. On the 3rd January 1921, the three sons of the deceased applied as his legal representatives to be added as parties appellants. This application, made under Order XXX, rule 4 (2) (*a*), Civil Procedure Code, was opposed on the ground that it was barred by limitation under Article 176 of the Schedule to the Limitation Act, which provides that an application under the Code of Civil Procedure to have the legal representatives of a deceased plaintiff or a deceased appellant made a party must be made within six months from the date of the death of the deceased plaintiff or appellant. This period of six months, it may be noted, has been reduced by Act XXVI of 1920 which received the assent of the Governor General on the 2nd September 1920 and came into force on the 1st January 1921; that, however, did not affect the position of the parties. The petitioners contended that they were entitled to apply within three years under Article 181. We hold that the application was governed by Article 176 and that as no satisfactory reasons had been assigned for the delay, the application must be dismissed. This order was made on the 21st June 1921; three days later, the surviving appellants applied to the Court to add as respondents to the appeal the legal representatives of the deceased co-appellant, who had, through their remissness, failed to join as appellants within the prescribed time. The surviving appellants urged that they should not be made to suffer by reason of a default on the part of the legal representatives of the deceased co-appellant; and that the Court should, under Order XLI, rule 20, Order XLI, rule 33, or, if, neither of these rules was considered applicable, in the exercise of its inherent power recognised in section 151, add as respondents to the appeal the representatives of the deceased, so that no exception might be taken that the appeal was not properly constituted. We granted this application, because apart from all questions as to the scope of Order XLI, rule 20 and Order XLI, rule 33, the Court has inherent power to add a respondent to the appeal in the events which had happened; *Hemangini Debi* v. *Harilas Banerjee* (1), *Lakhmichand* v.

(1) 46 Ind Cas. 398; 3 P. L. J. 409; (1918) Pat. 276; 5 P. L. W. 216.

PULIN BIHARI ROY v. MAHENDRA CHANDRA GHOSAL.

Kachubhai (2). The objection taken by the respondents that the appeal had ceased to be properly constituted by reason of the death of one of the appellants and the failure of his legal representatives to join as co-appellants within the time allowed by law, thus became unsubstantial. No doubt, as pointed out by the Judicial Committee in *Raj Chunder Sen* v. *Ganga Das Seal* (3), a suit to take the accounts and wind up the affairs of a partnership cannot proceed in the absence of one of the partners, or, in the event of his death *pendente lite*, in the absence of his legal representative. It may also be conceded that when an appeal has abated in part in respect of the heirs of a deceased appellant, the result of such abatement may be to make the appeal an imperfectly constituted appeal which the Court cannot proceed to hear; this depends upon the nature and scope of the suit; *Kali Dayal* v. *Nagendra Nath* (4). In the present case, however, no such difficulty arises, as all the parties interested are now before the Court either as appellants or as respondents. Apart from this, there is considerable force in the contention of the appellants that the addition of the representatives of the deceased was unnecessary, inasmuch as the suit as framed was a suit of the description contemplated by Order XXX of the Code of Civil Procedure. Such a suit may be brought by or against a firm in the firm-name even though the firm may have been dissolved before the date of the suit, provided the cause of action arose before the date of dissolution; *Davis* v. *Morris* (5), *Wenham, In re, Battams, Ex parte* (6). This may be done, notwithstanding the position that a firm is not recognised as an artificial or juristic person: *Corbett, Ex parte Shand, In re* (7), *Ellis* v. *Waterson* (8), *Sadler* v. *Whiteman* (9) affirmed in *Whiteman* v. *Sadler* (10) and cited in *Rex* v. *Holden* (11). The proceedings in a suit so brought continue in the name of the firm, even though the names of the partners are disclosed; Order XXX, rule 2, Civil Procedure Code. The case before us is not that of a suit brought in the names of particular individuals, as in *Monmohun Pandey* v. *Bidhu Bhusan Roy* (12), but rather that of a suit brought in the firm-name, as in *Bal Kissen* v. *Kailya Lal* (13). From this standpoint, no valid objection could be taken to the competence of the appeal, even if the representatives of the deceased were not added as parties. In our opinion, the preliminary objection cannot be sustained and the appellants are entitled to our judgment on the matters in controversy.

As regards the first ground, we are of opinion that the accounts must be taken, notwithstanding the Bantans which have taken place as found by the Subordinate Judge. The Subordinate Judge has correctly held that there were two sets of accounts taken, the Bantan and the Nikash. The scope and object of the two were not identical, as is clear from the samples of the Bantan and the Nikash which have been produced. The Bantan was an adjustment of the dues of the partners *inter se* on account of the inequality in the proportion of salt taken by each set of partners on their own account for sale by them to their own customers as opposed to joint sale of salt by the joint firm. Such an adjustment would show what quantity of salt had been taken by each set of partners and how much money would have to be contributed by one set to another on account of inequality in the appropriation. On the other hand, the Nikash at the end of the year would show the outstanding balance from customers of the joint business and expenditure of all descriptions incurred during the year. Opportunity would, no doubt, be taken on the occasion of this

(2) 11 Ind. Cas. 559; 35 B. 393; 13 Bom. L. R. 517.
(3) 31 C. 487; 1 A. L. J. 145; 8 C. W. N. 442; 31 I. A. 71; 14 M. L. J. 147; 8 Sar. P. C. J. 623.
(4) 54 Ind. Cas. 822; 24 C. W. N. 44; 30 C. L. J. 217.
(5) (1883) 10 Q. B. D. 436; 52 L. J. Q. B. 401; 31 W. R. 742.
(6) (1900) 2 Q. B. 698; 69 L. J. Q. B. 803; 83 L. T. 94; 48 W. R. 626; 7 Manson 309.
(7) (1880) 14 Ch. D. 122 at p. 126; 49 L. J. Bk. 74; 42 L. T. 164; 28 W. R. 569.
(8) (1899) 1 Q. B. 714; 68 L. J. Q. B. 604; 80 L. T. 508; 47 W. R. 420; 15 T. L. R. 274.
(9) (1910) 1 K. B. 768; 79 L. J. K. B. 786; 102 L. T. 472; 26 T. L. R. 372; 54 S. J. 375.
(10) (1910) A. C. 514; 79 L. J. K. B. 1050; 103 L. T. 296; 17 Manson 296; 54 S. J. 718; 26 T. L. R. 655.
(11) (1912) 1 K. B. 483 at p. 497; 81 L. J. K. B. 327; 106 L. T. 305; 76 J. P. 143; 22 Cox C. C. 727; 56 S. J. 188; 28 T. L. R. 173.
(12) 48 Ind. Cas. 309; 28 C. L. J. 268.
(13) 21 Ind. Cas. 509; 17 C. L. J. 643.

yearly settlement of accounts, to rectify the errors, if any, in the Bantan, which would, *prima facie*, form the basis of the annual account. But there has apparently been some misapprehension as to the true relation of a Bantan to a Nikash. One extreme view is that the Bantan may be entirely ignored and the Nikash taken irrespective thereof. The opposite extreme view is that the Bantan is absolutely conclusive and that its accuracy cannot be challenged at the time of the Nikash. Neither of these views can clearly be supported. The Bantan was regularly taken in the presence of the parties or their representatives, though its scope was limited. Consequently, if its accuracy is challenged at the time of the Nikash, the burden lies upon the party who assails it to establish the alleged error. The elementary principle that an account once taken in the presence of the parties interested and acquiesced in by them will not be lightly re-opened must plainly be applied to a Bantan; *McLellar* v. *Wallace* (14), *Mohesh Chandra Basu* v *Radha Kishore Bhattacharjee* (15), *Gokul Krishna Das* v. *Shoshi Mukhi Dasi* (16), *Mayniram* v. *Laxminarayan* (17), *Jehangir Cowasjee* v. *Hope Mills Limited* (18). Subject to this reservation, the Bantan cannot be treated as a conclusive answer to the claim for accounts for any period. This, however, does not, as the Subordinate Judge has correctly held, affect the decree in the former suit brought by the Rays against the Seals and finally decided by this Court on the 4th December 1919. That decree confirmed the decision of the primary Court, and, though conclusive between those parties, expressly left unaffected all matters outside the scope of the accounts comprised in that litigation. The direction given by the Subordinate Judge in this respect is not open to criticism.

As regards the second ground, the evidence is conclusive that the salt bond business was not dissolved at the end of 1320 B. E., but continued till the end of 1321 B. E. The case for the plaintiffs is that the dissolution was effected by the retirement of Jogendrakrishna and Nilkrishna, two of the members of the plaintiff firm, from the salt business at the end of 1320 B. E. Now, it is well-settled that where no fixed term has been agreed upon for the duration of a partnership, any partner may determine the partnership at any time on giving notice of his intention so to do to all the other partners; *Crawshay* v. *Maule* (19) But the dissolution takes place as from the date of the communication of the notice: *Mellersh* v. *Keen* (20). Tested in the light of this principle, the case for the plaintiff firm completely collapses. In the matter of the alleged dissolution by retirement, the parties acted in the most unbusinesslike way imaginable. The obvious course was to communicate their intention to dissolve the partnership in writing to the other partners. It is not necessary to consider whether notice to the defendant firms would have been sufficient or whether notice to each individual member of each of the firms concerned was essential. No written notice was in fact given, and the oral evidence of verbal intimation to some of the persons interested is of the vaguest description. On the other hand, the evidence discloses that the persons who intended to retire from the business did in fact continue to take salt from the business and to associate otherwise with its work. In such circumstances, a presumption may legitimately be drawn in favour of the continuance of the partnership; *Parsons* v. *Hayward* (21), *King* v. *Chuck* (22). There is, in our opinion no reasonable doubt as to the soundness of the conclusion of the Subordinate Judge that there was no effective dissolution of the firm at the end of 1320 B. E. and that it was continued till the end of 1321 B. E. In such a contingency, it was not only open to the Court but incumbent upon it, to direct the accounts to be taken for a longer period than that

(14) 5 M. I. A. 372; 8 Moo. P. C. 378; 1 Eq. Rep. 309; 1 Sar. P. C. J. 453; 18 E. R. 936; 14 E. R. 144; 97 R. R 62.

(15) 12 C. W. N 28; 6 C. L. J. 580.

(16) 13 Ind. Cas. 23; 15 C. L. J. 204; 16 C. W. N. 99.

(17) 32 B. 353; 10 Bom. L. R. 281.

(18) 2 Ind. Cas, 294; 33 B. 216; 10 Bom. L. R. 488.

(19) (1818) 1 Swanston 495 at p. 508; 36 E. R. 479; 1 Wils. 181; 18 R. R. 125.

(20) (1859) 27 Beav. 236; 122 R. R. 390; 54 E. R. 92.

(21) (1862) 4 DeG F. & J. 474; 135 R.R 249; 31 L. J. Ch. 666; 8 Jur (N. S.) 924; 6 L. T. (N. S.) 623; 10 W. R. 654; 45 E R 1267.

(22) (1853) 17 Beav. 325; 99 R. R. 169; 51 E R. 1059.

mentioned in the plaint. The accounts in a suit of this description have to be taken for the benefit of all the persons concerned; the scope and extent of such accounts must be determined by the Court on the true state of facts disclosed in the evidence and cannot be restricted to the limited measure of relief claimed by the plaintiff on inaccurate allegations.

As regards the third and fourth grounds, we have been invited to hold that each partner was entitled to have separate dealings in salt and could not be called upon to account for the profits of such transactions for the benefit of all the partners of the original business. This contention is opposed to the elementary rule that if a partner, without the consent of the other partners, carries on any business of the same nature as, and competing with, that of the firm, he must account for and pay over to the firm all profits made by him in such business, and he must also make compensation to the firm for any loss occasioned thereby. This obligation is formulated in section 259 of the Indian Contract Act and has long been recognised as a fundamental rule in the law of partnership: *Aas* v. *Benham* (23), *Trimble* v. *Goldberg* (24), *Glassington* v. *Thwaites* (25). The rule is not applicable to a really different business, though the same knowledge and information may be useful in both. In the case before us, however, there is no doubt as to the true naure of the separate business carried on by some of the members of the salt bond partnership. The evidence makes it abundantly clear that the separate transactions were of precisely the same nature as the business carried on by the partnership and that there was thus a breach of duty of the partners concerned not to carry on like business in the same field of competition. The correctness of the view taken by the Subordinate Judge cannot be successfully questioned. We may add in this connection that it was faintly suggested that the sum recoverable on account of this breach of obligation was limited by agreement to Rs. 5,000. The agreement, however, does not admit of such a construction; the sum of Rs. 5,000 mentioned therein was prescribed as a penalty and does not absolve the parties in default from the oligation to account for all the profits made in such business.

As regards the fifth ground, it has been urged that the Court should not, at the preliminary stage, have gone into the question of the custody of the account books, that the investigation has, at any rate, been inadequate and that the conclusion is not supported by the evidence. We are of opinion that this contention should prevail. Section 257 of the Indian Contract Act makes it obligatory upon each partner to render true accounts and full information of all things affecting the partnership to any partner or his legal representatives. The occasion in this case will, however, arise after the preliminary decree is made. At that stage each partner should be served with the notice contemplated by section 66 of the Indian Evidence Act to produce such accounts and papers as may be in his custody. If he omits to produce the books and the books are proved to be at the time in his custody or under his control, the presumption recognised in Illustration (*g*) to section 114 of the Indian Evidence Act may be applied, namely, that evidence which could be and is not produced has been withheld because, if produced, it would be unfavourable to the person who withholds it; *Hem Chandra* v. *Kali Prosanna Bhattacharji* (26). In such circumstances, secondary evidence will become admissible, and the party who has withheld the document will not be able to use the original document as evidence at a later stage without the consent of the other party or the order of the Court, as provided in section 164 of the Indian Evidence Act. The procedure as to notice was not followed in the Court below, and it has transpired that some of the account-books, namely, the books of 1318 B.E., 1319 B.E. and one of the books of 1320 B.E. were, at the time the plaintiffs were called upon to produce them, actually in this Court in the records of the appeal preferred in the previous suit brought by the Rays against the Seals. These books appear to have been subsequently

(23) (1891) 2 Ch. 244; 65 L. T. 25.
(24) (1906) A. C. 494; 75 L. J. P. C. 92; 95 L. T. 163; 22 T. L. R. 717.
(25) (1828) 1 Sim. & St. 124; 1 L. J. Ch. 118; 24 E. R. 153; 57 E. R. 50.
(26) 30 C. 1033; 8 C. W. N. 1; 30 I. A. 177; 8 Sar. P. C. J. 529 (P. C.).

returned to the plaintiffs, and they have expressed their readiness to produce them whenever called upon. In these circumstances, we are of opinion that the finding in the judgment of the Subordinate Judge relating to the custody of the account books should be expunged and that the direction in the decree based thereon should be omitted. When the enquiry is undertaken by the Commissioner, proper orders as to the production of account books and other papers by all the partners will be given by the Subordinate Judge on the lines indicated above.

The result is that this appeal is allowed in part and the decree of the Subordinate Judge modified in two respects, namely, first, as to the use to be made of the Bantan when the accounts are taken, and, secondly, as to the omission of the order for production of account books; subject to these variations, the decree of the Subordinate Judge will stand confirmed. The appellants will pay the respondents their costs in this appeal, but such costs will include only half the hearing fee, as the objection to the competence of the appeal has not been sustained and the decree of the Court below has not been affirmed in its entirety.

N. H.

Appeal allowed in part.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 119 OF 1921.

June 23, 1921.

Present:—Mr. Dalal, A. J. C.

CHHANNU LAL AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Musammat RAJ KUAR AND ANOTHER—DEFENDANTS—RESPONDENTS

Hindu Law—Widow, usufructuary mortgage by—Property let out to tenants—Death of widow—Rents, unrealised, by the mortgagee—Accretions—Presumption—Construction of document—Mortgage-deed, interpretation of—Hindu widow—Mortgage with personal liability—Liability, whether enforceable after her death—Transfer of Property Act (IV of 1882), 68 (a).

The presumption whether a Hindu widow dealt with the income of her deceased husband's estate as to make it an accretion to the corpus or not, must depend upon the circumstances of every case. [p. 17, col. 2.]

Where a Hindu widow creates a usufructuary mortgage of any property let out to tenants, rents actually fallen due at her death, though remaining unrealised by the mortgagees, cannot be treated as accretions to her husband's estate as in the real sense those rents—being transferred to the mortgagees—must be considered to have been already spent by the widow, thus leaving no doubt as to her intention to treat them as personal property. [p. 17, col. 2.]

Apart from any question of Hindu Law the mortgagees, in such a case, being really the landlords up to the date of the widow's death, rents fallen due during that period must be held to be due to them and not to their successors whoever they may be. [p. 17, col. 2.]

Where a Hindu widow executes a mortgage of property belonging to her husband but declares that the mortgagee would, if and whenever deprived of the same, be entitled to recover the mortgage-money from her personal property, the words are wide enough to include the enforcement of the personal liability even after her death. In a clear contract of this nature it is not necessary to interpret it in the light of the law of mortgages, although that law itself, as laid down in section 68 (*a*) of the Transfer of Property Act, would support this view. [p. 18, col. 1.]

Appeal from a decree of the Additional District Judge, Lucknow (at Sitapur), dated the 23rd February 1921, reversing that of the First Subordinate Judge, Sitapur, dated the 9th May 1921.

Mr. *A. P. Sen*, for the Appellants.

Mr. *Bisheshwar Nath Srivastava*, for the Respondents.

JUDGMENT.—The parties to this suit are at one as regards the facts and the decision of this Court is desired as to the interpretation to be placed on those facts in accordance with law. A Hindu widow with a limited share in property made two transfers by way of mortgage of two different properties in 1914 and died at the end of 1915. The mortgages were both usufructuary and the first inured for a period of 4½ years and the second for a period of 14 years. Soon after her death her husband's reversioners took possession of the mortgaged property without any objection from the mortgagees. Subsequently, by this suit the motgagees claimed recovery of the balance of money due to them out of the assets of the widow in the hands

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of the defendants reversioners. The mortgage-money was to be paid off out of the usufruct and there is no dispute that a balance of Rs. 1,270-5-11 was due to the plaintiffs on the date of the woman's death. There was a further prayer of the plaintiffs that a portion of this balance consisting of arrears of rent of the widow's lifetime recovered by the defendants and not by the plaintiffs may be ordered to be realised from the person and property of the defendants apart from the assets of the widow in the defendants' hands. That sum is a few annas under Rs. 300. The learned Subordinate Judge of Sitapur decreed both the reliefs, but on appeal by the defendants the suit was dismissed by the learned Third Additional District Judge of Lucknow.

The lower Appellate Court's opinion was that the mortgage came to an end with the life of the widow and that the plaintiffs were not entitled to recover the balance personally from the widow. As regards arrears of rent it held that they were accumulations added to the corpus of the husband's estate and did not form the assets of the widow.

I shall take up the question regarding the arrears of rent first. In my opinion the lower Appellate Court has made a mistake in weighing the facts of the case. As laid down in the ruling referred to by the lower Appellate Court *Bhagabati Koer v. Sohodra Koer* (1), "the test to be applied to a case of this description is to determine from the surrounding circumstances the intention of the widow. Did she intend to treat the disputed property as part and parcel of the estate of her husband, or did she treat it as a temporary saving liable to be applied by her subsequently for her own purposes." If the test is applied to the present case it will be obvious that the claim of the plaintiffs must prevail. A similar opinion was expressed by their Lordships in the Privy Council case reported as *Raja Rajeswara Dorai Rajah of Ramnad v. Sundara Pandiyasami Tevar* (2). Their Lordships pointed out at page 157* that the presumption whether a widow dealt with the income of her deceased husband's estate as to make it an accretion to the corpus or not, must depend upon the circumstances of every case. In the Calcutta case cited above, the learned Judges have taken the trouble of distinguishing the case before them from a Bombay case in which rents realised from the tenants were held to be the assets of a widow. They observed: "This view may, at first sight, seem to militate against that adopted by Sir Charles Sargent, C. J., in *Rivett-Carnac v. Jivibai* (3). That case, however, is distinguishable.....In that case the rent had actually been collected on behalf of the widow by her agent: at the time of her death it was consequently her money in the hands of her agent: no distinction could thus be drawn between the sums already expended and the balance in the hands of her agent." In the present case if the facts are considered in the true light, the widow had already expended the rents due to her during her lifetime. They had already been transferred to the mortgagees and thus her clear intention to treat them as her own personal property was disclosed from such action.

Apart from all considerations of Hindu Law, the plaintiffs were really landlords up to the date of the widow's death and whatever rents fell due during the period that they were landlords must be held to be due to them and not to their successors, the defendants.

I must, now, proceed to a consideration of the question whether the balance due to the plaintiffs on the mortgages is recoverable from the assets of the widow or not. For a decision of this question the only thing necessary to enquire is what was the contract between the parties. In both the mortgage-deeds there was a clause almost in identical terms to enforce the personal liability of the mortgagor. The mortgagees were declared to be entitled to recover their money by suit from the moveable and immoveable property and person of the executant in case of the mortgaged Manza going out of the possession of the mortgagees upon the claim of

(1) 18 Ind. Cas. 691; 16 C. W. N. 831.

(2) 49 Ind. Cas. 704; 17 A. L. J. 153; 36 M. L. J. 164; 23 C. W. N. 549; 29 C. L. J. 551; 25 M. L. T. 400; 21 Bom. L. R. 885; (1919) M. W. N. 511; 42 M. 581; 10 L. W. 322, 46 I. A. 64 (P. C.).

(3) 10 B. 473; 11 Ind. Jur. 103; Chitty's S. C. C. R. 137; 5 Ind. Dec (N. S) 706.

*Page of 17 A. L. J.—[*Ed.*].

any one for any reason. In the widest terms possible the executant has admitted her personal liability to pay the amount secured by the mortgage. The lower Appellate Court has imported in these clauses the words "during the executant's lifetime" without explaining how the expressions used in the two mortgages restricted the personal claim to the lifetime of the executant. In my opinion, the words are wide enough to enforce personal liability after the death of the executant without any reservation. If the widow has left any assets, the mortgagees are entitled to enforce their claim against those assets. When there is a clear contract of this nature, it is not necessary to make any reference to the law of mortgage. If any authority were required it would be lent by the provisions of section 68 (*a*) of the Transfer of Property Act where the mortgagee is given a right to sue the mortgagor for the mortgage-money where the mortgagor has bound himself to re-pay the same. It was pointed out on behalf of the respondents by their learned Counsel that no one deprived the plaintiffs of the mortgaged property and that the interest of the widow came to an end with her death and by operation of law as must have been well known to the plaintiffs when they took the mortgages. This is quite true, but it appears to me that the clauses in the mortgage-deeds were entered to provide for such a contingency as the present of the widow dying within the period of the mortgage.

In my opinion the decree of the first Court was correct. I set aside the decree of the lower Appellate Court and restore the decree of the First Court with costs of this Court and the lower Appellate Court.

N. H.

Appeal allowed.

CALCUTTA HIGH COURT.

CIVIL RULE No. 753 OF 1920.

January 18, 1921.

Present:—Justice Sir N. R. Chatterjea, Kt., and Mr. Justice Newbould.

In re GANENDRA MALLICK AND OTHERS—PETITIONERS.

Land Acquisition Act (I of 1894), s. 32—"Investment in the purchase of other lands," whether includes erection of buildings.

Having regard to the definition of the expression "land," the words "invested in the purchase of other lands" in section 32 of the Land Acquisition Act as amended by the Calcutta Improvement Trust Act include the erection of buildings upon the land. [p. 9, col. 1.]

Where, therefore, a *debutter* property is acquired by the Calcutta Improvement Trust, the amount of compensation for that property must be paid over to the trustees if the President of the Trust is satisfied that the money would be invested by the trustees in the erection of buildings. [p. 19, cols 1 & 2]

Rule against the order of the Court of Calcutta Improvement Tribunal in (Civil Deposit) Case No. 407 of 1919.

Babu *Bepin Ohunder Mullick*, for the Petitioners.

JUDGMENT.—The petitioners in this case are the Trustees of a *debutter* estate. Some lands belonging to the estate have been acquired for the Calcutta Improvement Trust and a sum of Rs. 2,24,000 and odd is in deposit with the President of the Tibunal. The petitioners applied to the President for payment to them of the amount so deposited in order that they might erect buildings on the exempted portion of the land. The President refused to pay the money and this Rule was obtained to set aside that order.

It appears that only a portion of premises Nos. 79 and 80 Collotollah Street has been acquired and the remaining portion is in the occupation of certain lessees. The term of the lease has not yet expired. It is stated that the lessees have entered into an agreement with the petitioners under which they would pay net profits to the extent of 7 and 7½ per cent. in addition to the existing rents provided buildings are erected on the exempted land by the petitioners, and that plans of such buildings have been approved by the Corporation. It is also stated that, if advances are made to the contractors who

would erect the buildings, it will be advantageous to the Trust estate as the costs in that case would be less. As stated above, the petitioners applied to the President of the Improvement Tribunal for payment to them of the money. That, however, was refused by the learned President on the ground that it was not a suitable mode of investment.

Now, section 32 of the Land Acquisition Act as amended by the Calcutta Improvement Trust Act provides that the Tribunal shall order the money to be invested in the purchase of other lands to be held under the like title and conditions of ownership as the land in respect of which such money shall have been deposited was held. Here, there can be no question as to the land being under the like title and conditions of ownership, because the proposal is to erect buildings on the land belonging to the Trust estate. The only question for consideration, therefore, is whether the erection of buildings would come within the words "invested in the purchase of other lands" in section 32 of the Act. Having regard to the definition of the expression "land," we think that the words of section 32 quoted above would include the erections of buildings upon the land, and if the President is satisfied, that the money would be invested in the erection of buildings as proposed by the petitioners, we are of opinion that he is bound to pay the money over to the petitioners.

We are informed that there is no question as to the petitioners being the sole trustees. The President may, however, easily satisfy himself as to the correctness of this statement.

The learned President in showing cause states that the order of the 14th August was made upon a request made verbally by the Vakil for the petitioners and, subsequently, on the 19th August, the petitioners submitted an unverified application for re-consideration of the order of the 14th August. Evidently, he is under a mistake because the record shows that there was a written petition filed on the 14th August, though it was not verified.

We think under these circumstances that the case should go back to the learned President of the Improvement Tribunal in order that he may satisfy himself as to whether the petitioners are the sole trustees of the Trust estate and, if so, whether the money would be invested in erection of buildings on the land and whether there is an agreement between them and their lessees for the erection of buildings on the portion of the land not acquired as mentioned in their petition and, if he is satisfied upon those points, we think that he should pay out the money to the petitioners.

We assess the hearing fee in this Rule at two gold *mohurs*.

Let the record be sent down at once.

J. P.

Rule made absolute

SIND JUDICIAL COMMISSIONER'S COURT.

ORIGINAL CIVIL SUIT No. 373 OF 1918.

August 24, 1920.

Present:—Mr. Madgavkar, A. J. C.

KHEMCHAND RATANCHAND AND ANOTHER—PLAINTIFFS

versus

DHALOMAL AND ANOTHER—DEFENDANTS.

Specific Relief Act (I of 1877), s 25—Vendor and purchaser—Vendor's title—Purchaser, right of—Pardanashin *lady, dealings with—General rule when not applicable.*

A purchaser, while he is not on the one hand at liberty to raise doubts which are not considerable or rational, cannot be compelled on the other hand, to take a title which will expose him to litigation or hazard. The question whether the doubt is reasonable must be determined on the facts of each case. [p 22, col 2.]

To cases where the husband, having entered into the agreement, obtains his wife's consent and signature shortly afterwards, the law which throws upon parties, dealing with *pardah-nashin* ladies, the *onus probandi* of their understanding the contents, has no application [p 22, col. 2.]

Mr. *Hirdaram Mewaram*, for the Plaintiffs.

Mr. *Isardas Oodharam*, for the Defendants.

JUDGMENT.—Suit for specific performance of a contract of sale of a house by the plaintiffs vendees against the defendants-vendors. The property in suit Survey-sheet D-1, Survey No. 39, admeasuring 94 square yards with a house, in the Sadar Bazar Quarter, Karachi, was bequeathed by Lalan Mal by a registered Will of 1839 (Exhibit 25) to his younger wife, Vishnibai, who in turn left it by a Will (Exhibit 43) to her daughter, defendant No. 2 Laxmibai,

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The plaintiffs are the leading members of a charitable association called the Sarveh Hiteshi Ayurvedic Aushadhalaya Association and negotiated through their leading spirit Swami Vriktanand, plaintiff No. 2 (*a*), with defendant No. 1. Dhalomal, husband of defendant No. 2, Lakshmibai; and on the 21st August 19.7 defendant No. 1 passed the agreement (Exhibit 8) in suit in favour of plaintiff No. 1 Khemchand to sell the property for Rs. 30,000, receiving Rs. 2,000 as earnest money. On the 31st August this agreement was signed by defendant No. 2 Lakshmibai and the transaction was to be completed according to the agreement in four months. On the 9th November plaintiffs published a notice (Exhibit 32) in the *Sind Observer* of their proposed purchase. On 1st December 1917 they received a letter (Exhibit 11) from Messrs. Kalumal and Co. as Pleaders for Asibai, step sister of defendant No 2, Laxmibai, asserting a claim to a half share in the property and objecting to the plaintiffs' purchase. The plaintiffs called upon the defendants to clear the title in respect of Asibai and her son Bachoomal; and correspondence (Exhibit 9) commencing with a letter on the 6th December ensued between the parties. On 22nd December 1917 the defendants' Pleader informed plaintiff No. 1 that the plaintiff had been guilty of breach and that, therefore, the earnest money was forfeited.

The case of the plaintiffs is that they were entitled to get from the defendants a clear marketable title, free from doubt as regards the claim of Asibai, but that the defendants had failed to clear the doubt so as to enable them to pay the balance of the purchase-money and to complete the transaction. The plaintiffs assert that on account of the rise of values of landed properties in Karachi the defendants delayed and obstructed and resiled from the agreement.

The defence in the main is that the defendants had cleared the title by producing to the plaintiffs the two Wills of Lalanmal and Vishenbai. They assert that it was the plaintiffs who were not in possession of the necessary purchase amount to complete the transaction, and failed to pay it and to tender a conveyance.

Two other defences were also raised which may briefly be noticed. The first paragraph of the written statement was that in addition to the earnest money of Rs. 2,000 paid on the 31st August the plaintiffs had also agreed but failed to pay Rs. 10,000 on the next day. The second defence was that defendant No. 2 Laxmibai signed the agreement without having been read over to her and without knowledge of the contents.

The following six issues were framed by my learned predecessor Mr. Raymond:—

1. Did plaintiffs agree to pay Rs. 10,000 on the 22nd August 1917, if so, what is the effect of the failure to pay? Can the defendants plead this in view of the written agreement?

2. Were plaintiffs justified in calling upon defendants to file a suit against Asibai with a view of obtaining the declaration from the Court that Asibai had no interest? Does this fact disentitle the plaintiffs to specific performance?

3. Which party is guilty of breach?

4. Are plaintiffs entitled to specific performance?

5. Are plaintiffs entitled to any damages, if so, what and from whom?

6. General issue.

Issue No. 2 was on the 12th August amended by me (Exhibit 36) as follows:—

"Were the plaintiffs justified in calling upon the defendants to have their title cleared (as per the plaintiffs' letters in correspondence Exhibit 9) as against Asibai? Does this fact disentitle the plaintiffs to specific performance?"

The reason for the amendment was that Issue No. 2 as originally framed implied an admission on the part of the plaintiffs that they had called upon the defendants to file a suit against Asibai. But no such admission was made either in the correspondence Ehibit 9 or in the evidence called by the plaintiffs. The defendants were, therefore, given the choice of an express issue and evidence as to whether the plaintiffs had called upon the defendants to file such a suit or of having the issue amended as it actually has been. The defendants' learned Counsel has chosen the second alternative and the issue has been amended accordingly. My findings on these issues are as follows:—

Issue No. 1. Evidence on the agreement set up by the defendants is inadmissible under section 92 of the Evidence Act.

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Issue No. 2 (amended). The plaintiffs were justified in calling upon the defendants to clear the title of the latter as against Asibai. This fact does not disentitle the plaintiffs to specific performance.

Issue No. 3. Defendants are guilty of breach.

Issue No. 4. Plaintiffs are entitled to specific performance.

Issue No. 5 does not remain as the damages would have been rupees eleven thousand.

Issue No. 6. As per order.

My reasons for the findings are as follows:—

The defendants have led no evidence and have not asked to lead any evidence on the first issue, their learned Counsel practically admitting in arguments the insuperable bar of section 92 of the Evidence Act. In view of this admission, it is needless to labour the point further. It is plain that when the terms of the agreement are as clear and formal as in Exhibit 8, an oral agreement which could only be entered into at the time of such written agreement Exhibit 8 to pay so large a sum as Rs. 10,000 on the following day and not as they seem to state, Rs. 28,000 in four months, cannot be admitted without rendering the express terms of section 92 totally nugatory. It is urged for the plaintiffs that an oral agreement, such as the defendant No. 1 sets up, is on the face of it false and it must help to convict the defendant of falsehood and bad faith; and the fact that this false oral agreement was set up as early as 7th January through his Pleaders by correspondence convicts the defendant No. 1 of bad faith, even about the time of the completion of the contract.

It will be convenient in this connection also to notice the defence that the document Exhibit 8 was not read over and explained to defendant No. 2 when she signed it. An issue on the point was apparently originally drafted but was not persisted in. Certainly in the proceedings before me no such issue was asked for and no reference made except in the final arguments. The writer of Exhibit 8 Jamiatrai is dead. Of the other parties at the signature of defendant No. 1 the two defendants deny that the agreement was read over or explained, while Keshamal witness, Exhibit 14, partner of plaintiff No. 1, asserts that it was defendant No. 2 who claimed to exercise the right of a *pardah-nashin* woman and has been examined on commission at her house. A perusal of her evidence with its point-blank denial of any knowledge or act of the whole transaction except her bare thumb impression constrains me to the conclusion that it is totally unacceptable. Making every allowance for the position of a Hindu wife who has devolved the management of this property of hers on her husband, I cannot for a moment believe that when defendant No. 1 negotiated and signed the agreement Exhibit 8 and afterwards agreed and arranged for the parties to go to his house and get his wife to sign it, that throughout this long period and, according to the defendants, even up to the two years that have since elapsed before her evidence, the husband should leave the wife in complete ignorance about the negotiations or the agreement. To cases such as the present where the husband, having entered into the agreement, obtains his wife's consent and signature shortly afterwards, the law which throws upon parties, dealing with *pardah-nashin* ladies, the *onus probandi* of their understanding the contents, has no application. I would, therefore, hold that the defendant No. 2, when she signed, was perfectly aware and understood the nature of her act and that she is for the purposes of this suit in exactly the same position as the defendant No. 1.

Issue No. 2 is, in my opinion, the crucial issue in this case and it must be considered along with Issue No. 3. The plaintiffs, it should be premised, had purchased the property for a charitable dispensary. They have none of them a personal interest in the case, and the leaders such as Khemchand Ratanchand plaintiff No. 1 and Ghulam Hussein Kassim plaintiff No. 2 appear to be merchants of position and means. Plaintiff No. 2A Swami Vriktanand is an ascetic and practising physician, who does not charge fees for treatment and is equally disinterested. These plaintiffs have produced clear evidence (Exhibits 18 to 23*a*) of regular books of account of three different firms and proved that the plaintiffs' association had ample funds to complete the sale long before the expiry of the stipulated period of four months in the agreement. I am, therefore, unable to accept the version for the defendants which rests upon no evidence worth the name, that the plaintiffs had no money and could not, therefore, complete the sale. On the letter, Exhibit 11, from Messrs. Kalumal and Co. and the correspondence (Exhibit 9) on the evidence of the

plaintiffs and on the admission of the defendants there can be no question but that it was Asibai's claim which induced a doubt as to title in the minds of the plaintiffs and caused them to delay payments and tender of conveyance to the defendants until this doubt was solved.

In this view, without injustice to the lengthy evidence and the elaborate arguments on both sides, the case could have been to all intents and purposes tried or argued upon the correspondence alone, and the single question submitted to the Court, whether, upon this claim of Asibai's, met as it admittedly was by the defendants with the two Wills, the title offered by the defendants was a clear marketable title which the plaintiffs were bound to accept or whether it was so clouded that the plaintiffs were within their equitable rights in calling upon the defendants to clear it, whether in the manner expressed in the correspondence, Exhibit 9, or in the manner admitted in the oral evidence, *viz.*, by the defendants' obtaining the signatures on the agreement of Asibai and Bachumal and two leading members of the defendants' caste and in any other reasonable manner.

The plaintiffs in addition to their ordinary rights under section 25 of the Specific Relief Act and section 55 of the Transfer of Property Act rely also on the concluding words in the third sentence of the second paragraph of the agreement, Exhibit 8: "That the vendor would also get the property free from all disputes and incumbrances and also get the signatures of all the other claimants (*haqdars*) thereto."

The plaintiffs contend that Asibai, being express claimant and a step sister of Lakshmibai defendant No. 2, the defendants were by virtue of this sentence, bound to clear their title by getting the signatures of Asibai and Bachumal. As for the two Wills, Probate was not taken out of either of them, and Vishenbai's Will was only registered after her death. The two Wills, therefore, did not clear the title sufficiently. It is contended for the defendants that the word '*haqdar*' means not any ordinary claimant but only a rightful claimant, and applied only to Lakshmibai, whom the parties had in contemplation. The two Wills it is contended sufficiently cleared the title.

The equitable rights of the parties, whether under the general law or under the agreement, can only be construed and given effect by the Court in a spirit of fairness to both parties. The phrase "Marketable title free from reasonable doubt" may be incapable of legal definition; but the purchaser, while he is not on the one hand at liberty to raise doubts which are not considerable or rational, cannot be compelled on the other hand to take a title which will expose him to litigation or hazard, *Pyre v. Waddingham* (1), *Scott and Alvarez's Contract, In re, Scott v. Alvarez* (2). The question whether the doubt is reasonable must be determined on the facts of each case *Ahmedbhoy Habibbhoy v. Sir Dinshaw Petit* (3).

On the actual facts of this case, I am of opinion that the doubts of the plaintiffs, as instructed by their legal advisers, were reasonable. First of all, the right of a Hindu, such as Lalanmal, who had brothers, to bequeath property by a Will may be open to doubt. Secondly, Vishenbai's Will was not registered till after her death. Thirdly, no Probate had been taken out in respect of either Will. It is true that the law does not compel interested parties to seek a Probate of the Will of a Hindu in Karachi, but, on the other hand, it is equally true that so long as Probate is not taken out, it is open to interested parties to challenge the genuineness or the validity of the Will and of its provisions. Lastly, there was the patent fact that Asibai, a step sister of the owner defendant No. 2 had, through her Pleaders, formally asserted to the plaintiffs her claim to half the property in suit as against the defendants. I do not think it can be said that a reasonable purchaser would feel upon the two Wills alone that he was protected from further litigation and harassment on the part of Asibai, who had never admitted their genuineness or validity. The doubts of the plaintiffs were, therefore, reasonable and they were justified in calling upon the defendants to protect them against any action on the part of Asibai and her heirs.

The positive suggestion of the plaintiffs in this behalf did not actually extend to

(1) 1862 10 Hare 1; 68 E. R. 1; 30 L. J. Ch. 248.
(2) (1895) 2 Ch. D. 603 at p. 611; 64 L. J. Ch. 821; 12 R. 474; 73 L. T. 43; 43 W. R. 694.
(3) Ind. Cas. 124; 11 Bom. L. R. 545 at p. 565; 6 M. L. T. 200.

the filing of a suit against Asibai by the defendants. The first alternative they proposed was that the defendants should obtain the signature of Asibai and her son Bachumal. When the defendant No. 1 professed his inability to do so, they made a further suggestion. They suggested that half the purchase amount should be deposited by them with some solvent and respectable third party agreeable to both and that it should remain in deposit upon interest at 12 per cent. payable to the defendants who would not withdraw the principal, until the doubt as to Asibai's claim was solved. It appears to me under the circumstances to have been a reasonable offer, which in any case shows the alacrity and desire of the plaintiffs to complete the transaction. It was, however, refused by the defendant No. 1.

The argument for the defence that Vishendas witness, Exhibit 41, had taken a mortgage on the property for Rs. 6,000 from the defendants alone without Asibai's signature and that the plaintiffs should, like Vishendas, have been content with the title, is in my opinion sufficiently met by the plaintiffs. The latter justly pointed out that Asibai's claim only extended to half the property which was worth Rs. 30,000 and, therefore, a mortgagee to whom Asibai had made no claim, and in any case a mortgagee to the extent of Rs. 6,000 could well be satisfied with a mortgage without Asibai's signature, whereas a purchaser of the whole property for Rs. 30,000 to whom Asibai had notified her claim, was very differently circumstanced.

I conclude, therefore, that, as in the case of *Ahmedbhoy Habibbhoy* v. *Sir Dinshaw Petit* (3), *Haji Mahomed Mitha* v. *Musaji Essaji* (4) and *Shrinivasdas* v. *Meherbai* (5), the plaintiffs had room for reasonable doubt both in law and in fact, as to the title, on the date of the suit, in spite of the Wills, and were justified in calling upon the defendants as they did in their correspondence and otherwise to clear title. How to do so was a matter mainly for the defendants. It did not suffice for the defendants to say that Asibai declined to give her signature. As a matter of fact, her son Bachumal states on oath in the box that though he made the claim through Messrs. Kalumal and Co. of his own accord, his persistence in it was directly instigated by the defendant No. 1, who asked, him not to withdraw from the claim so as to enable him, the defendant No. 1, to resile from the agreement. The matter, however, is one of the word of Bachumal as against that of the defendant No. 1; and it is unnecessary for me to express an opinion as to whether the defendant No 1 did or did not go to this extent It suffices for the purpose of the present suit on the defendant No. 1's own admission that he did nothing beyond producing the two Wills, to hold that he did not solve the reasonable doubts of the plaintiffs as he was in law bound to do and did not even meet their suggestion of leaving half the purchase amount in deposit.

In this view of the case it is not, strictly speaking, necessary to consider whether the word '*haqlars*' in the agreement is confined to the rightful owner such as Luxmibai or to quite new claimants such as Asibai and Bachumal, who asserted them, though they have now in Court agreed to give up all claim to the property. Reading the agreement as a whole, I should say that the parties and the writer meant by the sentence and the word in question that the defendants bound themselves to give to the plaintiffs a title free from all reasonable doubt and that they had not then in contemplation any particular claimant whether rightful owners such as Luxmibai or others such as Asibai. The case is, therefore, clearly distinguishable from cases such as *Bindeshri Prasad* v. *Mahant Jairam Gir* (6) where the purchaser insisted on including in the conveyance a clause giving him an absolute warranty of title, and failing such insertion withheld payment of the purchase-money beyond the time fixed. This case has been distinguished in the recent case of *Madurai Chetty* v. *Babu Saheb* (7). The

(4) 15 B. 637; 8 Ind Dec (N. s) 443.

(5) 39 Ind. Cas. 27; 41 B 30; 21 M. L T. 236; 32 M. L. J. 75; 19 Bom. L. R 151; (1917) M. W. N. 258; 21 C. W. N. 558; 25 C. L. J. 311; 44 I. A. 36 (P. C.).

(6) 9 A 705; 14 I A. 173; 5 Sar P. C. J. 61; 5 Ind. Dec. (N. s 903 P. C).

(7) 52 Ind. Cas. 971.

facts of the latter case are somewhat analogous to those of the present. Until, therefore, the defendants had satisfactorily solved this reasonable doubt of the plaintiffs, the plaintiffs were justified in not paying the balance of the purchase amount and tendering a conveyance but in coming to Court for investigation of the title and for specific performance, if the title was good. The defendants were not justified in cancelling the agreement or forfeiting the earnest-money, *Jamshed Khodaram Irani* v. *Burjorji Dhunjibhai* (8).

I would, therefore, hold on the third issue that the defendants are guilty of the breach and, as in the Madras case quoted above, that the purchasers are entitled to sue for specific performance and enquiry with a view to clear up the question of title.

The question, therefore, remains whether on the fourth and fifth issues the plaintiffs should be granted specific performance or damages only. No reasons have been placed before me to disentitle the plaintiffs to specific performance. The defendants have executed a second mortgage for Rs. 12,000 in favour of the same mortgagee Vishendas Fatehchand. It is also in evidence that from the day of the agreement up to the day of conveyance and until the end of 1919, landed property in Karachi has been rising in value at varying rates, at different times and in different quarters although, during the last few months, the greatest rise has passed and there has been, if any thing, a tendency to fall though not by any means to the rates before the agreement. The amount of the two mortgages is, however, amply covered by the balance of the purchase amount, and the fluctuations, though they make it difficult to assess damages on the day of the breach, induce no such difficulty in specific performance. I would, therefore, follow the usual rules which, except for reasons shown, grant specific performance, and answer on the fourth issue that the plaintiffs are entitled to specific performance and not to damages on the fifth issue. On the evidence of the brokers those cited for the plaintiffs are professional brokers while those for the defendants are small men. For this reason, so to speak, I would assess the damages at Rs. 18,000, if specific performance had not been granted.

On the general issue the learned Counsel for the defendants has argued that as the plaintiffs' doubts as to title have, now, in the face of Bachumal's admission in the witness-box, vanished and are now seen to have been groundless, the defendants are entitled to their costs from the plaintiffs even if the findings on the other issues are against the former. The question of costs is, however, one for the judicial discretion of the Court both on its findings and on its general view of the conduct of the parties. The findings are against the defendants. Conduct in the case of vendors and purchasers must be such as can be expected from parties dealing fairly and squarely with each other. In the present case, I am clearly of opinion, that the advantage in this respect is entirely with the plaintiffs and against the defendants. The plaintiffs have been throughout, subject to the doubts arising through Asibai's claim and the counsel of their advisers in respect thereto, ready and anxious to perform their part of the contract. The conduct of the defendants, on the contrary, from the time that Asibai put forward her claim, appears to me to have been precisely the opposite. There is very definite evidence of the broker Bhagwanji (witness Exhibit 13) to show that the defendant was after the agreement ready to sell the property for Rs. 45,000. There is the evidence of Bachumal that the defendants asked him to persist in his claim. Defendant No. 1 appears to have refused receipt of a telegram on the 7th December from the plaintiffs and to have delayed replying to the letters of the 6th, 19th and 22nd December, that is to say, the date after the expiry of the period fixed in the agreement for the conveyance. He appears to have repented of the agreement very soon after it, probably in view of the rising prices and to have been only waiting to put an end to it on the earliest possible date, *viz.*, 22nd December. To this conduct must be added the false defences raised in the suit such as the alleged agreement in Issue No. 1, and the alleged omission to read and explain the agreement to defendant No. 2. Nothing more is needed to justify the

(8) 32 Ind Cas 246; 40 B. 289; 30 M. L. J. 186; 3 L W. 239; 19 M L. T. 184; 14 A. L. J. 225; (1916) 1 M. W. N. 229; 18 Bom. L. R. 163; 23 C. L. J. 358; 20 C. W. N. 744; 43 I. A 26 (P. C.).

plaeirg of all the plaintiffs' costs on the defendants.

There will, therefore, be a decree for the plaintiffs in the following terms:—

The plaintiffs do deposit Rs. 28,000 in Court within 15 days of this decree and to tender a conveyance as in the agreement Exhibit 8 and the two defendants within a week of such deposit do pass the conveyance in respect of the property in suit in favour of the plaintiffs, the Sarveh Hitoshi Ayurvedic Aushadhalaya by its present Chairman Swami Vriktanand, plaintiff No. 2a, free of all incumbrances and claims. On the defendants failing to do so, the Nazir will execute the conveyance for them. Out of the amount paid into Court by the plaintiffs, the defendants, or on their default, the Nazir will make up the accounts of the mortgage with Seth Vishendas Fatchchand, witness, Exhibit 41, and redeem the two mortgages with interest and have them endorsed by the mortgagee as paid off and made over to the defendants. The balance of the purchase amount after deducting the amount found due to the mortgagee, and the amount due to the plaintiffs for costs, if the plaintiffs so desire, will be made over to the defendants.

J. P. & N. H.

Claim decreed with costs.

CALCUTTA HIGH COURT.

APPEALS FROM ORIGINAL DECREES Nos. 251, 260 TO 263, 266, 280 TO 283 OF 1919.

May 20, 1921.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Buckland.

MOHINI MOHAN BANERJEE AND OTHERS —APPELLANTS

versus

SECRETARY OF STATE FOR INDIA IN COUNCIL AND OTHERS—RESPONDENTS.

Land acquisition—Principle of assessing compensation—Potential value—Operative effect of special adaptability or future utility—Test.

Tribunals assessing compensation must take into account, not only the present purpose to which the land is acquired, but also any other more beneficial purpose to which in the course of events it might, within a reasonable period, be applied, just as an owner might do if he were bargaining with a purchaser in the market. [p. 27, col. 1.]

The operative effect of special adaptability or future utility must be estimated, not by idle speculation and impractical imagination, but by prudent business considerations such as would weigh with an intending purchaser at the imaginary market which would have ruled, had the land been exposed for sale when it was subjected to compulsory acquisition. [p. 27, col. 2.]

Too much importance must not be attached to evidence of offers in ascertaining the market value of land; but the position is different where the question is, whether there is a market at all for a tract of land for use for a special purpose. [p 28, col. 1.]

Per *Buckland, J.*—In assessing the compensation payable enquiry should be made as to what is the market value of the land when laid out in the most lucrative and advantageous way in which the owner could dispose of it. Whether or not the particular way in which it is claimed that the land if so laid out could be disposed to the best advantage to the owner is one appropriate to prevailing conditions is a question of fact to be decided according to the circumstances of each case [p. 29, col. 1.]

Appeal against the decrees of the Additional District Judge, Howrah, dated the 23rd June, 1919.

Babus *Charu Chandra Biswas* and *Bhujanga Bhusan Mukerjee*, for the Appellants in Appeals Nos. 251, 260 to 263 and for the Respondents in Appeals Nos. 266, 280 to 283.

Babus *Ram Charan Mitra* and *Surendra Nath Guha*, for the Respondents in Appeals Nos. 251, 260 to 263 and for the Appellants in Appeals Nos. 266, 280 to 283.

JUDGMENT.

MOOKERJEE, J.—These ten appeals are directed against five awards made by the Land Acquisition Judge of Howrah in five references under section 18 of the Land Acquisition Act, 1894. The Collector made his award in each case on the basis of the condition of the land at the time of the declaration. He adopted a three-fold classification, namely, homestead land at Rs. 400 per *bigha*, garden land at Rs. 100 per *bigha* and tank at Rs. 40 per *bigha*. The claimants applied in each case for a reference to the Court under sub-section (1) of section 18 and formulated the ground of their objection to the award of the Collector in these terms: "The land acquired is locate just by the side of a brick-field; it could have been a brick-field in future and the value of the land should consequently be assessed at not less than Rs. 1,500 per *bigha*." Thus the substantial question for consideration on the reference was, whether the land should be

valued on the basis of its actual condition at the time of the declaration or whether its special adaptability for possible use as a brick field should be deemed a relevant element in the determination of its market value. The District Judge gave effect to the contention of the claimants that as the lands adjoined brick-fields and might at any time have been converted into brick-field lands, their special adaptability for the purpose was a material factor in the assessment of their market value. But as the situation and condition of the lands would render necessary an appreciable expenditure of money to convert them for use as brick-fields, he assessed their value at Rs. 800 per *bigha*. The Secretary of State for India in Council has appealed against the five awards on the ground that the District Judge should have valued the lands to their present disposition and should not have valued them on the conjectural ground that they were capable of conversion into brick-field lands or even as lands which might be absorbed into neighbouring brick-fields. The claimants, on the other hand, have preferred five appeals against the awards on the ground that although the District Judge had adopted the principle of special adaptability, the market value of the lands as assessed by him was inadequate, as he had allowed for cost of conversion on too liberal a basis. The ten appeals consequently re-open all the important questions in controversy before the District Judge.

As regards the appeals preferred by the Secretary of State for India in Council, it is manifest that the District Judge rightly declined to assess the market value of the lands solely on the basis of their actual disposition at the time of acquisition. The principle that the fairest and most favourable principle of compensation to the owners is to estimate the market value of the property, not according to its present disposition, but laid out in the most lucrative and advantageous way in which the owners could dispose of it, was regarded as well-established by Garth, C. J. in the case of *Premchand Burral* v. *Collector of Calcutta* (1). The doctrine was applied by Sargent, C. J. in the case of *Collector of Poona* v. *Kashinath* (2) when he formulated the question for solution as to what would be the most lucrative and advantageous way in which the owner could dispose of it and what would be its market value if so laid out. The same view was emphasized in different terms in *Fink* v. *Secretary of State* (3): "The probable use of land in the most advantageous way, in accordance with or following the use already made of neighbouring lands, leads to speculative advance in prices, and regard should be had to such advance. The utility of land is certainly an element for consideration in estimating its value, that is, the utility which may be calculated by a prudent businessman." The limitation involved in the concluding words of this passage is of fundamental importance, for as Jenkins, C. J. observed in *Kalis Chandra Mitra* v. *Secretary of State* (4), what has to be determined is the "market value of the land" which may be roughly described as the price that an owner, willing and not obliged to sell, might reasonably expect to obtain from a willing purchaser with whom he was bargaining for the sale and purchase of the land. Precisely the same test was indicated by Moulton, L. J. in *Lucas and Chesterfield Gas and Water Board, In re* (5), when he observed that the owner is entitled to be paid the full price for his lands, and any and every element of value which they possess must be taken into consideration in so far as they increase the value to him. This was approved by the Judicial Committee in *Cedar Rapids Manufacturing and Power Co.* v. *Lacoste* (6), and is in accordance with the opinion previously expressed by Vaughan Williams L. J., in *Ewloe and Merthyr Tare Steam Collieries and Pontypridd Waterworks Company, In re* (7), that in assessing compensation every circumstance which is in existence as a fact at the moment when the notice to treat is given as also the probable use which might be made of the property must be taken into consideration, although we cannot take into account a contingency which cannot be anticipated and cannot be measured. That

(1) 2 C. 102; 1 Ind. Jur. 267; 1 Ind. Dec. (N. S.) 263.
(2) 10 B. 585 at p. 589; 5 Ind. Dec. (N. S.) 778.
(3) 34 C. 599 at p. 604.
(4) 18 Ind. Cas. 63; 17 C. L. J. 34.
(5) (1909) 1 K. B. 16; 77 L. J. K. B. 1009; 99 L. T. 767; 72 J. P. 487; 6 L. G. R. 1106; 24 T. L. R. 858.
(6) (1914) A. C. 569; 83 L. J. P. C. 162; 110 L. T. 873; 30 T. L. R. 293.
(7) (1902) 2 K. B. 135; 71 L. J. K. B. 612; 50 W. R. 627; 87 L. T. 291; 18 T. L. R. 604.

there is room for divergence of opinion in the application of the principle to the facts of a concrete case, is illustrated by the course of events in the litigation last mentioned, where the House of Lords disagreed with the conclusion of the Court of Appeal which had reversed the decision of the primary Court; *Builfa and Merthyr Dare Steam Collieries* v. *Pontypridd Waterworks Company* (8). The substance of the matter is that tribunals assessing compensation must take into account, not only the present purpose to which the land is applied, but also any other more beneficial purpose to which, in the course of events, it might within a reasonable period be applied, just as an owner might do if he were bargaining with a purchaser in the market. The recognition of this potential value, as it has been called, may be found in a variety of cases, *Reg* v. *Brown* (9) (Potential value of agricultural land for building purposes); *Ripley* v. *G. N Ry. Co.* (10) (Contiguity of land to a reservoir making it suitable for building a mill); *Brown* v. *Commissioner for Railways* (11) (Future profitable working of mine); *Osalinsky* v. *Corporation of Manchester* (12) Browne and Allen on Compensation, 659 (Contiguity of land to a lake, making it specially adaptable for use as a reservoir); *Eddel and New Castle and Gat-shead Water Co., In re* (3) (Fitness of land for reservoir); *Gough and Aspatria, Silloth and District Joint Water Board, In re* (14) (Fitness of land as base for water supply); *Kiney* v. *North-Eastern Ry. Co.* (15) (Adaptability of land for railway purposes); *Cedar Rapids Manufacturing and Power Co.* v. *Lacoste* (6) (suitability for development of water power). The principle has also been applied where the land of the claimant, though not in itself adaptable for a reservoir, is so adaptable in conjunction with other adjacent lands belonging to other owners: *Mayor of Tynemouth and Duke of Northumberland, In re* (16) Examples of the recognition of the doctrines of potential value and special adaptability may also be found in the cases of *Hugli Mills Co.* v. *Secretary of State* (17), *Rajendra Nath Banerjee* v. *Secretary of State* (18), *Mulji Khetsey, In re* (19), *Government* v. *Dyal Mulji* (20), *Dhanjibhoy, In re* (21), *Dorabji Qursetji, In re* (22), *Sorabji, Jamsetji, In re* (23), *Daya Khushal* v. *Assistant Collector, Surat* (24) The true rule was tersely stated by Lord Dunedin in pronouncing the opinion of the Judicial Committee in two recent cases. In *Cedar Rapids Manufacturing and Power Co* v. *Lacoste* (6) he formulated the proposition that the value to be paid for is the value to the owner as it exists at the date of the taking; such value consists in all advantages which the land possesses, present or future, but it is the present value alone of such advantages that falls to be determined. In *Ollum* v. *City of Vancouver* (25) he added the necessary corollary that while all opportunity of employment for a certain purpose in regard to the position of the land to be acquired is to be taken into account, there must come a point where the opportunity becomes so remote as to be negligible. This brings into clear relief the fundamental importance of the test that the operative effect of special adaptability or future utility, (expressions which have sometimes been criticised, not wholly without reason) must be estimated, not by idle speculation and unpractical imagination, but by prudent business considerations such as would weigh with an intending purchaser at the imaginary market which would have ruled, had the land been exposed for sale when it was subjected to compulsory acquisition. Let us now examine the circumstances of the case before us in view of these principles.

(8) (1903) App. Cas. 426; 72 L. J. K. B. 805; 89 L. T. 280; 52 W. R. 193; 19 T. L. R. 673.

(9) (1867) 2 Q. B. 630; 36 L. J. Q. B. 322; 16 L. T. 827; 15 W. R. 988; 8 B. & S. 456.

(10) (1875) 10 Ch. 435; 31 L. T. 869; 23 W. R. 685.

(11) (1890) 15 A. C. 240; 59 L. J. P. C. 62; 62 L. T. 469.

(12) (1883) 2 Hudson on Compensation 1546.

(13) (1879) Browne and Allen on Compensation 678; 90 L. T. 44*n*.

(14) (1908) 1 K. B. 574; 72 L. J. K. B. 285; 67 J. P. 187; 51 W. R. 510; 88 L. T. 2[illegible], affirmed on Appeal (1904) 1 K. B. 417; 73 L. J. K. B. [illegible]; 68 J. P. 229; 52 W. R. 5[illegible]2; 90 L. T. 43; 20 T. L. R. 79.

(15) (1914) 3 K. B. 628; 83 L. J. K. B. 1640; 111 L. T. 677.

(16) (1903) 89 L. T. 557; 19 T. L. R. 6[illegible]0; 67 J. P. 425.

(17) 8 Ind. Cas. 800; 12 C. L. J. 489.

(18) 32 C. 343 at p. 348.

(19) 15 B. 27; 8 Ind. Dec. (N. s.) 1[illegible]9.

(20) 9 Bom. L. R. 99.

(21) 10 Bom. L. R. 701.

(22) 10 Bom. L. R. 175.

(23) 10 Bom. L. R. 646.

(24) 21 Ind. Cas. 320; 38 B. 27; 15 Bom. L. R. 845.

(25) (1915) 85 L. J. P. C. 95; 113 L. T. 759.

It is an admitted fact that the lands acquired are at a short distance from the Bally canal which has numerous brick fields along both its banks. Three of these brick-fields were owned at the time of the declaration by Ghose Kumar and Bull. These brick-fields adjoined one another and the acquired lands were cut off from direct access to the canal by their interposition. It appears from the evidence of the superintendent of the East Indian Railway brick-fields that bricks are made either from natural clay or from silt deposit. There is no evidence to show that there was such a depth of natural clay on the acquired lands that they could have worked as brick fields for any length of time. Consequently, it may be assumed that the acquired lands could not be profitably used as independent brick-fields without deposit of silt. To obtain the requisite deposit of silt, a regular water supply would be necessary and as the acquired lands were cut off from the canal by intervening brick-fields, they could only have been of value for brick-field purposes if they should be acquired for and included in the neighbouring brick-fields. The claimants must accordingly show, in order to establish their proposition that the lands should have been valued on a brick-field basis, that there was reasonable probability that the lands would, but for their acquisition, have been included in those brick-fields. This assertion is not based on a mere hypothesis that as business flourished in the adjoining brick-fields, their owners might, in the normal course of events, seek for room for expansion. The claimants have actually proved that plots of land have from time to time been added to and included in at least one adjoining brick-field. They have also proved by reliable evidence that Kumar and Bull had negotiated with them for purchase or lease of some of these lands with a view to their incorporation in their existing brick-fields. No doubt, as pointed out by Batchelor, J. in *Government of Bombay* v. *Merwanji Muncherji* (26) too much importance must not be attached to evidence of offers in ascertaining the market value of land; but the position is different where, as here, the question is, whether there is a market at all for a tract of land for use for a specified purpose. In the present instance, there is no room for controversy that there is trustworthy evidence to show that if the acquired lands had been thrown into the market, adjoining brick-field owners would in all probability have come forward to purchase them or to take leases of them for inclusion in their brick-fields. The District Judge has thus rightly concluded that there was a reasonable probability that the lands might have been taken up by the adjoining owners for the extension of their brick-fields and that this possibility must be taken into consideration in calculating the amount to be awarded as compensation upon compulsory acquisition. The chief ground urged in support of the appeals preferred by the Secretary of State cannot consequently be sustained.

As regards the appeals preferred by the claimants, the point for consideration is whether the rate fixed by the lower Court is adequate. The District Judge was plainly right when he held that documents filed on behalf of the Secretary of State were not of much assistance. They relate to transactions regarding lands at some distance from the lands acquired, and even if they relate to leases or purchases of lands contiguous to brick-fields, they are not in respect of transfer of land to brick-field owners for brick-field purposes. On the other hand, the claimants have adduced documentary evidence (conveyances, leases and land acquisition awards) in respect of lands actually in use as brick-fields, these indicate a rate which varies from a minimum of Rs. 1,200 per *bigha* to a maximum of Rs. 2,250 per *bigha*, the majority of transactions show that the rate varies from Rs. 1,410 to Rs. 1,650 per *bigha*. From an analysis of the relevant evidence, the District Judge had thus correctly held that Rs. 1,600 per *bigha* may fairly be taken as the rate for fully prepared brick fields. He has then allowed a reduction of 50 per cent. because the lands acquired would have to be converted into lands fit for use as brick-fields at a considerable outlay. This reduction, however, is not supported by the evidence on the record. The method of brick manufacture in this country as described in standard treatises (such as the paper by Major Falconnet R E. in Volume III of the professional papers on Indian Engineering published by the Government), also does not lend any support to the view that the costs of conversion of ordinary land into land fit for use as brick fields amounts

(26) 10 Bom. L. R. 907 at p. 919.

to one-half of the value of the land. On the other hand, such evidence as there is on the record shows that the reduction allowed by the Court below is excessive. The District Judge has correctly found that the leases on the record prove that prepared brick-field lands fetch a rent of Rs. 80 per *bigha* The District Judge has also accepted the statement of Mohini Mohan Banerjee, one of the claimants, as to the rent paid to him by Mr. Bull for a plot of 15 *cottas* incorporated in a brick-field but he has inaccurately stated this to be Rs. 50 per *bigha* instead of Rs. 50 as the rent fixed as a lump sum. If this statement be accepted, the rent for unprepared land works out at Rs. 200 for three *bighas* as against Rs. 240 for three *bighas* of prepared land. This gives the proportion by which the value should be reduced, namely, 6 to 5. The conclusion follows that if the rate for prepared brick-fields is Rs. 1,600 as found by the District Judge, the rate for unprepared land should be approximately Rs. 1,333. We accordingly direct that the lands acquired be valued at Rs. 1,300 instead of Rs. 800 per *bigha*.

The result is that Appeals Nos. 266, 280, 281, 282 and 283 filed by the Secretary of State must be dismissed with costs. The hearing fee in each of these cases is assessed at two gold *mohurs*. Appeals Nos. 251, 260, 261, 262 and 263 preferred by the claimants are allowed with costs. The land in each case will be valued at Rs. 1,300 instead of Rs. 800 per *bigha*. The hearing fee in each of these appeals also is assessed at two gold *mohurs*. The order for proportionate costs made by the lower Court will stand but the amounts will be modified on the basis of the sums awarded in this Court.

BUCKLAND, J.—The principle adopted by the District Judge in assessing the compensation payable, by enquiring what is the market value of the land when laid out in the most lucrative and advantageous way in which the owner could dispose of it, is very well established and he has correctly applied it. Whether or not the particular way in which it is claimed that the land if so laid out could be disposed of to the best advantage to the owner is one appropriate to prevailing conditions is a question of fact to be decided according to the circumstances of each case. In the case before us there can be no question that the land which has been held to be suitable for a brick field, would fetch a higher price, if sold for that purpose to the owner of an adjacent brick-field than if sold for any other purpose. The District Judge has disregarded the evidence of leases of other lands adduced by the Secretary of State and done so rightly on two grounds:—(1) the lands are not contiguous to those in question, and (2) they are not leases of land to brick-field owners for the purpose of making bricks.

In assessing compensation the District Judge has erred in deducting 50 per cent. as the cost of converting the land for the purposes of a brick-field.

In addition to the evidence referred to by my learned brother Mr. Justice Mookerjee there is the statement of Sarada Prosad Kumar that it took him 6 or 8 months to convert land into a brick-field. Applying this to a computation of the value of the land on a lease-hold basis, the reduction on account of conversion for this particular purpose is comparatively trifling. Taking this in conjunction with the reasons given by my learned brother Mr. Justice Mookerjee I agree with him as to the rate at which compensation should be paid and I concur in the order made.

B N.

Appeals Nos. 251, 260-263 *allowed*;
Appeals Nos. 266, 280-283 *dismissed.*

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 403 OF 1919.

March 17, 1922.

Present:—Sir Grimwood Mears, Kt., Chief Justice, and Justice Sir P. C. Banerji, Kt.

Shaikh KARAMAT ALI AND ANOTHER—DEFENDANTS—APPELLANTS

versus

THE GORAKHPUR BANK, LIMITED, THROUGH MR. G. W. DILLON—PLAINTIFF—RESPONDENT.

Mortgage—Contribution—Auction-purchaser of part of mortgaged property, liability of.

KARAMAT ALI v. GORAKHPUR BANK, LD.

An auction-purchaser in execution of a decree obtained upon a mortgage purchases the rights of the mortgagor and the mortgagee at the date on which the mortgage was made, and any subsequent equities or liabilities which arise in respect of the mortgaged property cannot attach to him inasmuch as he acquires the property free from any such liabilities or equities. [p. 31, col. 1.]

Where a portion of a mortgaged property has been sold, a suit for contribution for the mortgage-money can be brought only against the holder of the portion of the mortgaged property which has remained unsold and not against the auction-purchaser of the portion sold. [p. 31, col. 2.]

First appeal against the decree of the Subordinate Judge, Azamgarh, dated the 19th September 1919.

Messrs. *B. E. O'Conor* and *Iqbal Ahmad*, for the Appellants.

Mr. *G. W. Dillon*, for the Respondent.

JUDGMENT.—The facts of this case are these. On the 15th of June 1883 one Hasru mortgaged a three-annas share to the defendants Nos. 3 and 4. The mortgaged property was sold in execution of a simple money-decree, and a one-anna share was purchased by one Kali Charan, who was the predecessor-in-title of the defendants Nos. 1 and 2. Another one-anna share was purchased by Sarju Prasad, and the third one-anna share was purchased by Wazir Ali, the defendant No. 5. Sarju Prasad mortgaged the one-anna share purchased by him to the Gorakhpur Bank. The Bank obtained a decree upon that mortgage and caused the one-anna share to be sold by auction and it became the purchaser of that share. The defendants Nos. 3 and 4, the mortgagees under the mortgage of 18 8, brought a suit on the basis of that mortgage against the defendants Nos. 1 and 2, the Gorakhpur Bank and Wazir Ali, defendant No. 5, and obtained a decree for sale. In the suit in which that decree was passed a compromise was entered into between the mortgagees and the defendants Nos. 1 and 2 by which the latter agreed to pay to the mortgagees Rs. 1,333-5-4 and the mortgagees undertook to release from liability the one anna share purchased by their father, Kali Charan. The aforesaid amount appears to have been paid to the decree-holders and a sum of Rs. 14,200 was the balance outstanding under the decree. The decree holders caused the one anna share of Wazir Ali to be sold by auction, and this sale realised Rs. 4,200. They then put up to sale the one-anna share purchased by the Gorakhpur Bank, and this sale realised Rs 10,000 which fully discharged the decree. After this auction sale the present suit was instituted by the Gorakhpur Bank against the defendants Nos. 1 and 2, the defendants Nos. 3 and 4 and Wazir Ali, the fifth defendant. The Bank's contention was that the one-anna share, of which it was the purchaser, was liable for one-third of the mortgage-debt, that it had contributed more than its ratable share, and that the Bank was, therefore, entitled to be recouped the amount which the sale of its property had fetched in excess of its share of liability, and on this ground the Bank claimed Rs. 4,823-7 and interest. The Court below dismissed the claim as against the defendants Nos. 1 and 2; it also dismissed the claim against Wazir Ali; but it made a decree against the defendants Nos 3 and 4, the decree-holders, on the ground that under the compromise between them and the heirs of Kali Charan they had undertaken to compensate the heirs of Kali Charan for any amount which they might have to pay on account of the decree in addition to the amount which they had undertaken to pay. The decree-holders, the defendants Nos. 3 and 4, have preferred this appeal, and it is contended on their behalf that if the claim could be maintained against any one, it could be maintained against defendants Nos. 1 and 2 and the decree of the Court below as regards them (defendants Nos. 3 and 4) was an erroneous decree. We may mention that the Gorakhpur Bank did not prefer any appeal against that part of the decree of the Court below which dismissed the claim, against Wazir Ali and against the defendants Nos. 1 and 2. In our opinion the decree of the Court below as regards Wazir Ali is correct. No doubt the one-anna share which Wazir Ali purchased was ratably liable for one-third of the mortgage-debt; but Wazir Ali surrendered that share and it was sold by auction. Therefore, no claim for contribution could be brought forward against him. He was not in possession of any part of the mortgaged property after the auction sale of his one anna share, and no claim could be advanced against him as no personal liability was incurred by him. The only persons against whom the Gorakhpur

Bank, which undoubtedly had contributed more than its ratable share of liability, could maintain its claim were the defendants Nos. 1 and 2, whose share in the mortgaged property has not yet been sold, but the Court below exempted those defendants from the claim on the ground that the decree-holders, defendants Nos. 3 and 4, had undertaken by the compromise to pay up any amount for which the defendants Nos. 1 and 2 might be liable. This part of the judgment of the learned Subordinate Judge is, in our opinion, erroneous. There was no privity of contract between the plaintiff (*i.e.*, the Gorakhpur Bank) and the decree-holders, defendants Nos. 3 and 4, and, therefore, by virtue of the compromise the Gorakhpur Bank could have no claim as against the defendants Nos. 3 and 4. The right of the Gorakhpur Bank to obtain contribution from the defendants Nos. 1 and 2 could not be deemed to attach to the decree-holders defendants Nos. 3 and 4 by reason of their agreement with the defendants Nos. 1 and 2 to release their one-anna share from liability for the mortgage. It was, however, contended by Mr. Dillon on behalf of the Bank that the defendants Nos. 3 and 4 being auction-purchasers of the one anna share of the Gorakhpur Bank, were liable to make good to the Bank the amount which the Bank had to pay in excess of its share of liability. In our opinion the position of the defendants Nos. 3 and 4 was that of auction-purchasers of the one-anna share of the Gorakhpur Bank. As such auction-purchasers they could not be held liable to contribute towards the mortgage-money. An auction-purchaser in execution of a decree obtained upon a mortgage purchases the rights of the mortgagor and the mortgagee at the date on which the mortgage was made, and any subsequent equities or liabilities which arose in respect of the mortgaged property could not attach to them inasmuch as they acquired the property free from any such liabilities or equities. Mr. Dillon has failed to draw our attention to any authority in which it has been held that a claim like the present could be brought against the auction-purchaser. He referred to the case of *Shanto Chandra Mukerji* v. *Nain Sukh* (1), but that was not a case like the present and the circumstances of that case are wholly distinguishable from those of this case. The case, which is applicable to the appeal before us, is that of *Hari Raj Singh* v. *Ahmad-ud-din Khan* (2). In that case it was held that a suit for contribution could be brought only against the holder of the portion of the mortgaged property which had remained unsold. In this view the decree of the Court below cannot be supported and this appeal must prevail. We accordingly allow the appeal, set aside the decree of the lower Court and dismiss the suit with costs and fees on the higher scale as against the appellants.

J. P. *Appeal allowed.*

(1) 23 A. 355; A. W. N. (1901) 101.

(2) 18 A. 545; A. W. N. (1897) 169; 9 Ind. Dec. (N. S.) 353.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 16 OF 1920.

June 21, 1921.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Buckland.

JAGANNATH MARWARI AND OTHERS—DEFENDANTS—APPELLANTS

versus

CHANDNI BIBI AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Adverse possession as between co-sharers—Joint property—Rights of co-tenants—Possession of one co-tenant, when adverse to others—Ouster—Exclusive possession—Erection of substantial building on joint property if conclusive evidence of ouster—Joint owner effecting in good faith valuable improvements upon common property—Equitable considerations upon partition—Trustee, claiming adversely—Burden of proof—Adoption, direct evidence of, if necessary.

In order to establish adverse possession as between co-sharers, there must be evidence of an open assertion of a hostile title by one of them to the knowledge of the others; mere non-participation in the profits by one party and exclusive occupation by the other is not conclusive [p. 36, col. 1.]

If possession may either be lawful or unlawful, in the absence of evidence, it must be assumed to be the former. [p. 36, col. 2.]

JAGANNATH MARWARI v. CHANDNI BIBI.

Possession is never considered adverse, if it can be referred to a lawful title. [p. 36, col. 2.]

Every co-tenant has the right to enter into and occupy the common property and every part thereof, provided that in so doing he does not exclude his fellow tenants or otherwise deny to them some right to which they are entitled as co-tenants; and they on their part may safely assume, until something occurs of which they must take notice and which indicates the contrary, that the possession taken and held by him is held as a co-tenant; and is in law the possession of all the co-tenants, and not adverse to any of them. [p 36, col. 2]

But one co-tenant may oust the others and set up an exclusive right of ownership in himself, and an open, notorious and hostile possession of this character for the statutory period will ripen into title as against the co-tenants who were ousted. [p. 36, col. 2]

In order to render the possession of one co-tenant adverse to the others, not only must the occupancy be under an exclusive claim of ownership, in denial of the rights of the other co-tenants, but such occupancy must have been made known to the other co-tenants, either by express notice or by such open and notorious acts as must have brought home to the other co-tenants' knowledge of the denial of their rights. [p. 37, col. 1.]

No comprehensive formula can be framed to test whether the possession of a co-tenant in a particular case is adverse to the other co-tenants. But the evidence to show adverse possession by one co-tenant must be much clearer than between strangers to the title, and the hostile intent of the co tenant in possession must be shown by unequivocal conduct. [p. 37, col. 1.]

The erection of a substantial building on joint property by one co-owner cannot be regarded as conclusive evidence of ouster. [p 35, col. 2.]

If a joint owner has in good faith effected valuable improvements upon the common property at his own expense, equity takes that fact into consideration upon a partition and in some suitable way makes an allowance to him therefor, in addition to his rateable share of the property. [p. 38, col. 1.]

The burden lies upon the trustee to establish when he became faithless to the trust imposed upon him and asserted a hostile title in himself to the knowledge of the rightful owner. [p. 35, col. 2.]

It is not necessary to produce direct evidence of the fact of an adoption: where it has taken place long since and where the adopted son has been treated as such by the members of the family, and in public transactions every presumption will be made that every circumstance has taken place which is necessary to account for such a state of things as is proved or admitted to exist. [p. 34, col. 1.]

Appeal against a decree of the Subordinate Judge, Asansol, dated the 17th December 1919.

Babus *Dwarka Nath Chuckerbutty* and *Jyotis Chandra Sarkar*, for the Appellants.

Sir *Asutosh Chaudhuri*, Babus *Bankim Chandra Mookerjee*, and *Rama Prosad Mookerjee*, for the Respondents.

JUDGMENT.

MOOKERJEE, J.—The subject-matter of the litigation which has resulted in this appeal consists of two parcels of land situated in the Town of Raniganj. The plaintiffs claim an one-fourth share of a leasehold interest in the land created by the Bengal Coal Company, the admitted landlords. The contesting defendants deny the alleged title of the plaintiffs and claim an independent right in themselves in the entire property. The Subordinate Judge has found in favour of the plaintiffs, on the question of title; he has also held that such title was in subsistence at the date of the commencement of the suit and had not been extinguished by adverse possession on the part of the defendants. In this view, the Trial Court has made a decree for possession upon declaration of title and has further directed partition by metes and bounds. On the present appeal, the decree of the Subordinate Judge has been assailed substantially on two grounds, namely, first, that the plaintiffs have failed to prove the existence at any time of the specific title set up by them; and, secondly, that even if the plaintiffs had such title at some remote period of time, it had been extinguished long before the date of the suit by adverse possession on the part of the defendants. For the determination of the questions in controversy which are closely connected and may be conveniently discussed together, a brief resital of the history of the devolution of the title to the disputed property is essential.

On the 14th August 1855 the Bengal Coal Company granted a permanent building lease in respect of two plots of land in the Town of Raniganj, at an annual rent of Rs. 24, to one Ram Singh Chaudhuri. There was some controversy in the Court below upon the question, whether the two plots covered by this lease are identical with the two parcels now in dispute. The schedule attached to the lease sets out the boundaries of the two plots, but, as might have been anticipated, the Subordinate Judge found it difficult to identify all the boundaries after the lapse of sixty years; there can, however, be little room for reasonable doubt as to the identity of the land. Ram Singh Chaudhuri continued in possession upon payment of rent to the Bengal Coal Co. till 18[illegible] when he transferred his leasehold interest to

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Mangaloband Baldeodas, who took a half share, Jainarain, who took an one fourth share, and Panna Lal, who took the remaining one-fourth share. These persons continued in occupation, upon payment of rent to the superior landlords at the rate of Rs. 24 annually for at least a quarter of a century. As there is no indication whatever that they held other lands under the Bengal Coal Co. at the same rate, the Subordinate Judge has, in our opinion, correctly held, notwithstanding the difficulty in the identification of boundaries, that the land now in dispute is precisely the same land as is covered by the lease of the 14th August 1855 granted by the Company.

We have next to consider the history of the share of Panna Lal which forms the subject matter of this litigation. The relationship of the members of his family is set out in the following genealogical table:

PANNA LAL, died 1892.

Surajmal, died during lifetime of Panna Lal Widow Lachmi Bibi defendant No. 19.	Mahadeo, (adopted son) died 12th September 1896, Widow Chandni Bibi plaintiff No. 1.
	Ramnibas (adopted 1892) plaintiff No. 2.

The evidence leaves no room for doubt that Mangaloband Baldeodas, Jainarain and Panna Lal were jointly in enjoyment of the lease hold property from 1865 till 1882. In the latter year, Panna Lal who had lost his son Surajmal and had taken Mahadeo in adoption, retired to Benares. With a view to make provision for the maintenance of his widowed daughter-in-law, Lachmi Bibi, he executed on the 25th June 1882 a deed of gift whereby he gave her a life interest in his share of the disputed property; he further directed that his adopted son Mahadeo would become full owner upon the death of Lachmi Bibi. The document was not registered, though it transferred interest in immoveable property of value exceeding Rs. 100. The transaction took place, it will be observed, shortly before the Transfer of Property Act came into force on the 1st July, 1882, and was consequently not affected by the operation of section 123 which provides that for the purpose of making a gift of immoveable property, the transfer must be effected by a registered instrument, signed by or on behalf of the donor and attested by at least two witnesses. The deed of gift was, however, compulsorily registrable under section 17 of the Indian Registration Act, 1877, and, consequently could not, under section 49, affect any immoveable property comprised therein or be received as evidence of any transaction affecting such property. It was, however, admissible in evidence for a collateral purpose, namely, to explain the reason why Lachmi Bibi received the income as if she were a joint owner in possession of the property; *Lalla Gopee Chand* v. *Sheikh Lutkut Hossein* (1), *Thakore Fatesingji* v. *Bamanji Ardeshir Patel* (2), *Venkatachari* v. *Rangaswami Iyengar* (3), *Varada Pillai* v. *Jeevarathnammal* (4). It may also be added that if there had been evidence of delivery of possession, the intended gift might have been validated under the Hindu Law which was then in force: *Kalidas Mullick* v. *Kanhaya Lal* (5), *Dharmodas Das* v. *Nitarini Dasi* (6), *Lakshimoni Dasi* v. *Nityananda Day* (7), *Ram Chandra* v. *Ranjit Singh* (8). The true position then was that the intended gift by Panna Lal in favour of his widowed daughter-in-law, Lachmi Bibi, did not take effect in law. But the evidence makes it abundantly clear that the first defendant Jagannath (the son of Mangaloband), who managed the property on behalf of the joint owners, regularly paid to Lachmi Bibi the surplus income in the one-fourth share of Pannalal. This continued unquestionably during the lifetime of Pannalal who died, as we have seen, in 1892. It is, we think, also indisputable that as the Subordinate Judge finds, Lachmi Bibi continued to receive the income also during the lifetime

(1) 25 W. R. 211.
(2) 27 B. 515; 5 Bom. L. R. 274.
(3) 3 Ind Cas. 228; 6 M. L. T. 192.
(4) 53 Ind. Cas. 80; 46 I. A. 255; 43 M. 244; (1919) M. W. N. 724; 10 L. W. 679; 24 C. W. N. 346; 38 M. L. J. 313; 18 A. L. J. 274; 2 U. P. L. R. (P. C.) 61; 22 Bom. L. R. 444 (P. C.).
(5) 11 I. A. 218; 11 C. 121; 8 Ind. Jur. 638; 4 Sar. P. C. J. 578; 5 Ind Dec. (N. S.) 849.
(6) 14 C. 446; 7 Ind Dec (N. S.) 297.
(7) 20 C. 6[illegible]; 10 Ind Dec (N. S.) 314.
(8) 27 C. 242 at p. 249; 14 Ind. Dec (N. S.) 160.

of Mahadeo who might before his death on the 12th September 1896 have repudiated the unregistered deed of gift; but there is no indication that he took such a step; on the other hand, he apparently acquiesced in the arrangement which his father had made for the maintenance of his sister in law. In this connection, we may add that the Subordinate Judge had before him ample materials to justify the conclusion that Mahadeo had been duly adopted by Pannalal and that Ramnibas had in his turn been validly adopted by Mahadeo. As has been repeatedly ruled, it is not necessary to produce direct evidence of the fact of adoption; where it has taken place long since and where the adopted son has been treated as such by the members of the family and in public transactions, every presumption will be made that every circumstance has taken place which is necessary to account for such a state of things as is proved or admitted to exist; *Rajendro Nath Holdar* v. *Jogendro Nath Banerjee* (9), *Achal Ram* v. *Kazim Husain Khan* (10), *Rup Narain* v. *Gopal Dei* (11), *Sebo Biwa* v. *Nulogkun Mytee* (12), *Hur Dyal Naig* v. *Hoy Krishto* (13), *Vyas Chinan Lal* v. *Vyas Ramchanara* (14). The Subordinate Judge has further found that Lachmi Bibi continued to receive from Jagannath one-fourth share of the surplus income for several years after the death of Mahadeo, down to 1901. He has, however, held that there is no satisfactory proof that thereafter Lachmi Bibi received the income; but under what circumstances payment came to be discontinued has not been explained by Jagannath, who is the first defendant in this suit. We next find that disputes broke out between Lachmi Bibi and Chandni Bibi, that is, the widows of Surajmal and Mahadeo, and the daughters-in-law of Pannalal. Matters in difference were referred to arbitration on the 14th July 1909 and the arbitrators made their award on the 12th June 1912. The substance of the award was that Chandni Bibi and Ramnibas would pay to Lachmi Bibi for her life Rs. 12 per month, and Lachmi Bibi would, for a consideration of Rs. 1,000, release whatever right or claim she might have to the Raniganj property under the deed of gift of the 25th June 1882. This award was confirmed and embodied in a formal memorandum, which was executed by all parties concerned on the 31st March 1913, and was registered on the following day. The present suit was then instituted on the 13th October 1917 by Chandni Bibi and Ramnibas against the representatives of Mangalchand, Baldeodas and Jainarain, the three co-sharers of Pannalal. Upon the question of title, there can, in our opinion, be no vestige of doubt that the claim is well-founded. The only question which requires consideration is, whether the title of the plaintiffs as joint-owners with the contesting defendants had been extinguished by adverse possession on their part for the statutory period before commencement of the suit. The Subordinate Judge has pronounced in favour of the plaintiffs, and after careful examination of the evidence, we have arrived at the conclusion that his view is correct.

It is plain that Pannalal was originally a joint owner of the disputed property along with his three co-sharers, the predecessors of the defendants. Even before his retirement to Benares, he did not usually reside at Raniganj. From 1865 to 1882 the property was looked after by Baldeodas, one of the co-sharers, from whom Pannalal regularly received his proportionate share of the surplus income, after payment of rent to the superior landlord, the cost of repairs and other incidental charges. The evidence establishes clearly that there was great intimacy between Pannalal, Baldeodas, Mangalchand, and his son Jagannath, the first defendant, and that the wives of Pannalal and Mangalchand treated each other as if they were sisters. The management by Baldeodas during this period was plainly on behalf and for the benefit of all the joint owners, and Pannalal must be deemed to have been in possession. At the end of the period just mentioned, Pannalal retired to Benares. At that time, his family consisted of his wife, his

(9) 14 M. I. A. 67; 7 B. L. R. 216; 15 W. R. P. C. 41; 2 Suth. P. C. J. 422; 2 Sar. P. C. J. 666; 20 E. R. 711.

(10) 32 I. A. 112; 27 A. 271; 15 M. L. J. 197; 8 Sar. P. C. J. 77; 9 C. W. N. 477; 8 O. C. 155 (P. C.).

(11) 3 Ind. Cas. 882; 36 I. A. 103; 36 C. 780; 10 C. L. J. 58; 6 A. L. J. 517; 13 C. W. N. 420; 5 M. L. T. 428; 11 Bom. L. R. 838; 93 P. R. 1909; 68 P. L. R. 1910; 146 P. W. R. 1909; 9 M. L. J. 548 (P. C.).

(12) 11 W. R. 280; 2 B. L. R. App. 51; 1 Ind. Dec. (N. S.) 1068.

(13) 24 W. R. 107.

(14) 24 B. 473; 2 Bom. L. R. 163; 12 Ind. Dec. (N. S.) 847.

widowed daughter in law, Lachmi Bibi, and his adopted son Mahadeo. He was naturally anxious to make suitable provision for Lachmi Bibi, and on the 25th June 1882 he executed in her favour the deed of gift under which she was to take a life interest in his share of the Raniganj property and Mahadeo was to take a vested remainder. The deed was neither registered nor accompanied by delivery of possession, with the consequence that it did not take effect in law. But it has been proved beyond doubt that the parties acted on the assumption that a valid gift had been made. Pannalal, at the time of his retirement to Benares, requested the first defendant Jagannath, the son of his intimate friend Mangalchand, to look after the property, to realise rent from the tenants, to make necessary repairs, to pay rent to the superior landlord and then to give Lachmi Bibi her proportionate share of the profits. Jagannath appears to have faithfully carried out the trust reposed in him and to have regularly paid to Lachmi Bibi her dues down to 1901. Here it may be stated that down to 1890, the property had stood in the books of the landlord in the names of the four persons who had got themselves substituted on their purchase from the original tenant Ramsingh Chaudhri. But in 1891, Jagannath managed to have the names of Pannalal and Jainarain removed from the books of the landlord. It seems probable that this was done in pursuance of a design to appropriate the entire property on a convenient opportunity. But even if he did entertain such a dishonest purpose at the time, he did not venture to carry it into immediate execution and continued to pay the surplus profits to Lachmi Bibi down to 1901. The Subordinate Judge has held that the evidence of payment during the period subsequent to 1901 is not reliable. It is a matter for comment that the account-books produced by Jagannath for this period could not be scrutinised in the Trial Court, as they were written in the peculiar script used by Marwari merchants. We are thus left with the finding of the Subordinate Judge that receipt of surplus income by Lachmi Bibi has not been proved for the period subsequent to 1901. On these facts, the contesting defendants have argued that the title of the plaintiffs has been extinguished by adverse possession for the statutory period. We are of opinion that this contention is not well founded. The evidence clearly establishes that Jagannath was not only a joint owner, but that he undertook to look after the share of Pannalal at his express request. The burden lies upon him to establish when he became faithless to the trust imposed upon him and asserted a hostile title in himself to the knowledge of the rightful owner. He has not ventured upon an explanation of his conduct; on the other hand, he has repudiated the title set up by the plaintiffs as altogether unfounded and has falsely denied that he had ever paid a proportionate share of the usufruct to Lachmi Bibi as claiming title through Pannalal. The two circumstances relied upon by the defendants in proof of assertion of hostile title to the knowledge of the rightful owner are by no means conclusive. The fact that a substantial building has been erected on one of the plots by the defendants is clearly not conclusive proof of ouster. As was pointed out in *Direndra Narain* v. *Purnendu Narain* (15) the erection of a substantial building on joint property by one co owner cannot be regarded as conclusive evidence of ouster, and this accords with the view indicated in *Anandi Chandra Sen* v. *Parbati Narain Sen* (16) and *Upendra Nath Banerjee* v. *Umesh Chandra Banerjee* (17). The fact that the surplus profits, if any, have not been received by Lachmi Bibi since 1901 is equally inconclusive, in view of principles settled beyond controversy by recent decisions of the Judicial Committee: *Corea* v. *Appuhamy* (18), *Muttuna yagam* v. *Brito* (19), *Hardit Singh* v. *Gurmukh Singh* (20) and *Varada Pillai* v. *Jeevarathnammal* (1). Reference may also be made in this connection to the observations of Lord Denman in *Cubitt* v. *Doe d. Taylerson* (21) which were quoted with approval in the judgment of the Judicial Committee in the case last mentioned:

(15) 5 Ind. Cas. 171; 11 C. L. J. 180.

(16) 4 C. L. J. 198.

(17) 6 Ind. Cas. 343; 12 C. L. J. 25; 15 C. W. N. 375.

(18) (1912) A. C. 230; 81 L. J. P. C. 151; 105 L. T. 833.

(19) (1918) A. C. 895; 87 L. J. P. C. 146.

(20) 47 Ind. Cas. 628; 28 C. L. J. 437; 53 P. W. R. 1918; 64 P. R. 1918; 24 M. L. T. 389; 20 Bom. L. R. 1014; (1919) M. W. N. 1; 9 L. W. 123; 1 U. P. L. R. (P. C.) 8 (P. C.).

(21) (1840) 11 A. & E. 1008 at p. 1014; 3 P. & D. 539; 9 L. J. (N. S.) Q. B. 238; 113 E. R. 697; 52 R. R. 566

"Generally speaking, one tenant-in-common cannot maintain an ejectment against another tenant-in common, because the possession of one tenant in common is the possession of the other, and, to enable the party complaining to maintain an ejectment, there must be an ouster of the party complaining. But, where the claimant tenant-in common has not been in the participation of the rents and profits for a considerable length of time and other circumstances concur, the Judge will direct the Jury to take into consideration whether they will presume that there has been an ouster; as to which see the cases of *Doe d. Fisher* v. *Prosser* (22), *Doe d. Hellings* v. *Bird* (23) and *Doe d. White* v. *Cuff* (24)."

Among the cases in this Court, reference may be made to the decisions in *Jogendra Nath Roy* v. *Baladeo Das* (25), *Ayennessa Bibi* v. *Sheikh Isuf* (26), *Lokenath Singh* v. *Dhwakeshwar Prosad Narayan Singh* (27), *Jatendra Nath Roy* v. *Sabidannessa Khatun* [*Narendra Bhusan Roy* v. *Jogendra Nath Roy*] (28), *Balaram Guria* v. *Syama Charan Mondal* (29).

The fundamental rule is that in order to establish adverse possession as between co sharers, there must be evidence of an open assertion of a hostile title by one of them to the knowledge of the others, mere non-participation in the profits by one party and exclusive occupation by the other is not conclusive. Apart from this, we have the important circumstance that in this case the rightful owner, the second plaintiff Ramnibas, who, when a child few months old, was taken in adoption in 1892, was a minor till at least 1910; it is thus difficult to appreciate how the contesting defendants began to hold adversely to the knowldege of the infant in 1901. Indeed before this action was brought, there was no attempt on the part of the defendants to rely on adverse possession; their pretence was that they were the rightful owners, and one of them, the first defendant, has pledged his oath in support of that untrue allegation in the witness-box in this suit; they cannot consistently urge that from 1901 the first defendant began to hold adversely to the knowledge of the rightful owner: See the observations of Lord Macnaghten in *Corea* v. *Appuhamy* (18). Reliance may further be placed on the judgments of Lord Buckmaster in *Hardit Singh* v. *Gurmukh Singh* (20), of Lord Dunedin in *Muttunayagam* v. *Bito* (19) and of Viscount Cave in *Varada Pillai* v. *Jeevarathnammal* (4) which emphasise the principle that if possession may either be lawful or unlawful, in the absence of evidence, it must be assumed to be the former, or, in the language of Wood, V. C. in *Thomas* v. *Thomas* (30) possession is never considered adverse, if it can be referred to a lawful title. Reference may also be made to the decision of this Court in *Lokenath Singh* v. *Dhwakeshwar Prosad Narayan Singh* (27) where the cases on the subject were reviewed and the doctrine deducible therefrom formulated. Every co tenant has the right to enter into and occupy the common property and every part thereof, provided that in so doing he does not exclude his fellow tenants or otherwise deny to them some right to which they are entitled as co-tenants; and they on their part, may safely assume, until something occurs of which they must take notice and which indicates the contrary, that the possession taken and held by him is held as a co tenant, and is in law the possession of all the co tenants, and not adverse to any of them. It cannot be questioned, however, that one co tenant, may oust the others and set up an exclusive right of ownership in himself; and an open, notorious and hostile possession of this character for the statutory period will ripen into title as against the co-tenants who were ousted. Thus, although as a general rule, the possession of one co tenant is not deemed adverse to the other co tenants, the existence of the relation of co tenants does not preclude one co-tenant from establishing an adverse possession in fact as against the other co-tenants; and though the co-tenant enters in the first instance

(22) (1774) 1 Cowp. 217; 98 E. R. 1052.
(23) (1809) 11 East 49; 103 E. R. 922.
(24) (1808) 1 Camp. 174.
(25) 35 C. 961; 6 C. L. J. 785; 12 C. W. N. 127.
(26) 14 Ind. Cas. 722; 16 C. W. N. 840.
(27) 27 Ind. Cas. 465; 21 C. L. J. 253; 20 C. W. N. 51.
(28) 35 Ind. Cas. 36; 20 C. W. N. 1258; 24 C. L. J. 165.
(29) 60 Ind. Cas. 298; 33 C. L. J. 341; 24 C. W. N. 1057.
(30) (1855) 2 K. & J. 79 at p. 83; 25 L. J. Ch. 159; 1 Jur. (N. S.) 1160; 4 W. R. 135; 69 E. R. 701; 110 R. R. 107.

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without claiming adversely, his possession afterwards may become adverse. In order to render the possession of one co tenant adverse to the others, not only must the occupancy be under an exclusive claim of ownership, in denial of the rights of the other co-tenants, but such occupancy must have been made known to the other co-tenants, either by express notice or by such open and notorious acts as must have brought home to the other co-tenants knowledge of the denial of their rights. The same principle is involved in the familiar statement that to enable one of several co-tenants to acquire title by adverse possession as against the others, his possession must be of such an actual, open, notorious, exclusive, and hostile character as to amount to an ouster of the other co-tenants, that is, must have been such as to render him liable to an action of ejectment at the suit of the co-tenants. No comprehensive formula can be framed to test whether the possession of a co tenant in a particular case is adverse to the other co-tenants. But it has been stated that the evidence to show adverse possession by one co tenant must be much clearer than between strangers to the title, and the hostile intent of the co tenant in possession must be shown by unequivocal conduct. It is indisputable that acts, which might properly be held to show adverse possession as between strangers, do not necessarily have such effect as between tenant in common; acts of ownership by one co tenant may not in themselves amount to the disseisin of the other co tenants, and may, indeed, be so explained as to show a consistency with the joint title. But the ouster of the other co tenants, in order to render the possession adverse, need not be by violent, or intimidating expulsion or repulsion; nor need notice of the adverse holding be actually brought home to the other co-tenants by personal or formal communication; it is sufficient, if the contrary is not proved, that the circumstances show that such knowledge may reasonably be presumed. From this point of view, it has been maintained that sole possession by a co tenant becomes adverse to his fellow tenants by his repudiation or disavowal of the relation of co-tenancy between them; and any act or conduct signifying his intention to hold, occupy and enjoy the premises exclusively and of which the tenant out of possession has knowledge or of which he has sufficient information to put him upon enquiry, amounts to an ouster of the co-tenants; but what is essential is that the overt acts which constitute a definite and continuous assertion of an adverse right must be of an unequivocal character, clearly indicating as assertion of ownership of the premises to the exclusion of the right of the other co-tenants. Tested in the light of these principles, the contention of the defendants must be deemed unsubstantial. In 1882, the first defendant undertook, at the request of his co-sharer Pannalal when he left for Benares, to manage his share of the property, and carried out his obligations for a period of twenty years. He has never explained why, when, and how he cast off his character as co-sharer, manager and asserted a hostile title in himself to the knowledge of the rightful owner. If he renounced the trust in 1901, he is met by the difficulty that the rightful owner at the time was an infant who continued to be a minor for at least nine years thereafter. He may be pertinently asked, when did his repudiation take place, when was his hostile intent manifested by such overt and notorious acts of an unequivocal character, to the denial and exclusion of the right of his co sharer, as could not be misunderstood by the latter? It may be conceded that a co-sharer cannot close his eyes and ears, nor by wilful inattention obtain an advantage from his lack of diligence. For this reason, it has been held sufficient that the acts of adverse possession are such in their character and attendant circumstances that a man reasonably attentive cannot but realise that an adverse right is asserted against him. But if no notice is given to the co-sharer of the denial of his right, the occupant must make his possession so visibly hostile and notorious and so apparently exclusive and adverse as to justify the inference of knowledge on the part of the co-owner sought to be ousted and of laches if he fails to discover and assert his rights. Tested from the point of view thus indicated, the defence of adverse possession for the statutory period to the knowledge of the rightful owner cannot possibly be deemed to have been established in this case and it has been rightly negatived by the Subordinate Judge.

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We may add finally that much stress was laid by the appellants on the fact that they have built a costly structure on the parcel known as the Marwaripati property. This, however, does not create any real difficulty. The Subordinate Judge has not overlooked the equitable considerations which have been held applicable in such circumstances, as was explained in the cases of *Upendra Nath Banerjee* v. *Umesh Chandra Banerjee* (17), *Narayan Lal Gupta* v. *Chulhan Lal Gupta* (31), where the rule recognised in *Leigh* v. *Dickeson* (32), and *Brickwood* v *Young* (33) was applied. In such cases, if a joint owner has in good faith effected valuable improvements upon the common property at his own expense, equity takes that fact into consideration upon a partition and in some suitable way makes an allowance to him therefor, in addition to his ratable share of his property. The Subordinate Judge has given directions in this behalf which will adequately protect the defendants when the partition is actually effected.

The result is that the decree made by the Subordinate Judge must be affirmed and this appeal dismissed with costs.

BUCKLAND, J.—I agree and have nothing to add.

B. N. *Appeal dismissed.*

(31) 14 Ind. Cas. 677; 15 C. L. J. 876.

(32) (1886) 16 Q. B. D. 90; 54 L. J. Q. B. 18; 52 L. T. 710; 33 W. R. 539.

(33) (1905) 2 Com. L. R. 387.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 846 OF 1919.

December 17, 1921.

Present:—Mr. Justice Scott-Smith and Mr. Justice Harrison.

BAGGU AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Musammat DANI AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Alienation—Occupancy rights, alienation of—Landlord, consent of—Reversioners, right of, to contest alienation, whether affected.

In a suit to set aside an alienation of occupancy rights where the plaintiff proves (1) that he is the reversionary heir and (2) that if the land had been ancestral he could have contested the alienation, he is entitled to succeed. [p. 39, col. 2.]

The mere fact that the alienation of an occupancy right was consented to by the landlord does not deprive a reversioner of the right to question it [p. 40, col. 1.]

Puran Chand v. *Mahesha*, 69 P. R. 1900, *Abdulla* v. *Allah Dad*, 98 P. R. 1907 (F. B.); 62 P. W. R. 1907; 18 P. L. R. 1908, *Nikka* v. *Musammat Gurdai*, 9 Ind. Cas. 295; 5 P. L. R. 1911; 50 P. W. R. 1911, *Bhag Singh* v. *Sharam Singh*, 1 Ind. Cas. 778; 98 P. R. 1909; 10 P. W. R. 1910, *Faiz Bakhsh* v. *Ditta*, 15 P. R. 1910; 115 P. L. R. 1911, *Hari Chand* v. *Dhera*, 12 P. R. 1904, relied on.

Hardit Singh v. *Gopal Singh*, 8 Ind. Cas. 869; 97 P. L. R. 1911; 1 P. W. R. 1911, distinguished.

SECOND APPEAL from a decree of the District Judge, Lahore, dated the 24th March 1919, reversing that of the Munsif, First Class, Chunian, District Lahore, dated the 28th November 1918.

Bakshi *Tek Chand*, for the Appellants.

Messrs. *D. N. Mehra* and *Badr ud Din Kureshi*, for the Respondents.

JUDGMENT.—In the suit out of which the present second appeal arises the plaintiffs-appellants sued for possession of certain land in which Allah Bakhsh had occupancy rights. Allah Bakhsh during his lifetime made a Will on the 21st May 19 2 by which he left the land in suit to his daughter-in-law, *Musammat* Dani, and after his death it was mutated in her name with the consent of the landlords. The pedigree-table showing the relationship between the plaintiffs and Allah Bakhsh is as follows:—

RAHMAT

- Tara
  - Hussain
    - Samanda
      - Karim Bakhsh, Plaintiff No. 3.
    - Baggu, Plaintiff No. 1.
    - Rahim, Plaintiff No. 2.
- Sadhara
  - Allah Bakhsh
    - Sher ud-Din
    - *Musammat* Dani, (Defendant.)

The Courts below concurrently held that the land in suit was occupied by Rahmat, the common ancestor of the plaintiffs, and of Allah Bakhsh. The First Court held that the plaintiffs had *locus standi* to sue as they would have been entitled to succeed to the tenancy had there been no Will, and decreed the claim. The lower Appellate Court appears to have held that as the alienation was assented to by the landlords it could not be contested by the reversioners, and also that as there was no proof that Rahmat was either the proprietor or an occupancy tenant of the land in suit plaintiffs had no *locus standi* to sue. In support of this decision the Court referred to *Abdulla* v. *Allah Dad* (1). It

(1) 98 P. R. 1907 (F. B.); 62 P. W. R. 1907; 18 P. L. R. 1908.

accordingly accepted the defendants' appeal and dismissed the plaintiffs' suit. The plaintiffs have preferred a second appeal to this Court.

The finding that Rahmat, the common ancestor, occupied the land is a finding of fact and is based upon evidence which is referred to by both the Courts in their judgments. Counsel for the respondent sought to uphold the judgment of the lower Appellate Court by contending that there was no proof that Rahmat occupied the land, but as the finding is one of fact and is based on evidence, we did not allow him to argue the point.

It is common ground that the landlords consented to the alienation by Allah Bakhsh in favour of his daughter-in-law, but there is ample authority for holding that this consent does not bind the reversioners. In *Puran Chand* v *Mahesha* (2) it was held, following the Full Bench ruling in *Karam Din* v. *Sharif Din* (3) "that the plaintiff as reversionary heir of an occupancy tenant was competent to dispute the validity of the alienation, in favour of a stranger, of his ancestor's occupancy rights although such alienation had received the assent of his landlords." Again in *Nikka* v. *Musammat Gurdai* (4), it was held "that like the alienations of ancestral land under the Punjab Customary Law, a transfer of ancestral occupancy rights, without necessity or consideration, is liable to be contested by the alienor's collaterals, whose rights to object to the alienation remain intact, and are enforceable so long as the occupancy rights in question, which are extinguishable only by Statute, are not extinguished under the provisions of the Punjab Tenancy Act." It was further held "that where an occupancy tenant alienates his rights in the tenancy with the consent of the landlord, the occupancy rights do not become extinct by operation of law or by the act of the landlord and the alienor's collaterals can contest the alienation." In *Bhag Singh* v. *Sharam Singh* (5) it was held that "a reversiner is not debarred from suing to protest his reversionary interest against an alienation of occupancy rights merely because such alienation has also been challenged by the landlord as an invalid alienation." In *Hardit Singh* v. *Gopal Singh* (6) which is referred to by the lower Appellate Court, the tenancy was self-acquired of the alienor and, therefore, the case is not on all fours with the present one. We are, therefore, clear that the mere fact that the landlords have consented to the alienation of the land by Rahmat (Allah Bakhsh?) does not take away from the reversioners any right which they might otherwise have had to contest it under the Customary Law.

The next question is whether the plaintiffs, by reason of being the heirs of Allah Bakhsh, under section 59 of the Tenancy Act, have a right to contest the alienation, or whether it was necessary for them to prove that the common ancestor, Rahmat, was also an occupancy tenant of the land. In *Hari Chand* v. *Dhera* (7) it was laid down that "where a general agricultural custom is found to prevail as regards alienation of proprietary rights, the presumption is, unless the contrary can be shown, that such a custom is also applicable to the occupancy rights. The onus of proving a special custom antagonistic to such a rule rests on the party asserting the existence of such a custom." In *Faiz Bakhsh* v. *Ditta* (8) it was held that the onus lay on the plaintiff to prove that by custom he is entitled to question the validity of the alienation of occupancy rights made by his father. As it was considered that there was some conflict between this ruling and that in *Hari Chand* v. *Dhera* (7) the question was referred to the Full Bench in the case of *Abdulla* v. *Allah Dad* (1). The Judges in that case considered that there was no substantial conflict between the two cases referred to, and they laid down that "when a collateral seeks to restrain an alienation of any occupancy right by an occupancy tenant, proof that such a power of restriction exists in respect of proprietary rights would be relevant." They said that "when such a suit is brought, the initial onus lies on the plaintiff, but when he has proved first, that he is entitled to succeed to occupancy right on the

(2) 69 P. R. 1900.
(3) 89 P. R. 1898 (F. B.).
(4) 9 Ind. Cas. 292; 52 P. L. R. 1911; 201 P. W. R. 1911.
(5) 1 Ind. Cas. 703; 38 P. R. 1909; 60 P. W. R. 1907.
(6) 8 Ind. Cas. 862; 97 P. L. R. 1911; 11 P. W. R. 1911.
(7) 12 P. R. 1904.
(8) 115 P. R. 1901; 115 P. L. R. 1901.

death of the occupancy tenant; and, second that had the subject matter in question been a proprietary right instead of a right of occupancy he could have maintained the suit, the onus will be shifted and it will be upon the person, who asserts that no such custom obtains as to occupancy rights to prove that contention," Counsel for the respondents contends that if the subject-matter of the present suit had been properietary rights the plaintiffs could not have contested the alienation unless it had been proved that Rahmat was the proprietor, and, therefore, he contends that the plaintiffs cannot contest the alienation of occupancy rights unless they prove that Rahmat was an occupancy tenant. The lower Appellate Court seems to have adopted this view but, in our opinion, the Full Bench in the case of *Abdulla* v. *Allah Dad* (1) did not intend to lay down any such rule. It certainly did not dissent from the decision of the Division Bench in *Hari Chand* v. *Dhera* (7), and according to that decision all that the plaintiff has to prove is that a general agricultural custom prevails as regards the alienation of proprietary rights and the presumption then is that such a custom is also applicable to occupancy rights. Now, it is not contended in the present case that if Rahmat had been the proprietor of the land in suit and the proprietary rights had been alienated by Allah Bakhsh, the plaintiffs could not have contested that alienation. We, therefore, find in the present case that (1) plaintiffs are the reversionary heirs of Allah Bakhsh and (2) that if the land had been the ancestral property of the plaintiffs they could have contested the alienation. In our opinion, therefore, the two essentials laid down by the Full Bench in *Abdulla* v. *Allah Dad* (1) are fulfilled and the plaintiffs are entitled to contest the alienation.

The remarks in the penultimate paragraph of the lower Appellate Court's judgment as to the custom of the parties in matters of inheritance are *obiter* and do not affect the question for decision.

We accept the appeal and setting aside the order of the lower Appellate Court restore the decree of the First Court with costs throughout.

N. H.

Appeal accepted.

CALCUTTA HIGH COURT.

CIVIL RULE No. 161 OF 1921.

July 28, 1921.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, and Mr. Justice Chotzner.

GOPESWAR BANERJEE AND ANOTHER —PLAINTIFFS—PETITIONERS

versus

BRAJA SUNDARI DEBI—DEFENDANT—OPPOSITE-PARTY.

Contract Act (IX of 1872), s. 70—Hindu reversioner, whether a person lawfully interested in making payment to save property from sale under the Bengal Public Demands Recovery Act (III of 1913).

A Hindu reversioner is not a person lawfully interested in making a payment to save a property in the hands of the widow from sale under the Public Demands Recovery Act His direct interest accruing only upon the widow's death, he cannot be said to be a person lawfully interested at the moment of making the deposit so as to bring him within the purview of section 70 of the Indian Contract Act. [p. 42, col. 2.]

Rule against an order of the Court of the Sub-Judge, Birbhum, exercising the powers of a Court of Small Causes.

Babu *Sarat Chandra Mitter*, for the Petitioner.

Babu *Mahesh Chandra Banerjee*, for the Opposite Party.

JUDGMENT.

SANDERSON, C. J.—This is a Rule which was granted, at the instance of the plaintiff, by my learned brothers Mr. Justice Richardson and Mr. Justice Cuming calling upon the opposite-party to show cause why the judgment and decree of the Small Cause Court Judge of Birbhum complained of in the petition should not be set aside.

The plaintiff sued to recover a certain sum of money which he alleged he had paid on behalf of a widow called Brojo Sundari Davi, and he claimed to be reimbursed in respect of that sum of money. I take the facts as to which there is no dispute from the judgment of the learned Small Cause Court Judge. The learned Judge said, "Brojo Sundari has 6-annas share in Lot Bakulia as heir of her husband. On account of that share she has to pay Rs. 29 odd as road cess in each *kist*; she defaulted

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in making payments for *kist* and her share was advertised for sale under the Public Demands Recovery Act. The plaintiff who is the reversionary heirs of her husband paid the amount and claims to be reimbursed. The question is whether she is entitled to be reimbursed. The plaintiff's Pleader relied upon section 70 of the Contract Act. The learned Judge held that this case did not come within the provisions of section 70 of the Contract Act and dismissed the suit. The terms of that section are as follows: "where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered". There is no doubt that the plaintiff paid the money on behalf of the widow defendant. In my judgment there is also no doubt that the defendant enjoyed the benefit of that payment; and, the sole question which arises in this case is whether the plaintiff can be said to be a person who lawfully made the payment; and, to confine the question even to narrower limits the point really turns upon the meaning of the word "lawfully." It has been held in this Court in the case of *Panchcowri Ghosh* v. *Hari Das Jati* (1), which was decided by my learned brother, Mr. Justice Mookerjee, and myself that the word "lawfully" in section 70 cannot be regarded as mere surplusage, and that the meaning is that a person must have a lawful interest in making the payment, and that it must be considered in each individual case whether the person making the payment had any lawful interest in making it. The passage to which I wish to draw attention is at page 330.* There I find I said as follows: "The test as regards the meaning of the word 'lawfully' was laid down by my learned brother Mr. Justice Mookerjee in the case of *Raja Brikunto Nath Dey Bahadur* v. *Utoy Chand Maiti* (2). The word 'lawfully' in section 70 of the Contract Act is not merely a surplusage. It must be considered in each individual case, whether the person, who made the payment, had any interest in making it; if not, the payment cannot be said to have been made 'lawfully'". Then I proceeded to say "I expect my learned brother would agree with me, when I say he meant 'had any lawful interest in making it.'" My learned brother did not deliver judgment in that case but he said that he entirely agreed. It is interesting to note that in the commentary on the Indian Contract Act by the learned Commentator Sir Frederick Pollock at page 388 (4th Edition) he refers to the matter as follows: "The word 'lawful' in this section is not mere surplusage. It must be considered in each individual case whether the person who made the payment had any lawful interest in making it, if not, the payment cannot be said to have been made 'lawfully.'"

The whole question in this case is whether the reversioner can be said to be a person who had a lawful interest in making this payment. The words of the section are very wide. Our attention was drawn to what was said by the late learned Chief Justice Sir Lawrence Jenkins in the case of *Mohinee Ghoshal* v. *Bhuban Mardana* [*Suchand Ghosal* v. *Balaram Mardana* (3) where he said: "The terms of section 70 are unquestionably wide, but applied with discretion they enable the Courts to do substantial justice in cases where it would be difficult to impute to the persons concerned relations actually created by contract. It is however, especially incumbent on final Courts of fact to be guarded and circumspect in their conclusions and not to countenance acts or payments that are really officious". The learned Judge sitting with the learned Chief Justice said that in interpreting this section it is very necessaay to remember the almost elementary rule of law that "it is not in every case in which a man has benefited by the money of another that an obligation to re-pay the money arises." The terms of this section, as I have said, are very wide, but in my judgment the Court ought to be careful that it does not extend the meaning of the section and apply it to cases which were not intended to be covered thereby. In my opinion the plaintiff in this case does not come within the terms of this section. The interest which he has is merely that of a reversioner, the

(1) 31 Ind. Cas. 84; 25 C. L. J. 325; 21 C. W. N. 394.

(2) 2 C. L. J. 311.

*Page of 25 C. L. J.—[*Ed.*].

(3) 6 Ind. Cas. 870; 38 C. 1; 14 C. W. N. 945; 12 C. L. J. 566.

interest being expectant upon the death of the widow defendant. It is an interest which the plaintiff may never be able to realize because he may die before the defendant herself.

The learned Vakil who showed cause against this Rule pointed out that it was within the power of the widow to sell her widow's estate under certain circumstances and that the reversioner could not interfere with it. That was an argument which, to my mind, was relevant to the point which he was urging, namely, what was the real nature of the plaintiff's interest in this property. The only way in which I can see it could be said that the plaintiff had a lawful interest within the meaning of the section is as follows:—It might be said that if the plaintiff had not paid the money the property would have been put up to sale: a stranger might have bought the property and got possession of it: the plaintiff might survive the widow, and when he came into his property he might find the stranger in possession and he might have difficulty in getting the stranger out of possession and, consequently, having regard to those contingencies it might be said that the plaintiff had a present lawful interest in paying the money on behalf of the defendant. It seems to me that what I have stated is the most favourable way in which the case could be put for the plaintiff. That, however, in my judgment, is too problematical and hypothetical for us to hold that the plaintiff at the time he made this payment had a lawful interest within the meaning of the section. Consequently, in my judgment the decision of the learned Small Cause Court Judge was correct and this Rule should be discharged.

I think it is right to notice that in this case the learned Judge set out fully and completely what was the issue between the parties what was the decision arrived at and the reasons for arriving at that decision. The judgment compares in that respect very favourably with some of the judgments which have come before us from other learned Judges when exercising the jurisdiction of the Small Cause Courts.

The Rule is discharged with costs hearing fee one gold *mohur*.

CHOKSEY, J.—I am in full accord with the judgment just delivered by my Lord the learned Chief Justice. There seems to be only one point which has to be decided in this case and that is whether a Hindu reversioner is a person lawfully interested in making a payment to save a property from sale under the Public Demands Recovery Act. The interest of a Hindu reversioner is a contingent and expectant interest. His direct interest only accrues upon the widow's death; and, therefore, it seems difficult to hold that he is a person lawfully interested at the moment of making the deposit so as to bring him within the purview of section 70 of the Indian Contract Act. It was said in the case of *Mohendra Ghoshal* v. *Bhuban Mardana* [*Kuchand Ghosal* v. *Balarm Mardana* (3) "The terms of this section are unquestionably wide, but applied with discretion they enable the Courts to do substantial justice in cases where it would be difficult to impute to the persons concerned relations actually created by contract.' In my view the section does not give the reversioner in this case the right he claims. The question as to the position of a Hindu reversioner has never been decided directly by this Court. The learned Vakil for the petitioner referred us to the case of *Sambaiya Aiyar* v. *Seethalokshmi Ammal* (4) I may point out in passing that the decision was given by a single Judge. The head note to that case is in these terms: "A Hindu reversioner is interested in the payment of Government Revenue in respect of the estate held by the widow (the life holder) within the meaning of section 69, Contract Act, and he is consequently entitled to recover the same from the widow." With great respect to the learned Judge I should say that he has given a Hindu reversioner an interest to which he is not entitled under the law. In the present case the reversioner's interest is not directly affected by the sale and in my judgment he was not competent to make the payment which he did make. I agree, therefore, with my Lord that the Rule must be discharged with costs.

J. P.

Rule discharged.

(4) 4 Ind. Cas. 162; 19 M. L. J. 331.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No 79 OF 1921.

December 6, 1921.

Present:— Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

VISHNU VINAYAK VAZE—PLAINTIFF —APPELLANT

versus

THE SECRETARY OF STATE FOR INDIA —DEFENDANT—RESPONDENT.

Bombay Irrigation Act (VII of '87), s 35—Loss due to interruption of supply of water—Suit for compensation—Civil Court, jurisdiction of.

A Civil Court has no jurisdiction to entertain a suit against Government for compensation for loss alleged to have arisen out of interruption to the supply of water to land by the Irrigation Department, as the remedy for such a loss is provided by section 35 of the Bombay Irrigation Act under which the decision of a Collector is final unless there is an appeal to the higher authority

First appeal from the decision of the District Judge, Ahmednagar, in Suit No. 2 of 1919.

Mr. *P. V. Nisure*, for the Appellant.

Mr. *S. S. Patkar*, Government Pleader, for the Respondent.

JUDGMENT.

MACLEOD, C. J.—The plaintiff filed this suit to recover damages for the alleged wrongful failure of the officers of Government in charge of the water supply to give a sufficient supply of water to his Survey Numbers during the years 1916 to 1918 Under section 35 of the Bombay Irrigation Act, VII of 1879, the holder of land may apply to the Collector for compensation for any loss arising out of such interruption provided that such interruption does not come under section 31 clause (*d*). This case cannot come under section 31 (*d*) and, if it did, compensation could not be awarded; but the person suffering loss might be entitled to such remission of water rate payable by him as might be authorised by the Governor in Council. If there is loss, under section 35 the holder of land may present a petition for compensation to the Collector, and the Collector, after consulting the canal officer, shall award to the petitioner reasonable compensation for such loss.

Under section 36 the decision of the Collector either under section 34 or 35 as to the amount of the compensation to be awarded shall be final, unless there is an appeal to a higher authority, in which case the decision of the higher authority shall be conclusive. These words, in my opinion, show that it was intended that the jurisdiction of the Civil Courts should be ousted, so that the holder of land should not be entitled to bring a suit, similar to the present one, for compensation for loss alleged to have arisen out of interruption to the supply of water to his lands. It seems to me that this was the obvious intention of the Legislature. Otherwise, numerous suits might be filed by cultivators dissatisfied with the operations of the irrigation officers, though questions which arise between cultivators and irrigation officers are clearly questions which, in the first instance, must be dealt with by the officer in charge of irrigation operations on the spot, and then in appeal by the Revenue Officers. That being, in my opinion, the intention of the Legislature, I think it has been given effect to by the words used. Therefore, I think that the jurisdiction of the Courts is ousted and the decision of the Court below was right. The appeal must be dismissed with costs.

SHAH J.—I think it is clear that the compensation which the plaintiff claims if it falls under section 31, proviso clause (*d*) cannot be allowed at all except the amount, if any, claimed by way of remission of water rates under the last paragraph of that proviso. But his claim is not for such remission, but for compensation. He is not entitled to such compensation so far as it falls under clause (*d*) of the proviso. But if it does not fall under clause (*d*) of the proviso to section 31, it is clear that his claim is one which would fall under section 35. The claims falling under that section are to be dealt with by the Collector, or by the higher officer to whom an appeal would lie under the rules framed, and the decision of that officer is conclusive. The effect of that provision, in my opinion, is to oust the jurisdiction of the Civil Courts in respect of such claims. The jurisdiction of the Civil Courts is not ousted in terms; but in view of the scheme of the Act and the special procedure laid down for compensation for interruption to the supply of water to any land irrigated by a canal, it seems to me that the jurisdiction of the Civil Courts is ousted.

In either case the result is that the plaintiff's claim must fail.

J. P. *Appeal dismissed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1118 OF 1920.

January 14, 1921.

Present :—Mr. Justice Chevis.

JIWAN SHAH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Musammat FATEH BIBI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Appeal—Ground not taken in memorandum of appeal, whether, and when permissible.

Although an appellant may, with the permission of the Court, be heard on grounds not taken in the memorandum of appeal, this should ordinarily not be allowed after the period of limitation for appeal has expired.

Second appeal from the decree of the District Judge, Gujranwala, dated the 25th February 1920, reversing that of the Munsif, First Class, Gujrat, dated the 28th November 1919.

Mr. *Mukand Lal Puri*, for the Appellants.

Mr. *Abdul Ghani*, for the Respondents.

JUDGMENT.—The plaintiffs are collaterals who sue for a declaration that a gift of land made by a widow in favour of her married daughter shall not affect their reversionary rights. The defendants, *i.e.*, the widow and the donee, pleaded ignorance as to whether the land was ancestral. The first of the issues framed was, whether the land was ancestral, and the First Court decided this issue in plaintiffs' favour. Other issues also were decided in plaintiffs' favour and the suit was decreed. The defendants appealed to the District Judge, but their memorandum of appeal does not challenge the finding as to the land being ancestral. But the District Judge took up this question and, holding that the land was not proved to be ancestral, accepted the appeal and dismissed the suit without going into other grounds.

It is true that an appellant may, with permission of the Court, be heard on grounds not taken in the memorandum of appeal, but there is nothing in the District Judge's judgment to show that such permission was ever asked for or obtained, or even that the point was argued before him. Still, I am not prepared to assume that the point was not raised in arguments. But to allow such a point to be raised in arguments long after the period of limitation for appeal had expired would practically amount to allowing the defendants to set up a new appeal and I do not think this should ordinarily be allowed after limitation has expired.

I accept this appeal and, setting aside the decision of the learned District Judge, I return the case for re-hearing of the appeal on the points raised in the memorandum of appeal. Stamp on appeal to this Court will be refunded, other costs in this Court will follow the event.

W. C. A. *Appeal accepted; Case remanded.*

SIND JUDICIAL COMMISSIONER'S COURT.

CIVIL SUIT No. 410 OF 1921.

March 30, 1920.

Present :—Mr. Kemp, A. J. C.

FIRM OF LILARAM MADHAWDAS—PLAINTIFFS

versus

FIRM OF HUSSAINBHOY KARIMJI AND SONS—DEFENDANTS.

Account, suit on—Continuous account—Test—Cause of action, when arises—Suit on cross-contract.

If the items in an account are so connected together that it appears the dealing is not intended to terminate with one contract, but to be continuous, so that one item if not paid shall be united with another and form one continuous demand, the whole together forms but one cause of action and cannot be divided. [p. 45, col. 2.]

An amount due on a contract and cross-contract in any case, is not payable until the due date, because the effect of a cross-contract is to fix the liability for the due date. [p. 45, col. 2.]

Mr. *Srikrishindas H. Lula*, for the Plaintiffs.

Mr. *Kundanmal Dayaram*, for the Defendants.

JUDGMENT.—The question in this suit is whether the contracts sued upon former part of an account consisting of forward dealings in Java sugar. There were in all

FIRM OF LILARAM MADHAWDAS v. FIRM OF HUSSAINBHOY KARIMJI.

5 contracts between the parties *viz.*:—

	Sold.	Bought.
19-5-17	75 tons @ 17-13 6 per cwt. July-September 3 lots.	22-7-17 75 tons @ 20-4 0 per cwt. July-September 3 lots.
9-6-17	75 tons @ 16-10-0 per cwt. July-September 3 lots.	
14-7-17	300 tons @ 17-12-0 per cwt. July-September 3 lots.	
1-8 17	150 tons @ 19-7-0 per cwt. July-September 3 lots.	

The plaintiffs' suit is on the difference between the first contract of sale and the first contract of purchase. In other words, he takes those two contracts as cross contracts and sues on the difference. Now, the defendants' Pleader frankly admits that these two contracts may be regarded as cross-contracts. In all probability they are so, being for the same shipment, in the same lots, and the same quantity, and the application by analogy of the rule in *Clayton's case* (1), regarding the appropriation of the earlier items on one side of an account to those on the other in order of date would strengthen this conclusion. The point for decision, however, is whether plaintiff can pick these two contracts out of the dealings for July-September shipments between the parties and sue on them alone without bringing all the other transactions for those shipments into the suit. This is exactly the position I have referred to in *Jethalal Kallianji* v. *Parsram Khemandas* (2).

The question turns on the existence of an account of July-September shipments between the parties. If there be such an account, the plaintiffs cannot pick out a contract and cross-contract in the account and sue on it. From one point of view it would be better if all their dealings with one another for the same *vaidha* could be determined by one rather than by a dozen or more suits.

Now, the test for determining the existence of an account furnishing one and only one cause of action has been referred to by Jenkins, C. J., in *Kedar Nath* v. *Denobandhu Shaha* (3). If the items in the account are so connected together that it appears the dealing is not intended to terminate with one contract, but to be continuous, so that one item, if not paid, shall be united with another and form one continuous demand, the whole together forms but one cause of action and cannot be divided. Were the contracts between the parties in this suit for July-September shipments so interdependent that it can firmly be assumed the parties intended only one liability to accrue at due date? The investigation may be still further narrowed. These transactions were on "Office Diara" terms and according to the terms of the indents of the offices such shipment constitutes a separate contract. The defendant does not carry his case further than this—that all shipments of a particular month are settled when the due date for that shipment arrives. Thus July shipment would be settled when the last shipment carrying July goods would arrive because until then the seller may make "Miti Khari" simultaneously, with regard to August and September shipments. It is clear that the amount due on a contract and cross contract in any case is not payable until the due date because, as pointed out by me in *Firm of Pokerdas* v. *Firm of Vishinji* (4), the effect of a cross contract is to fix the liability *for the due date*. I believe there is a decision of Fawcet, J.C., to the contrary but I must respectfully dissent from that decision on this point. The question, however, before me is whether that liability can then be recovered separately from the rest of the transactions for the same shipment and this question turns, as I have said, on the question whether there was an account between the parties of all transactions for that shipment or not. There may, of course, be an express agreement to keep an account between the parties or there may be an implied agreement to that effect which is to be determined from the acts and conduct of the parties. The defendant in the present case disclaims any intention of setting up an

(1) (1816) 1 Merivale 572 at p. 608; 35 E. R. 781; 15 R. R. 161.
(2) 58 Ind. Cas. 799; 14 S. L. R. 99 at pp. 102, 103.
(3) 31 Ind. Cas. 626; 42 C. 1043 at p. 1049; 19 C. W. N. 724.
(4) 58 Ind. Cas. 514; 14 S. L. R. 18.

express agreement. He says there was an implied agreement and refers to the correspondence and the accounts between the parties as proving it. The point is also important because important questions have arisen with regard to the rights and liabilities under outstanding contracts for July-September 1917 shipments in Java sugar and a commission has issued to Java in those cases and some time will elapse before those cases come up for adjudication. The decision in *Firm of Gobindram* v. *Firm of Khushaldas* (5) has only partly adjudicated on those transaction.

Was there, therefore, any understanding between the parties that only the amount due at the foot of an account of the dealings in each of these shipments should be recoverable? Where delivery is actually taken—or what is tantamount to the same thing "*picha picha*" is effected—the question does not arise because the price is paid when the goods are delivered. The question only arises where certain liabilities are fixed by cross-contracts or are outstanding under contracts which still remain open.

There is no question of June shipment between the parties because plaintiffs paid for June shipment and took delivery. Defendant shows that he settled June shipment with another merchant, Adamji Jafferji, when the last steamer carrying June shipment arrived and that the settlement included the amount due on a contract and cross-contract as well as the amount due on outstanding contracts. Defendants' witness, Mahomedally, who effected the contracts with plaintiffs, says an account of all the contracts between the parties was intended to be kept and the liability on the whole account and not on each separate contract was contemplated. He says that is the custom. Merchants do not expect to file suits on each and every transaction but on the result of all the transactions for the particular shipment. They would send "Miti Khari" notices only for the number of bales outstanding between the parties and not for the total number of bales sold whether the contracts of purchase were cross-contracts or not. This shows the interdependency of one contract in the account with another which forms one of the tests for determining whether an account only is intended to be kept between the parties. Plaintiffs themselves have entered their dealings with defendants in one *khata* (Exhibit 10). Plaintiff supports his argument by a reference to his transactions for 1st April shipment but of the 75 tons sold for that shipment 25 were given delivery of and, therefore, paid for there and then and 25 were settled by "*picha picha*" which has the same effect. These are settlement in part of the account. The remaining 25 tons were settled by a cross-contract. Similarly the plaintiffs made "Miti Khari" for 50 tons June shipment on 20th July 1917 and that was discharged by "*picha picha*" on 3 th July 1917. Neither of these cases are, therefore, in point. Moreover, the 1st April shipment was *godown* delivery, not Bunder delivery like the contracts in suit, and under 1st April godown delivery the purchaser may take delivery at his option at any time up to 1st April. That is, therefore, not a case of settlement on the due date.

Defendant shows that he has kept one Sodha Khata (Exhibit 4) of his transactions with plaintiff. The profits and losses on all these transactions have also been entered by defendant in one account of the plaintiffs. In their letter of 23rd August 1917 plaintiffs have claimed delivery of the outstanding 175 tons of July shipment (25 under contract of 9th June 1917) 100 under contract of 14th July 1917, and 50 under contract of 1st August 1917) "accounting for contract both of purchase and sale between yourselves and our client" *i.e.*, the contract and cross contract for 75 tons. They have, therefore, treated all the transactions for July shipment as an account after setting off the contract of 19 h May 1917 and the cross contract of 22nd July 1917 in the account.

The plaintiffs' demand in their printed notice of 15th October 19 7 is for all the outstanding sugar sold by defendants to them for July shipment. There is no separate demand under such contract. Then in their letter of 23rd January 1918 plaintiffs demand the sum they say is due to them at the foot of an account of 600 tons between the parties. This account shows the 75

(5) 56 Ind. Cas. 885; 13 S. L. R. 100.

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bales settled at the rate of the cross-contract and the other tons at the market or the *panchayat* rate. Clearly, therefore, the plaintiffs treated the transactions as embodied in an account. The parties continued to correspond in a similar manner, the plaintiffs sending demands for all the sugar of such shipment. Then, in their letter of 19th March 1918, plaintiffs demand the balance of tons outstanding, *viz.*, 525 tons. On 15th March 1918 defendants allege plaintiffs have failed to take delivery of the 175 tons July shipment, thereby again evidencing their acceptance of the position of one demand for all the tons *outstanding* under all the July shipment contracts. On 3rd April 1918 defendants write demanding damages for the 525 bales outstanding under all the uncovered contracts for July-September shipments. Plaintiffs agree that this shows an intention to treat the contract and cross contract separately and at any rate his letter shows that all the *outstandig contracts* were treated by defendants as furnishing one demand. Probably as they had lost over the contract and cross-contract and the plaintiffs were disputing the liability under the outstanding contracts the defendants demanded the sum due to them on the outstanding contracts at what they claimed as the market rate without giving credit for the sum due by them on the contract and cross contract in the account. Plaintiffs on 9th April 1918 replied by repeating their demand contained in their letter of 23rd January 1918 which, be it noted contained an account including the sum payable to them on the contract and cross-contract. Defendants replied through their Pleaders on 10th May 1918 repeating the demand in their letter of 3rd April 1918 and again on 30th September 1918 to the same effect. Then, for the first time on 4th July 1919 plaintiffs demand the sum due on the contract and cross-contract alone. In their reply of 9th July 1919 defendants demand the balance due after giving credit for the amount payable by them on the contract and cross-contract.

This correspondence shows that if the defendants had accepted the position taken up by the plaintiffs in their letter of 23rd January 1918 of one account of all the transactions including the contract and cross-contract, the plaintiffs, would not now have been permitted to say that the amount due on the contract and cross-contract was separable but the defendants did not accept that position until after plaintiffs had made a separate demand for the amount due on the contract and cross-contract. They insisted on only claiming the amount due on the *outstanding* tons without giving credit for the amount due on the contract and cross-contract. The defendants cannot now, therefore, be heard to say that they were led into believing that only one account of both the outstanding and the covered contract for 75 tons existed. The position is exactly similar to that which exists where a suit is brought on one *hundi* and the defendant contends there is a *hundi* "*khata*" consisting of several *hundi* items on all of which only one suit may be brought. The defendant in such a case can only succeed if he shows not only that the plaintiff has kept one account of all such hundies *but that he has led the defendant to treat the dealing between them as on an account* [*Simson* v. *Ingham* (6)]. If the defendant can show this there is an implied contract between the parties that all the transactions will furnish but one cause of action. In the present case the most the defendants could successfully plead is that the outstanding contracts should form but one account. The defendant has not up to the plaintiff's demand of 4th July 1918 acted as if the amount due on the contract and cross-contract were part of the account. He has deliberately excluded it from his demands upon the plaintiff. I, therefore, hold on the facts of this case that the plaintiff can sue for the amount due on the contract and cross-contract.

No custom has been proved that the amount due on a contract and cross-contract is, necessarily, included in an account of the other shipment dealings between sugar merchants in the Karachi Bazar, although probably, as a matter of convenience, the amount due on a contract and a cross-contract is taken into account in adjusting the claims due on the outstanding contracts at the time of settlement.

I, therefore, answer the preliminary issues:—

(2) There was an account between the parties only of the outstanding contracts

(6) (1823) 2 B. & C. 65; 26 R. R. 273; 3 Dowl. & Ry. 249; 1 L. J. (o. s.) K. B. 234; 107 E. R. 307.

which did not include the contract and cross-contract.

(2) (*a*) Yes. It is maintainable on the evidence in respect of the amount due on the contract and cross-contract.

(3) Admittedly so.

(4) Yes, on the evidence.

Srikrishindas admits issue (1). I answer issue (1) in affirmative.

I allow interest at 9 per cent. from 4th July 1919 the date when plaintiffs demanded it in writing, on the liquidated sum due on the contract and cross contract only. I answer issue (5) accordingly.

I answer issue (6). Decree of Rs. 3,870 and costs thereon and interest from suit at 6 per cent. to payment.

J. P.

Suit decreed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1347 OF 1921.

November 29, 1921.

Present:—Mr. Justice Chevis.

UTTAM CHAND—PLAINTIFF—APPELLANT

versus

MEHTAB SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Punjab Pre-emption Act (I of 1913), s. 15 (c), secondly—"Patti *or other sub-division," meaning of*—Taraf *or* patti *created for purely fiscal purposes.*

A *taraf* or *patti* of a village created at the time of Settlement for purely fiscal purposes, *i.e.*, for the purpose of convenience in collecting the land revenue, is not a *patti* or other sub-division, within the contemplation of section 15 (*c*), *secondly*, of the Punjab Pre-emption Act [p 49, col. 1.]

Second appeal from a decree of the District Judge, Hoshiarpur, dated the 1st April 1921, affirming that of the Subordinate Judge, First Class, Hoshiarpur, dated the 13th November 1920.

Lala *Fakir Chand*, for the Appellant.

Lala *Harbhajan Das*, for the Respondents.

JUDGMENT.—Plaintiff in this case claims to pre-empt on the ground that he is a proprietor in the *patti* in which the land in suit is situated. The lower Courts have agreed in dismissing the suit on the finding that there are no recognised sub-divisions of this village for the purpose of pre-emption.

The history of the village as recorded at the 1884 Settlement shows that there were originally two *zails* known as Haji Khan and Ghazi Khan. These *zails* were named after two brothers and undoubtedly at one time these *zails* were real sub-divisions. But the history of the village goes on to show that later on some of the proprietors had to leave the village owing to poverty and ancestral shares disappeared and possession became a measure of right. In 1884 the names of the two *zails* were still kept up, but the *zails* were spoken of as *tarafs*. Persons of different castes had come into both *tarafs* and the present plaintiff himself is, as the learned District Judge points out, a *saini* and not descended from either Haji Khan or Ghazi Khan who were Rajputs. There is no *shamilat patti* in the village and the fields of each *patti* are scattered about promiscuously throughout the whole village.

Counsel for the plaintiff-appellant relies on *Bhagat Hira Nand* v. *Lal Khan* (1) where it was held that there is nothing in section 12 of the Punjab Laws Act to show that the term "sub-division" should be construed with reference to any particular principle of division. He also relies on *Uttam* v. *Buta* (2) which lays down that in villages a proprietor holding land in any sub division recognised by the Settlement Record, be it *taraf patti*, *thulla* or *dheri*, should have, as regards land sold in that sub-division, a right superior to any one whose land is outside it. This, however, does not seem to have been the test laid down in *Sadda* v. *Maj a Singh* (3) where a certain *thulla* was recognized as a sub-division because it was held on the evidence to be a *real* sub division of the *patti* and not merely a name representing the distribution of the proprietors for convenience in collecting revenue or similar purposes. *Bija* v. *Bishan Singh* (4) seems

(1) 169 P. R. 1880.
(2) 69 P R. 1893.
(3) 76 P. R. 1894.
(4) 45 P. R. 1897.

to me a case somewhat similar to the present though there the Settlement record did not recognise any *pattis*. There were two sections in the village who held their land for the most part in different portions of the village though some land lay intermixed. Each section had its Lambardar through whom its revenue was paid, but there was no *shamilat patti* and nothing common to one group of proprietors in which the members of the other group had no interest. It was held that the two *patti's* were not recognised sub-divisions of the village within the meaning of the Punjab Laws Act. In *Sher Singh* v. *Maluk Singh* (5) it was held that in order to justify treatment of a section of the village as a sub division for the purpose of pre-emption there must be some well-defined attribute, such as homogeniety of area or descent of the proprietors. In *Basawa Singh* v. *Natho Singh* (6) it was held that certain *thullas* into which a *patti* of the village had been sub-divided were sub divisions of the village for the purpose of pre-emption. I note that in this case each *thulla* had a separate *shamilat* in which the proprietors of the other *thulla* had no share. *Waryam Singh* v. *Mahtab Singh* (7) was a case of pre-emption being claimed in a village which was of recent date and was peopled by persons of various caste whom the Government had selected as persons to whom grants of land might fitly be made *pattis* had been created, in the village but merely for fiscal purposes and it was held that such *pattis* were not sub-divisions for the purposes of pre emption. This case is, of course, not on all fours with the one before me, but I note that in this judgment the correctness of the proposition laid down in *Bhagat Hira Nand* v. *Lal Khan* (1), which is to the effect that if there is in point of fact a recognised sub-division of a village, such sub-division must be accepted as such for the purposes of the Pre-emption Act irrespective of any question of principle, is doubted, and it is noted that later authorities take a different view and place a far more limited construction upon the words "*patti* or other sub division,"

(5 142 P. L. R. 1905.

(6) 23 Ind. Cas. 151; 60 P. R. 1914; 128 P. L. R. 1914; 83 P. W. R. 1914.

(7) 26 Ind. Cas. 433; 21 P. R. 1915; 31 P. L. R. 1916; 224 P. W. R. 1914.

In the present case it seems to me obvious that the two *tarafs* or *pattis* created at the Settlement of 1884 were merely nominal divisions created for purely fiscal purposes, and that in fact there is no real sub division of the village except that some proprietors have been allotted to one Lambardar and some to another merely for the purpose of convenience in collecting land revenue. The decision of the lower Courts seems to me in accordance with the later decisions of this Court, and I uphold their orders dismissing the suit, and dismiss the appeal with costs.

W. C. A.

Appeal dismissed.

PATNA HIGH COURT.

LETTERS PATENT APPEALS NOS. 109 TO 111 OF 1921.

May 9, 1922.

Present:—Sir Dawson Miller, Kt., Chief Justice, and Mr. Justice Adami.

W. M. GRANT AND OTHERS—PLAINTIFFS—APPELLANTS

versus

EKLAL JHA AND OTHERS—DEFENDANTS—RESPONDENTS.

Appeal, second—Finding of fact, when will be interfered with—Parties, duty of—Document not valid for purpose intended, whether can be used as evidence—Bengal Tenancy Act (VIII of 1885), s. 29—"Specially," meaning of—Applicability of section—Documents, part legal and part illegal, enforcement of.

A finding of fact cannot be interfered with in second appeal, unless it can be shown that there was no evidence to support it. If either of the parties raise the point that there is no evidence to justify the finding, it is their duty to place that evidence on the record, to enable the Court of second appeal to decide the question, and not merely to rely upon certain references thereto in the judgments of the lower Courts. [p. 52, col 2; p 53, col 1.

The mere fact that a document may not be valid for the purpose for which it was intended would not prevent it from being used as evidence of an admission by a person executing it where its execution has been admitted and proved. [p. 54, col. 2.]

The word "specially," as used in section 29 of the Bengal Tenancy Act, has no reference to the *quantum* of the reduction of rent allowed for the consideration there mentioned, but merely requires that owing to special circumstances, *viz*, the agreement to cultivate a particular crop, the rent is lower than it otherwise would have been. Mere proof

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that the rent was a low rent would not be sufficient to comply with the section unless it were also proved that the low rate was arrived at in consideration of cultivating a particular crop. But once it is proved that this is the case, then the actual amount whereby the rent is reduced below what it otherwise would have been if no such obligation had existed is not a matter to be taken into consideration in deciding whether the proviso has been complied with. [p. 53, col 2.]

Section 29 of the Bengal Tenancy Act has no application to an increase in the amount of rent by reason of an increase in the area, it applies only to an increase in the rate of rent. [p. 55, col 2.]

Although a party cannot ask the Court to make a new contract in place of that which is illegal, but where in the same instrument there are distinct engagements by which a party binds himself to do certain acts, some of which are legal and some illegal, the performance of those which are legal can be enforced although the performance of those which are illegal cannot. [p. 55, col. 2.]

Appeal from the decision of the Hon'ble Mr. Justice Ross, dated the 22nd November 1921, reported as 64 Ind. Cas. 332.

Messrs. *Manuk, H. Imam, S. M. Mullick, N. C. Roy* and *S. C. Roy*, for the Appellants.

Messrs. *Kulwant Sahai* and *S. Saran*, for the Respondents.

JUDGMENT.

MILLER, C. J.—These three appeals are brought under the Letters Patent from a decision of Mr. Justice Ross dated the 22nd November last year reversing the decision of the lower Appellate Court.

The suit out of which the appeals arise were tried together along with three others of a similar nature before the Munsif at Bhagalpur and determined by the same judgment. The plaintiffs, who are the proprietors of the Lattipur Indigo Factory, at Narainpur, are the same in each case. The defendants, who are the same in two cases but different in the other, are tenants holding under the factory and the same questions for determination arise in each of the cases. The claim of the plaintiffs, who are the appellants before us, is for the recovery of rent payable under the terms of certain *kabuliyats* executed by the defendants respectively in the year 1909 whereby they agreed to pay an enhanced rent amounting to about 4 annas in the rupee in excess of the rent formerly payable under the earlier *kabuliyats* in consideration of being released from the obligation imposed by the earlier *kabuliyats* of cultivating indigo on a portion of their holdings.

It is the plaintiffs' case that the defendants held their land at a specially low rate of rent before the date of the *kabuliyats* sued on in consideration of cultivating indigo for the landlords' convenience, within the meaning of the third proviso of section 29 of the Bengal Tenancy Act, and that in consideration of being released from that obligation, they agreed to pay the increased rent which they deemed fair and equitable. Section 29 of the Act, in so far as it is material, reads as follows:—

"The money rent of an occupancy *raiyat* may be enhanced by contract, subject to the following conditions.

* * *

(*b*) The rent must not be enhanced so as to exceed by more than 2-annas in the rupee the rent previously payable by the *raiyat*: * * *

Provided as follows. * * *

(*iii*) When a *raiyat* has held his land at a specially low rate of rent in consideration of cultivating a particular crop for the convenience of the landlord, nothing in clause (*b*) shall prevent the *raiyat* from agreeing, in consideration of his being released from the obligation of cultivating that crop, to pay such rent as he may deem fair and equitable."

It is the defendants' case that there is no proof that they held their lands at a specially low rate of rent in consideration of cultivating a particular crop within the meaning of the proviso, and that, therefore, although they executed the *kabuliyats* agreeing to pay the rent claimed, such an agreement cannot be enforced as the enhancement was in excess of the maximum allowed under clause (*b*) of section 29 of the Act. The defendants further rely upon sections 23 and 178 (3) (*b*). The former section gives occupancy *raiyats* the right to use the land in any manner which does not materially impair its value or render it unfit for the purposes of the tenancy, whilst the latter section provides that nothing in any contract made between the landlord and the tenant after the passing of the Act shall take away or limit that right. It is important to bear in mind that the Bengal Tenancy Act was passed in the year 1885, before which date it is conceded that the restrictions imposed by section 29 upon the freedom of contract had no

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operation. The first *kabuliyats* of which there is any evidence in the case are dated the 3rd June 1888. These documents refer to the lands settled as *sabek jote nij*, but when the lands were first settled upon the defendants or their predecessors there is nothing to show. It has been found, however, that the defendants are occupancy *raiyats*.

The *kabuliyats* in the case of each of the defendants are of the same tenour. Those of 1888 are for a period of 10 years from 1295 to 1304 F. They provide in paragraph 6 that "I, the *raiyat*, will from year to year till the expiration of the term of this *kabuliyat* sow indigo only, or indigo with certain mixed crops such as linseed and mustard, upon one-fourth of the said holding after taking indigo seeds from the factory without payment of any price for the same according to the choice of the *sahibs* and *amlas* of the Lattipur Indigo concern". Then follow certain stipulations as to the landlord's rights if this obligation is not complied with and as to the harvesting of the indigo and the price to be paid for it. Paragraph 7 says "The conditions in paragraph 6 above are according to the old custom of the village and upon these conditions the rent of the holding has been fixed. If I, the *raiyat*, refuse in any year to set apart one-fourth of the land at the time of measuring the same for the purpose of sowing indigo, I, *raiyat*, will pay excess rent at the rate of Re. 1 per *bigha* for the entire area of the holding from that year until the expiration of the term of this *kabuliyat*." Paragraph 9 provides: "In the beginning of the year, when the term of this *kabuliyat* will expire, I shall appear before you the *patnindars* and shall put in a *kabuliyat* for a fresh settlement and shall obtain a *patta* for the same, and if I do not put in a *kabuliyat* and obtain a *patta* then until I obtain a settlement I shall pay rent at the rate of Re. 1 in excess for the entire area as provided by paragraph 7 hereof." When these *kabuliyats* expired, they were renewed for a further term which expired in 1315 F., that is, in September 1908. A few months later, on the 14th January 1909, fresh *kabuliyats* were executed after a fresh measurement of the land. These were for 9 years from 1317 to 1325 F inclusive. It was found by the method of measurement adopted that there had been an increase in the area, in excess of the area mentioned under the previous *kabuliyats* and for this the tenants agreed to pay an additional rent. They further agreed to pay an enhanced rent at a rate which worked out at about 4 annas in the rupee. The stipulation as to growing indigo finds no place in these *kabuliyats*. Clause 14 provides as follows: "Be it known that for my having grown indigo on one-fourth of my *nagdi* holding the *maliks* had settled the land with me at a low rate, but the *maliks* have now closed the indigo business, therefore, the excess rate which has been assessed upon my *nagdi* holding according to my wish neither I nor my heirs and representatives have or will have any objection to pay".

One of the questions which arose for determination by the Munsif was, whether in fact under these *kabuliyats* the area had been properly measured. The *lagga* used, as stated in the *kabuliyats* themselves, was a *lagga* of 5¼ cubits, whereas the tenants contended that the standard *lagga* in use in the village was 6½ cubits and when measured by this standard no increase in area had in fact taken place. This question was decided by the Munsif in favour of the defendants and the additional rent proportionate to the excess area was disallowed. The learned Munsif also came to the conclusion that the agreement to enhance the rent in excess of 2 annas in the rupee was in contravention of section 29 (*b*) of the Bengal Tenancy Act and was not taken out of the operation of the section by the third proviso. He considered that, although it was proved, that the rent was low in consideration of growing indigo, it was not shown that it was specially low. He further held that the *kabuliyats* of 1883 were executed in respect of lands held by the tenants previously and that there was nothing to show that there was any obligation upon them to cultivate indigo at the inception of the tenancy, and, unless this could be shown, the proviso had no application. He also found that there was nothing to show that the defendants deemed the rent agreed upon to be fair and equitable. I may mention here that in some of the other cases, which are not the subject of this appeal, where similar *kabuliyats* were proved showing the original settlement with the tenants, he found upon exactly the same evidence that

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the rent was specially low and that the tenants deemed the enhancement to be fair and equitable. A further point was taken and decided against the landlords that the *kabuliyats* sued on represented a *bona fide* settlement of a dispute for rent between the parties and should not, therefore, be treated as a case of enhancement.

The plaintiffs appealed from this decision to the District Judge who affirmed the decision of the Munsif as to the claim for excess area, but allowed the appeal in so far as it claimed an enhancement in respect of the area allowed, being of the opinion that on the evidence the case came within the terms of the third proviso of section 29. There was no direct evidence to show whether the obligation to grow indigo was one binding on the tenants at the inception of the tenancy, but the learned Judge considered that, as the origin of the tenancy was lost in obscurity, he was entitled to consider the surrounding circumstances and the conduct of the parties and the inferences to be drawn from the *kabuliyats* themselves in determining whether the obligation to grow indigo was an incident attaching to the tenancy at its inception. The fact that the *kabuliyats*, as far back as 1888, recited an obligation to grow indigo on a fourth part of their holdings according to the custom of the village, he considered indicated that no new obligation was then imposed but that it was pre existing and in accordance with custom and usage, and the conduct of the parties, in agreeing to pay an enhanced rent in 1909 and for several years afterwards complying with that agreement, was also indicative of the nature of the tenancy in its origin. He further relied upon a petition in connection with a fresh settlement with one of the defendants in 1905 as showing that indigo cultivation was one of the purposes for which the land was settled. He also found upon the oral evidence, as well as from the defendants' own admission in the *kabuliyats*, that the lands had been settled with the tenants at a specially low rate in consideration of growing indigo and that the new rate was fair and equitable.

On second appeal to this Court by the tenants the learned Judge, before whom the appeal came, reversed the decision of the learned District Judge. The evidence upon which the lower Appellate Court's decision was based, in so far as it was given orally, was not before the learned Judge in second appeal, but he referred to certain passages in the Munsif's judgment in which some of the oral evidence was dealt with and arrived at the conclusion that this was no proof that the *raiyats* held their land at a specially low rate of rent in consideration of cultivating indigo. He further considered that the admission that they had previously held at a low rate, in consideration of this obligation contained in the *kabuliyats* sued on, could not be relied upon as the *kabuliyats* themselves were repudiated as void, and that, in these circumstances, the admission itself would not prove the truth of what it states. He further considered that the admission itself was not sufficient as it did not show that the purpose of the tenancy was the growing of a particular crop or that, in consideration thereof, the rent was specially low. He considered, however, that at the time of the *kabuliyats* in 1888 a less rent was fixed than would otherwise have been fixed because the proprietors wanted indigo on one-fourth of the land. He also considered that, although there was an obligation to grow indigo under the *kabuliyats* of 1888 and again under the renewal in 1902, this obligation came to an end with the *kabuliyats* of 1902 and had ceased to exist when the new *kabuliyats* agreeing to the enhanced rent were executed. It would follow, therefore, under section 23 of the Act, that the tenants were then entitled to use the land for any purpose they chose consistent with the provisions of that section and the agreement to pay enhanced rent in consideration for the release of a non-existing obligation was void under the provisions of section 178 (3) (*b*).

The determination of these appeals ultimately depends upon the answer to the question whether there was evidence to support the conclusions of fact arrived at by the first Appellate Court. The findings must be accepted in second appeal unless it can be shown that there was no evidence to support them. In the present case the evidence was both oral and documentary. The *kabuliyats* which were relied upon by both parties in support of their respective contentions have been placed before us, but we are not in a position to deal with the oral evidence nor can we say to what extent it justified the finding except in so far as appears from the judg-

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ments of the Munsif and the learned District Judge. Had either of the parties intended to raise the point that there was no oral evidence to justify the findings in so far as they are based thereon, it was their duty to have placed that evidence on the record to enable the Court to decide this question and not merely to rely upon certain references thereto in the judgments of the lower Courts.

I should have had little hesitation in coming to the conclusion that the findings of the lower Appellate Court could not be disturbed but for the fact that the learned Judge of this Court, in second appeal, has taken a different view and considers that there was no evidence upon which those findings can legally be supported. His opinion is entitled to all respect. He concieely states the question for decision when he states that the enhancement being in excess of that allowed by section 29, the agreement by the tenants to pay the enhanced rent is void unless it is protected by the third proviso, and that in order to bring it within that proviso, three factors must be present (1) the *raiyat* must have held his land at a specially low rate of rent in consideration of cultivating a particular crop for the convenience of his landlord, (2) he must have been released from an existing obligation of cultivating this crop, and (3) he must have deemed that the rent which he agreed to pay was fair and equitable. The learned Judge thought that neither of the first two factors existed upon the evidence and that it was unnecessary, therefore, to consider the third. With regard to the first point, the two earlier *kabuliyats* contain an admission that the tenants are under an obligation to grow indigo on a part of their holdings according to the old custom of the village and that upon these conditions the rent of the holdings has been fixed. They further agree that if they refuse in any year to set apart a fourth of the land for the purpose of sowing indigo, they will pay an excess rent at the rate of one rupee per *bigha* for the entire area of the holding. It appears from the Munsif's judgment that the plaintiffs' witnesses said that the tenants were under an obligation to grow indigo and three of them stated that the rent was low in consideration of so doing. They do not appear, however, according to the Munsif, to have stated that the rate was specially low. The learned District Judge, on the other hand, found in these words: "The former rates at which the respondents held are specially low as appears from the oral evidence as well as from their own admissions in the *kabuliyats*." I may mention here that in the *kabuliyat* of 1909 there is a further admission that in consideration of growing indigo the *malik* had previously settled the land at a low rate. In my opinion, this evidence was amply sufficient to justify the finding that the land was previously held, that is to say, under the *kabuliyats* of 1888 and 1902, at a specially low rate of rent in consideration of cultivating a particular crop within the meaning of the third proviso of section 29. The word, "specially" as used in the section has, in my opinion, no reference to the *quantum* of the reduction of rent allowed for the consideration there mentioned, but merely requires that owing to special circumstances, *viz.*, the agreement to cultivate a particular crop, the rent is lower than it otherwise would have been. Mere proof that the rent was a low rent would not be sufficient to comply with the section unless it were also proved that the low rate was arrived at in consideration of cultivating a particular crop. But once it is proved that this is the case, then the actual amount whereby the rent is reduced below what it otherwise would have been if no such obligation had existed is not a matter to be taken into consideration in deciding whether the proviso has been complied with. I may also point out that this appears to have been the view of the learned Munsif although it would seem that in deciding the question he subsequently lost sight of it. In considering this point he first of all says, "the first thing to be shown is that the defendant in this case has been holding at a specially low rate of rent, or, in other words, at a rate lower than what it would have been if there were no obligation to grow indigo", but, in considering the evidence in order to ascertain whether it proved such a state of affairs, he found that it did not, merely because the witnesses did not use the words "specially low", and as already pointed out in one of the other cases not now on appeal before us in which he came to a different conclusion of fact he says, "the *kabuliyats*, however, do not state expressly that the rent was fixed at a specially low

rate of rent in consideration of this obligation but that a specially low rate of rent was partly the considertion for the settlement is c'ear". It would appear, therefore, that upon precisely the same evidence he came to two diametrically opposite conclusions of fact. In my opinion the decision arrived at by the learned District Judge upon this question was amply justified by the evidence even if it be taken to have gone no further than appears from the judgment of the learned Munsif.

The decision of this question, however, merely goes to the state of affairs existing from 1888 onwards and it still remains to consider whether in 1909, when the new *kabuliyats* were executed after the old ones had expired, the obligation to grow indigo still existed. If it did not, there was no consideration for the agreement to pay enhanced rent beyond that prescribed by the Statute, and any obligation undertaken by the tenants to do so would not have been binding upon them. Whether that obligation existed or not depends upon whether, either at the inception of the tenancy or, at least, at sometime before 1885, when the Bengal Tenancy Act was passed, the tenants were under an obligation to grow indigo. I think it must be conceded that it is not necessary to go back to the inception of the tenancy. If, at any time before 1885 this obligation was a part of the terms under which the tenants held, then it would be a binding obligation as there was no law to prevent the freedom of contract. It is conceded that there is no direct evidence as to the terms upon which the tenants held before 1888 and the question for consideration is, whether the learned District Judge was justified in drawing the inferences from the evidence contained in the *kabuliyats* themselves and from the acts of the parties that the obligation was one of old standing and not newly created by the *kabuliyats* of 1888. I have already stated the grounds upon which the learned District Judge arrived at his finding upon this question. The reference in the earlier *kabuliyats* to the custom of the village, the agreement by the tenants to pay an enhanced rent of one rupee per *bigha* if they failed to comply with their obligation and the fact that in 1909 they willingly agreed to pay excess rent after due consideration and without any coercion on the part of the landlord, which was found as a fact in the case, coupled with the admission in the *kabuliyats* of that date that the *malika* had settled the land with them at a low rate for having grown indigo, all seem to me to lead to the inference that the obligation was not imposed for the first time in 1888 but was in existence at all events, before the passing of the Bengal Tenancy Act in 1885. It will be observed that the admission referred to speaks of the land being settled with the tenants upon certain terms, and to my mind this clearly points to the original settlement. There were other matters also referred to by the learned District Judge arising on the evidence, but which we are not in a position to deal with as the evidence is not before us, and which pointed towards the same conclusion, *viz.*, that indigo cultivation was one of the purposes for which the land was settled. Added to this, there is not a scintilla of evidence adduced by the defendants to show that the obligation arose for the first time under the *kabuliyats* of 1888. In my opinion, therefore, the findings of the learned District Judge on these two points were in fact supported by the evidence.

The only other question is, whether the tenants can be said to have deemed as fair and equitable the enhanced rent which they agreed to pay. The mere fact that they entered into a formal written agreement with the landlords to pay it is sufficient to raise the presumption that they deemed it fair and equitable. There is nothing in the rate of enhancement which militates against this view, and the parties were dealing at arms length and without any coercion on the part of the landlords. The question was one of fact and, in the circumstances, I can see no ground upon which the finding can be disturbed.

The learned Judge of this Court whose decision is now under appeal took the view that the admission contained in the *kabuliyat* of 1909 could not be regarded as evidence because the *kabuliyat* itself was challenged as void. If the *kabuliyat* was valid, as I have found it to be, this question does not arise but in any case I am unable to follow the learned Judge's reasoning that, because a document may not be valid for the purpose for which it was intended, it cannot be used as evidence of an admission by the person executing it

when its execution has been admitted or proved. The admission therein contained that the lands were previously held at a low rent was made by the tenants without coercion and even if the document, as an agreement to pay enhanced rent should not be binding, I cannot see any reason why it should be rejected as an admission of the facts stated.

A further question was raised before us in argument by the learned Government Pleader on behalf of the respondents which was not taken in any of the Courts below. It was contended that the whole agreement of 1909 was void because one of the considerations for paying an enhanced rent, *viz.*, an increase in the area had been found not to exist and even if the other consideration, *viz.*, the release from the obligation, should be valid, the promise to pay an enhanced rent could not stand. Reliance was placed upon sections 23 and 24 of the Contract Act. It was contended that part of the consideration for the enhancement of rent was the increased area shown to exist by the form of measurement adopted, whereas in fact it was found that the area had not increased at all, a wrong method of measurement having been employed. It was argued that, in this state of affairs, a part of the consideration for the enhancement of rent having failed, it must be treated as unlawful under section 23 of the Contract Act, as if permitted it would defeat the provisions of section 29 (*b*) of the Bengal Tenancy Act relating to enhancement. I agree that under section 24 of the Contract Act if one of the several considerations for a single object is unlawful the agreement is void but even assuming that the consideration in the circumstances stated was unlawful it would appear that the increase of area alleged to exist was no part of the consideration for the enhancement of rent. As this point had never been taken in any of the lower Courts, the schedule attached to the *kabuliyats* of 1909 had not been placed in evidence before us, but we were informed by the learned Counsel for the appellants, and it was not contradicted, that the schedule clearly shows how the rent was arrived at. It sets out the original area and the original rent and the additional area and additional rent and then shows the enhancement of rent in consideration of the release from the obligation. The additional rent was disallowed by the lower Courts, and although there was a cross-appeal by the plaintiffs on that question to this Court the cross-appeal was not pressed as no point was taken about separating the legal from the illegal part of the consideration. The engagements to pay additional rent and enhanced rent are entirely separate and distinct. One cannot ask the Court to make a new contract in place of that which is illegal, but where in the same instrument there are distinct engagements by which a party binds himself to do certain acts some of which are legal and some illegal the performance of those which are legal can be enforced although the performance of those which are illegal cannot. Section 29 of the Bengal Tenancy Act has no application to an increase in the amount of rent by reason of an increase in the area. It applies only to an increase in the rate of rent and the engagements by the defendants to pay additional rent for an additional area and an enhanced rent for release from an obligation are entirely separate and distinct. The tenants are not entitled to say, because we have undertaken to pay additional rent for an additional area which cannot be enforced, therefore, we shall not pay enhanced rent in consideration of being released from an existing obligation, although that consideration is perfectly good.

I am further of opinion that at this stage although the question raised is one of law we ought not to entertain it in the particular circumstances which have arisen. The present appellants, who were respondents in the Court below, entered a cross-appeal in that Court challenging the findings as to the additional rent and further contending that the *kabuliyat* sued on represented a *bona fide* settlement of a dispute for rent between the parties and that the case should not be treated as one of enhancement, but as no point was taken before Mr. Justice Ross about separating the legal from the illegal part of the consideration they were content not to press their cross-appeal. For both these reasons I think that this question should be determined against the respondents and in favour of the appellants. In my opinion, this appeal should be allowed, the decree appealed from

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should be set aside and that of the District Judge restored. The appellants are entitled to their costs of this appeal and to the costs of the appeal of the defendants before Mr. Justice Ross.

ADAMI, J.—I agree.

W. C. A.

Appeal allowed.

LAHORE HIGH COURT.

MISCELLANEOUS SECOND APPEAL No. 1004 OF 1921.

December 23, 1921.

Present :—Mr. Justice Chevis.

KIDAR NATH AND OTHERS—JUDGMENT-DEBTORS—APPELLANTS

versus

RADHA KISHEN AND OTHERS—DECREE-HOLDERS—RESPONDENTS.

Execution of decree—Limitation—Objection not taken against previous application, whether can be taken against subsequent application—Joint family—Decree against managing member—Limitation Act (IX of 1908), Sch. I, Art. 182, Explanation.

An application for execution of a decree cannot be objected to on the ground that a previous application, to which no objection on the ground of limitation was taken, was barred by time. [p. 57, col. 1.]

Manna Lal v. *Samandu*, 48 P. R. 1906; 94 P. L. R. 1906; 62 P. W. R. 1906, followed.

Three Hindu brothers carried on a joint business. A decree was obtained against the eldest brother and certain applications for execution of the decree were made against him and after his death against his legal representatives Subsequently execution was applied for against the other brothers also :

Held, that the brothers being joint and carrying on a joint business, the decree against the eldest brother must be taken to have been passed against the firm and that previous applications for execution, therefore, operated to save limitation. [p. 56; col. 2; p. 57, col. 1.]

Miscellaneous second appeal from an order of the District Judge, Sialkot, dated the 24th February 1921, reversing that of the Subordinate Judge, First Class, Sialkot, dated the 15th December 1920.

Mr. *Nanak Chand*, for the Appellants.

Mr. *Manohar Lal*, for the Respondents.

JUDGMENT.—This appeal arises out of proceedings in execution of a decree, which was passed on the 23rd July 1902, against Peshori Lal, Brothers, sons of Jairam Das. At the last hearing of this appeal I remanded the case and sent for the records of the original suit, but I learn that these records have been destroyed. The decree-holder applied for execution on the 13th November 1914. Notice issued and Kandhari Lal, a brother of Peshori Lal, appeared in Court and said that Peshori Lal had died in September 1914. These execution proceedings were eventually dismissed. On behalf of the minor sons of Peshori Lal an application was presented for setting aside the decree, but this application was rejected. The decree holder started fresh execution proceedings in July 1917. Lahori Mal, another brother of Peshori Lal, then appeared both for himself and as guardian of the minor sons of Peshori Lal. He then stated that Peshori Lal had left no property except some self-acquired property but that it was joint property which had descended from Peshori Lal's father. He also stated that there was no firm of the name of Peshori Lal Brothers. These execution proceedings were eventually dismissed on the 21st March 1918. In October 1919 the decree-holder again applied for execution of decree. On behalf of Lahori Mal and the minor sons of Peshori Lal an objection was raised that the application was time-barred, as the execution proceedings taken in 1914 were invalid and could not be used to keep limitation alive. The First Court held this objection to be correct and dismissed the application as time-barred. The learned District Judge on appeal overruled the objection as to limitation and hence the judgment-debtors have lodged a second appeal to this Court.

Peshori Lal was, so I understand, the eldest of the three brothers. He was a Khatri shop-keeper, and the presumption is that he and his brothers were joint. In his statement in Court in 1918 Lahori Mal admitted that the property which had descended from his father was still joint, and there is not the slightest evidence nor is it suggested that Peshori Lal and his brothers separated. The presumption, therefore, is that the family was a joint Hindu family

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and that the business carried on by Peshori Lal under the name of Peshori Lal Brothers sons of Jairam Das, was a joint family business. Lahori Mal's bare denial in 1917 as to the business being joint I regard as insufficient rebuttal. I take it then that the decree was against the firm and not against Peshori Lal only, and I think that the District Judge is right in holding that the proceedings of 1914 were proceedings in execution of decree and kept limitation alive. The learned District Judge has also held, on the authority of *Manna Lal* v. *Samandu* (1), that as the plea of limitation was not raised in the former execution proceedings taken in 1917, it cannot be raised now. This also appears to me to be perfectly correct. The question is dealt with on page 171 of the judgment just referred to. What the appellants are trying to do is to plead that the present application is time-barred because the previous application was also time-barred. No objection on the ground of limitation was raised at the time of the previous application and so it cannot be urged now that the previous application was time-barred.

The appeal is dismissed with costs.

Z. K.

Appeal dismissed.

(1) 46 P. R. 1906; 94 P. L. R. 1906; 62 P. W. R. 1906.

PATNA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 25 OF 1919.

January 24, 1922.

Present:—Mr. Justice Das and Mr. Justice Adami.

Musammat CHANDRAMA KUER AND ANOTHER—APPELLANTS

versus

RAMGAYAN AND OTHERS—RESPONDENTS.

Evidence Act (I of 1872), s. 32 (2)—Entry in choukidar's diary recording death of a person—Entry written not by choukidar but by third person—Admissibility of the entry in evidence after choukidar's death—Appeal—Finding of fact—Appellate Court, duty of—Evidence—Interested persons—Corroboration.

Entries made in the diary of a deceased illiterate *choukidar* not by the *choukidar* himself, but by other person at his instance are not admissible under section 32 (2) of the Evidence Act unless it is established that it was the duty of that person in the ordinary course of business to make the entries. [p. 60, col. 2.]

Although a Court of Appeal ought not to differ from a Trial Court on a finding of fact in the absence of strong and weighty reasons for doing so, yet it has certain responsibilities, and in a proper case it will examine the evidence with a view to seeing whether Judge of the Trial Court in giving judgment has not misdirected himself. [p. 58, col. 1.]

As a rule, the evidence of persons who are vitally interested in the result of a case ought not to be acted upon, unless that evidence receives corroboration from surrounding circumstances. [p. 61, col. 1.]

Appeal from a decision of the Subordinate Judge, Shahabad.

Messrs. *Kulwant Sahay* and *Sambhu Saran*, for the Appellants.

Mr. *Sivanarain Bose*, for the Respondents.

JUDGMENT.

DAS, J.—This appeal raises the question whether any authority was given to *Musammat* Chandrama Kuer, one of the defendants-appellants, by her deceased husband, Brij Nandan Singh, to adopt a son to him and whether *Musammat* Chandrama Kuer did in fact adopt defendant No. 2, the other appellant before us, as a son to her deceased husband. The plaintiffs, who are the respondents before us, claim to be the reversioners of Brij Nandan Singh and their case is that Brij Nandan Singh died suddenly on the 24th Baisakh 1308 corresponding with 27th April 1901 and that he gave no authority to his widow to make any adoption to him. Their case further is, that there was, in fact, no adoption and that they are entitled to a declaration to the effect that the widow was neither entitled to, nor did she in fact, make an adoption to her deceased husband. The defendants resist the plaintiffs' action and they contend that Brij Nandan was ill for about twenty-four days and that on the 21st Baisakh 1308, corresponding with the 24th April 1901, that is to say, three days before his death, he gave authority to *Musammat* Chandrama Kuer to adopt a son to him and that *Musammat* Chandrama Kuer did in fact, in pursuance of the authority given to her by her deceased husband, adopt the second defendant as a son to him on the 17th May 1916,

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On the pleadings, the learned Subordinate Judge framed the following issues.

1. Is the suit as framed tenable?
2. Have the plaintiffs right to sue? Are they reversionary heirs to Brij Nandan Singh?
3. Whether defendant No. 2 has been adopted as alleged by the defendant No. 1?
4. Did Brij Nandan Singh give defendant No. 1 authority to adopt?
5. Is the suit barred under section 42 of the Specific Relief Act?
6. Is the adoption of defendant No. 2 illegal and invalid and without the permission of Brij Nandan Singh?
7. Is the suit tenable against the principle of *factum valet*?
8. Are the plaintiffs entitled to any relief.

The learned Subordinate Judge has found that plaintiff No. 1 was the reversionary heir of Brij Nandan Singh and was entitled to maintain the action. He thought that section 42 of the Specific Relief Act did not bar the suit and accordingly answered Issue No. 5 in the negative and Issue No. 1 in the affirmative. He considered Issues Nos. 4 and 6 together as in fact they raised the same question and answered those issues in favour of the plaintiffs. On a review of all the evidence in the case, he came to the conclusion that Brij Nandan Singh did not give any authority to his widow to adopt a son to him and he also came to the conclusion that the widow did not in fact make any adoption. In the result, he decreed the plaintiffs' suit and made the declaration in favour of plaintiff No. 1 substantially as claimed by him in the plaint.

The questions raised in this appeal are questions of facts, and I entirely agree with the learned Vakil for the respondents that we ought not to differ from the Trial Court unless there are strong and weighty reasons for doing so. We have, however, certain responsibilities as an Appellate Court and we are bound to examine the evidence with a view to see whether, in giving judgment in favour of the plaintiff No. 1, the learned Judge did not misdirect himself. Now, the way in which the learned Judge dealt with the whole case has been severely criticised by Mr. Kulwant Sahay on behalf of the appellants. It was pointed out that, although the learned Judge refused to consider the evidence of *Musammat* Chandrama Kuer, *Musammat* Jagatraj Kuer, the sister-in-law of *Musammat* Chandrama Kuer, and Mahadeo Singh, who was in the service of *Musammat* Chandrama Kuer, on the ground that they were interested witnesses, he strongly relied upon the evidence of Ram Gayan Singh, plaintiff No. 1, and Keshwar Singh, another of the plaintiff, although they were far more interested in the result of the suit than the witnesses whose names I have just mentioned. Now, in supporting the case of adoption, *Musammat* Chandrama Kuer was really asserting that she had divested herself of any proprietary interest in the estate of her deceased husband. There is, therefore, no *prima facie* ground for rejecting her evidence which was really against her pecuniary interest. On the other hand, the result of the suit would have serious effect on the fortunes of the reversioners. This was the first argument of Mr. Kulwant Sahay on the judgment itself. Next, he argued that the witnesses examined on behalf of the defendants deserved some consideration whereas the learned Subordinate Judge dismissed them with the remark that some of them were relatives of Brij Nandan Singh whereas others were partisans of Gokula Prasad Singh, the father of defendant No. 2 It was pointed out that there is absolutely no evidence on the record to establish that any of the witnesses examined on behalf of the defendants is a partisan of Gokula Singh and that to be a relative of Brij Nandan Singh is no disqualification whatever since a relative of Brij Nandan Singh is likely to know the facts of the case. But, as a matter of fact, out of seventeen witnesses examined on behalf of the defendants only four are relatives of Brij Nandan Singh-defendant No. 4 who is the brother of *Musammat* Chandrama Kuer, defendant No. 12, who says that he is a relative of Brij Nandan Singh, but does not say what the relationship is, Gokula Prasad Singh, the nephew of Brij Nandan Singh, and the father of defendant No. 2 and Jagatraj Kuer, the widow of his brother. In my opinion, the learned Subordinate Judge has not dealt fairly with the evidence which was adduced on behalf of the defendants. But it is remarkable

that, although he rejected the testimony of witnesses examined on behalf of the defendants on the ground that they were relatives of Brij Nandan Singh, still he made it a matter of comment that the defendants did not examine any of the *gotais* of Brij Nandan Singh residing in the village. The failure to examine the *gotais* who resided in the village is capable of a very simple explanation. It is not likely that the *gotais* could contemplate with equanimity the prospect of the property passing out of the family to the family of the sister's son of Brij Nandan Singh. It is not unreasonable to assume that they would have a great deal of sympathy with the reversioners. In regard to the witnesses examined on behalf of the defendants, it may be pointed out that they were mostly men of wealth, position and respectability and were not in the slightest degree interested in the result of the suit. Even a cursory examination of the evidence of the witnesses examined will establish that those for the defendants were drawn altogether from a better class of society. Lastly, it was contended that the reasons assigned by the learned Subordinate Judge for accepting the only documentary evidence produced by the plaintiffs are, to say the least, somewhat peculiar He conceded that there were circumstances in connection with the document which threw a great deal of suspicion on the critical entry on which the plaintiffs relied, but he thought that these very circumstances established the genuineness of the document. In connection with this document it was further pointed out that the learned Subordinate Judge advanced a theory which fitted with nobody's case and that he acted upon the theory to the prejudice of the defendants.

These and other arguments that arose on the face of the judgment have compelled us to scrutinize the evidence with more than ordinary care and anxiety; and we have come to the conclusion that the decree passed by the learned Subordinate Judge cannot be supported and ought to be set aside.

The plaintiffs' case is, that Brij Nandan Singh dies suddenly after his evening meal on the 24th Baisakh corresponding with the 27th April 1901. The defendants' case, on the other hand, is that Brij Nandan suffered from a protracted illness which lasted for 24 days and that he actually gave Chandrama Kuer authority to adopt a son on the 21st Baisakh 1303 in the presence of many respectable persons. It must be conceded that if the plaintiffs establish that Brij Nandan Singh died suddently after his evening meal on the 24th Baisakh 1308, the defendants' case must fail.

Now, what is the evidence upon which the defendants rely? In the first place, they rely upon an entry in the *hathchita* form of deaths, Exhibit 1, kept by a Chaukidar, named Bilat Ahir who has given evidence in support of the document. Now, it will appear on an examination of the document that the first entry printed in the paper book is of the 27th April 1901—that giving informationas to the death of Brij Nandan Singh. The second entry is dated the 10th of May, the third entry is dated the 24th of May, the fourth is dated the 21st June and the fifth is dated the 13th May. The learned Subordinate Judge thought that it was a matter of some suspicion that the entry of 13th May follows the entries of the 24th and 21st June respectively. But taking the view that, had the plaintiffs wanted to produce a forged document, they would probably have steered clear of such difficulties as there are on the face of this document, he accepted the suspicious nature of the entries as in itself establishing the genuineness of the document. In my opinion, there is really no reason to suspect the genuineness of the document. The entry of the 13th May no doubt follows those of 24th May and 21st June respectively. It is quite possible that the information as to the death of Haluman Singh who, according to this document, died on the 13th May 1901 may have been received by the Chaukidar after he had made the entries on the 24th May and 21st June respectively.

But that was not the ground upon which Mr. Kulwant Sahay asked us to reject the document. The plaintiffs rely upon this document in so far as it establishes that the cause of the death of Brij Nandan Singh was apoplexy. The actual word which appears in the document is not apoplexy but "epopegsy" which, according to the learned Subordinate Judge, stands for apoplexy although there is no support for it in the evidence. But I will assume for the moment that "epopegsy" stands for apoplexy. The critical question is, who is responsible for the words in the *hatchita*? Now, the only

witness who has been examined by the plaintiffs to prove this document is Bilat Ahir the Chaukidar of the village. He says in his evidence that he got the fact of the death of Brij Nandan noted in the document by Ram Lagan, Chaukidar. His evidence is that Ram Lagan wrote the entry in his presence and then he says "I do not know what is meant by 'epopegsy'". Asked as to the cause of the death of Brij Nandan he said that he died of '*gash*' and that he got that noted in his *bahi*. Now, that is the whole of the evidence of Bilat Ahir which establishes, first, that the cause of death according to him was '*gash*' and that is what he asked Ram Lagan to note in the *hathchita*; secondly, that he does not know what is meant by 'epopegsy,' lastly, that Ram Lagan wrote the entries in his presence. Now, it seems to me on this evidence that it is impossible to rely upon the document in so far as it establishes that Brij Nandan died of apoplexy. The word '*gash*' means 'fit' as the learned Subordinate Judge himself says. That would be perfectly consistent with the case of the defendants. If the cause of the death of Brij Nandan was stated in the *hathchita* to be 'gash' (no objection could be taken to it by the defendants as it would be perfectly consistent with their case. How comes it then that we find the word 'epopegsy' there although Bilat Ahir repudiates it and states that Ram Lagan wrote the entries in his presence. Now, the learned Subordinate Judge has a theory of his own. "It is true" the learned Subordinate Judge says, "that this word could not have been written by Ramdagan of his own accord but there can be no wonder if this word which corresponds to apoplexy was supplied by the Daroga at the Thana when it would have been told to him that Brij Nandan had died suddenly after having fits." Now, there is absolutely no evidence to support the theory of the learned Subordinate Judge. But assuming that the theory is a good one, the question arises who told the Daroga at the Thana that Brij Nandan had died suddenly after having fits. If it were the plaintiffs, the entry cannot be used by them in their support. If it were by the defendants, then, of course, the entry can be used as against them. There is absolutely no evidence on the point. All that we know is that the Chaukidar whose duty it was to make the entry in the *hathchita* knew that Brij Nandan had died of '*gash*' and that is what he asked Ramlagan to note in the *hathchita*. In my opinion, the entry, as it stands, cannot be used as evidence against the defendants.

In the next place, I have very grave doubt whether the entry was at all admissible in evidence. It was urged by the learned Vakil for the respondents that it was admissible under section 32 (2) of the Evidence Act, but that clause is clearly not applicable. It was held by the late Chief Justice of this Court and Roe, J., in the case of *Naina Koer* v. *Gobardhan Singh* (1) that entries in the diary of a deceased illiterate Chaukidar, not by the Chaukidar himself, but by other persons at his instance, are not admissible under section 32(2) of the Evidence Act. Had the entry in this case been made by Bilat Ahir, then no doubt it would be admissible under section 32 (2); but it was not: and it has not been established that it was the duty of Ram Lagan in the ordinary course of business to record these matters. But in the view which I take of the entry, the question of law does not arise.

There only remains the oral evidence and that evidence, in my opinion, is of the weakest kind. Two of the plaintiffs have examined themselves and their evidence is that Brij Nandan took his meal at about 10 P. M. on the night of his death and that as soon as he went to his bed he lost his power of speech and became unconscious. According to them, he expired shortly after he became unconscious. According to plaintiff No. 1, he went to the house of Brij Nandan Singh as soon as he heard that he was taken ill suddenly and he took with him 8 or 9 persons. There is no reason whatever why these 8 or 9 persons should have accompanied him to the house of Brij Nandan unless it be that they were required to give evidence afterwards. He says that he sent for a a doctor from Nasriganj and that the doctor came and told him that Brij Nandan was suffering from "Sarsam" or "Ghahi" (delirium or fainting). Now a case of apoplexy is hardly consistent with the

(1) 37 Ind. Cas 174; 3 P. L. J. 43; (1919) Pat 352.

case of delirium and it is noteworthy that it did exercise the curiosity of the learned Subordinate Judge that this doctor, who, according to the evidence of plaintiff No. 1, was, when the case was going on before the learned Subordinate Judge in Hasua, Bihar, a station on the Bihar Light Railway, was not called by the plaintiffs to give evidence in the case. As the learned Subordinate Judge has pointed out, his evidence would have been of very great value, but for some reason which has not been explained, he was not cited as a witness. The failure on the part of the defendants to examine the Baid who, according to them, attended Brij Nandan, is not open to the same comment. The order sheet shows that the defendants took the earliest opportunity to summon him as a witness, and asked the Court to adjourn the hearing of the suit for two weeks when the Baid failed to put in an appearance as a witness in the case. Now the evidence of plaintiff No. 1 and Keshwar Singh, another plaintiff, in the case ought to be received with very great caution. They are vitally interested in the result of the suit and it is a good working rule not to act upon the evidence of persons who are vitally interested in the result of the case unless that evidence receives corroboration from surrounding circumstances. The failure to examine the doctor is not a circumstance in favour of the plaintiffs; nor is the insertion of the word "epopegey" in the *hethshita*. But the plaintiffs rely upon the evidence of some witnesses who followed him into the house of Brij Nandan Singh and it is necessary to consider their evidence. The first of these witnesses is Pahalwan Singh who admits that there are two suits between Chandrama Kuer and his family and that rent for one year was at that time due from him to Chandrama Kuer. He describes himself as a cultivator, and it does not appear from his evidence that he is a substantial cultivator. There is, however, nothing in his evidence which really hurts the defendants except his assertion that Brij Nandan met with a sudden death and that he did not die after a protracted illness. He admits that on the night of Brij Nandan's death cow, land etc., were being gifted to Brahmins. This is a fact which has been spoken to by some other witnesses who have been examined on behalf of the plaintiffs and accords with the evidence that has been produced on behalf of the defendants. In my opinion, this circumstance namely, that cow, land, etc., were being gifted away to the Brahmins, establishes beyond reasonable doubt that Brij Nandan could not have died suddenly. The gifting of cows at the time of death is a ceremony and requires preparation and it is impossible for such ceremony to take place in the case of a sudden death. The next witness is Bhirgu Nath Singh who describes himself as a cultivator and admits that he is a distant *gotia* of the plaintiffs. There is nothing in his evidence except his assertion that Brij Nandan died after an illness of 2 or 3 hours. The next witness is Chhabi Singh, a cultivator. He admits that he is a distant *gotia* of the plaintiffs. He further admit that *Musammat* Chandrama Kuer sued him for rent for one year. The next witness is Deo Saran Singh who admits that he is paying the plaintiffs the expenses of the litigation. He is obviously interested in the result of the litigation and his evidence cannot be of much value. The next witness is Bachnoo Singh whose evidence is purely hearsay. The next witness is Parmeshwar Upadhya who describes himself as a cultivator. He says that Brij Nandan died after an illness of two hours. He admits that cows, calves, grains etc., were gifted to the Brahmins at that time and that he himself got a gift of one cow and a she-calf at that time besides cloth. In his cross-examination he admits that his uncle Lal Bihari was sued by Chandrama Kuer for rent and that he is now in possession of the *kast* land of Lal Bihari. He also admits that rents are due by him to Chandrama Kuer for three years. The next witness is Ram Kirit Upadhya, a Brahmin cultivator, who says that he got a gift of two cows and some rice on the night of the death of Brij Nandan Singh.

These are all the witnesses who have been examined on behalf of the plaintiffs and, in my opinion, it is quite impossible to rely on this class of witnesses if there is nothing in the surrounding circumstances connected with the adoption to excite our suspicion. I shall consider the

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surrounding circumstances in a moment. It is necessary, first, to see what is the nature of the evidence that has been produced on behalf of the defendants.

The defendants rely, in the first place, upon the extract from the *jama kharach bahi* of 13.8. The learned Subordinate Judge says that this book was written up at one sitting for the purpose of the case. The suspicion of the learned Subordinate Judge was roused by the fact that there is no entry in this book subsequent to the death of Brij Nandan. It must be remembered, however, that the *jama kharach* book relied upon by the defendants is not the Zamindari account-book but the *deroi* account-book, that is to say, a book kept for household expenses. I have examined the book with very great care and, in my opinion, there is nothing at all in it to excite suspicion. It is a complete account-book of 1303 from the first day of the year up till the day of the death of Brij Nandan Singh. The fact that there are no entries in the book subsequent to the death of Brij Nandan may be due to a variety of reasons. It may be due to the fact that, for some days subsequent to the death of Brij Nandan, they did not think of entering such expenses as they incurred in any books of account. Chandrama Kuer and her sister-in-law, Jagaraj Koer, were the only two members of the family and it may be that, for days together, they incurred no expenses which had to be entered in the *jama kharach* book. I am not prepard to reject the book on an argument so speculative as that which has been advanced by the learned Subordinate Judge.

Now, the book, if it is genuine, establishes the case of the defendants that Brij Nandan was ill for a number of days and that he could not have died suddenly as is alleged by the plaintiffs. There is an entry on the 30th Chait to the effect that Sukhnandan Singh was sent to call Baidji of Pasaur on account of *malik's* illness and that the expense incurred in respect of this was Rs. 2-8. Then there are number of entries for purchasing such articles as are given to a person who is ill. On the 24th Baisakh the entry runs as follows ;

		Rs.	a.	p.
Babu Saheb's death, hence purchase of Sakal	...	1	0	0
Ghee	...	2	0	0
Pitambari cloth	...	7	0	0
Bleached malmal	...	1	5	0
Dome for lighting the fire	...	1	4	0

The account-book, taken as a whole, strongly supports the case of the defendants.

I now come to the oral evidence. The first witness examined on behalf of the defendants is Mahadeo Singh who says that he was a companion of Brij Nandan Singh since his birth and was in his service and is now in the service of the widow. There is no cross-examination to suggest that he was not on such intimate terms with Brij Nandan and his widow as he asserts. His evidence is that Brij Nandan was ill for 25 days before his death, that he was treated by Ram Kirit Panday of Pasaur for his illness and that he authorised his wife, Chandrama Kuer, to adopt a child and that he was present when he gave the authority. The learned Subordinate Judge has rejected his evidence on the ground that he was an interested witness. According to him, to quote his own words, "there is a wide field for his profit should the alleged adoption stand", but it seems to me that if the plaintiffs' case is true, namely, that Mahadeo had a great influence over Chandrama Kuer there was equally a wide field for his profit even if there was no adoption. Chandra Kuer was entitled to retain possession of the properties until her death and Mahadeo, as her Chief Officer, might be expected to make some profit out of that estate if, as the learned Subordinate Judge says, he put forward the adoption in order to make profit out of it. It may be pointed out that the plaintiffs' case in the plaint is that Mahadeo Singh was the Tashildar of Brij Nandan and that on the plaintiffs' complaint against him Brij Nandan had dismissed him from service and that after the death of Brij Nandan Mahadeo Singh won over Jagatraj Koer and Chandrama Kuer and got himself engaged as their agent and that he obtained full control over the ladies and exerted undue influence over them. But it is remarkable that this case was not to put to Mahadeo Singh in the witness-box. In my opinion, there is no substantial reason for rejecting

the testimony of Mahadeo Singh especially as he was intimately acquainted with Brij Nandan and presumably knew his affairs. If, indeed, the boy who is alleged to have been adopted was in any way related to or connected with Mahadeo Singh, there would be ground for viewing his evidence with some amount of suspicion. But that is not the suggestion of the plaintiffs. Their suggestion, on the other hand, is that Mahadeo was so enraged by reason of the fact that at the instance of the plaintiffs he was dismissed from service by Brij Nandan that he entered into a conspiracy with Gokula Prasad Singh to introduce Gokula's son into the family as the adopted son of Brij Nandan. This case was not put to Mahadeo and we cannot investigate it. The next witness is Raghunath Singh, who is a Zamindar and a co-sharer of Brij Nandan having an income of Rs. 5,000 a year. His evidence is that, upon receiving the information of Brij Nandan's illness, he went to his house to see him. He says that he stayed with Brij Nandan for two days and left his house three days before his death. He says, further, that Brij Nandan was ill with fever and there was a rise and fall of his fever during the time that he stayed there. He asserts that in his presence Brij Nandan called Chandrama Kuer before him and gave authority to adopt a son to him. The next witness is Sheonandan Singh, brother of Chandrama Kuer. It is somewhat difficult to rely on his evidence as he could not have been more than 15 years at the time of the death of Brij Nandan. But it must be remembered that his evidence is against his apparent interest, the fact which the learned Subordinate Judge did not at all take into consideration. If the adoption did not take place, his sister remained the proprietor of the properties. If, however, it took place, then she was divested of any interest which she might possess in these properties. The next witness is Basudeo Singh who describes himself as a Zamindar and a cultivator. His evidence is that his father, on receiving the news of Brij Nandan's illness, sent him to Brij Nandan's house and that he was actually present when the authority was given by Brij Nandan to his wife to adopt a son to him. The only thing that can be said against this witness is, that there was a criminal case between Mahabir Singh, his uncle, and plaintiff No. 1. The next witness is Indra Dawan Singh, a substantial Zamindar, having an income of Rs. 12,000 a year. There is no reason whatever why his evidence should not be accepted, especially as he is not in the slightest degree interested in the case. His evidence is that three days before the death, Brij Nandan's servant came to him with a message that his master was seriously ill and that he wanted to see him. Brij Nandan obviously had sent for him and the others who have given evidence in the case in order that he might give permission to his wife to adopt a son to him in the presence of respectable witnesses. His evidence is that, in pursuance of the message which had been sent to him, he went to Brij Nandan's house and was actually present when the authority was given to Chandrama Kuer to adopt a son. It is suggested that this witness was an accused in the case brought by plaintiff No. 1, but the suggestion was not put forward to him and it would be most unfair to consider it in connection with a witness who apparently has no sort of interest in the dispute between the plaintiffs and the defendants.

It is unnecessary to go through all the evidence adduced on behalf of the defendants. It is sufficient to say that it appears to us to be reliable and of a class superior to that to which the witnesses called on behalf of the plaintiffs belong. Their evidence receives strong corroboration from the account-book which has been adduced in the case and there is no reason whatever why it should not be acted upon. I ought to mention that the evidence of the ladies who were examined on commission have made a deep impression on me. They seem to have given their evidence in a straight forward manner and there is no *prima facie* reason to reject their testimony. I quite concede that, if Chandrama Kuer had attempted by adoption to benefit her father's family, her evidence might be open to very grave suspicion: but the adoption which she sets up is that of the son of a nephew of her husband. The adoption was a natural one and against her pecuniary interest. There is no suggestion in the case that there was any enmity between her and the plaintiffs and there is no reason at all why she

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should have divested herself of her proprietary interest in the estate in favour of one who did not belong to her father's family, but was a relation of her husband; specially as there is no suggestion that there was any enmity between her and the plaintiffs.

The learned Subordinate Judge thought that the surrounding circumstances stood against the case of an adoption. The learned Subordinate Judge accepted the following facts for his decision on the point. Brij Nandan had no issue by his first wife though he had lived with her for 12 years from the time of the marriage. He then married defendant No. 1 and his married life with Chandrama Kuer did not last more than six or seven years. In the opinion of the learned Subordinate Judge, it is improbable that Brij Nandan should have given an authority to his wife to adopt a son as there was no reason why he should not have a child by her before his death. If the case of the plaintiffs that Brij Nandan died suddenly be accepted, then there may be something in the view which has been taken by the learned Subordinate Judge; but, in my opinion, the plaintiffs have entirely failed to establish that Brij Nandan died suddenly. I accept the case of the defendants that Brij Nandan had a protracted illness lasting for 24 days. If that be so, then what are the facts? First, that Brij Nandan married Chandra Kuer, obviously with the intention of having son by her; secondly, he was seriously ill and it may be that he took the view that he will not recover. It is not possible to say what was in the mind of Brij Nandan as he lay ill for 24 days: but, in my opinion, there is nothing improbable in the story set up by Chandrama Kuer that after an illness lasting for 24 days Brij Nandan gave authority to adopt a son to him. The learned Subordinate Judge thought that as on the evidence of defendants the condition of Brij Nandan had not materially changed on that critical day, namely, the 21st Baisakh it is improbable that he could have given her permission that day. That is the first line of attack adopted by the learned Subordinate Judge. The question, in my opinion, is not what view the defendants and their witnesses took of the illness of Brij Nandan, but what view Brij Nandan himself took of it. As to that there can of course be no evidence. The learned Subordinate Judge, then, changing his line of attack, thought that Brij Nandan must have had brain complications on the 21st Baisakh and, therefore, he was not in a proper state of mind to give any authority to his wife to adopt a son. The foundation for this opinion is, that there are entries in the book of account showing that Kasturi and Attar were purchased on the 20th and 21st Baisakh. The learned Subordinate Judge says that everybody knows that Kasturi and Attar are given to a patient when there are brain complications and that accordingly if the defendants' account-book be genuine, Brij Nandan was suffering from brain complications on the 21st Baisakh. In my opinion the reasoning is far too speculative to merit any examination. It may be that these articles were purchased for future use, if occasion arose for them, but no conclusion can be founded on the sole fact that Kasturi and Attar were purchased on the 20th and 21st Baisakh. In my opinion, having regard to the fact that Brij Nandan has lived through at least 18 years of married life without having a son the story told by the defendants becomes inherently probable. I hold that Brij Nandan did give authority to Chandrama Kuer to adopt a son to him.

The next question is, did Chandrama Kuer adopt a son in pursuance of the authority which was given to her? Now, on this point the evidence is all one way; but the learned Subordinate Judge has come to the extraordinary conclusion that there was no adoption by the widow. Now, it may be pointed out that if, in fact, Chandrama Kuer wanted to set up defendant No. 2 as her husband's adopted son, there is no reason at all why she should not have gone through the ceremony of adoption. The question would have stood on a different footing had it been raised after the death of Chandrama Kuer. There is absoultely no reason to hold that there was in fact no adoption when it was in the power of Chandrama to go through the ceremony of adoption. The evidence, in my opinion, is conclusive on the point. It appears that, before the adoption, Chandrama Kuer took the precaution for asking for Police help as she thought that the plaintiffs might create disturbances. Exhibit A is a personal diary of Sub-Inspector B. K. Roy and hi

report shows that he "left the Police station for Burdiha with constable Suleman and Sukhdeo Missir to see that no breach of the peace takes place at the time of adoption of a son to Chandrama, as ordered by the Magistrate." The Sub-Inspector has given evidence in the case, and he says that he did not go to Burdiha in order to preserve peace. The learned Vakil for the respondents has argued that his evidence of adoption (*sic*) for he does not say that he was present at the ceremony of adoption. This is true; but the evidence of the Sub-Inspector proves that Chandrama Kuer had made preparations for the adoption. In my opinion, it is impossible to say that no adoption in fact took place if Chandrama Kuer had in fact asked for Police and was prepared to go through the ceremony of adoption. With what object, it may be asked, would Chandrama Kuer not go through that ceremony if it was her desire to do so? There is no evidence on the other side worth considering. They were admittedly not present at the adoption and their evidence cannot possibly establish anything. In my opinion, there is abundant evidence to establish that defendant No. 2 was in fact adopted by defendant No. 1 on the 17th May 1916.

I would allow this appeal, set aside the judgment and decree passed by the learned Subordinate Judge and dismiss the plaintiffs' suit with costs in this Court and in the Court below.

ADMI, J.—I agree.

W. C. A.

Appeal allowed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 198 OF 1920.

March 16, 1922.

Present:—Mr. Justice Lindsay and Mr. Justice Stuart.

Chaudhri GOBERDHAN SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Chaudhri RAM BADAN SINGH—DEFENDANT—RESPONDENT

Malicious prosecution, action for—Evidence, necessary—Judgment of Criminal Court, whether sufficient.

In an action for malicious prosecution the plaintiff has to prove first that he was innocent and that his innocence was pronounced by the tribunal before which the accusation was made and it is not sufficient to put in the judgment of the Court which acquitted him. [p. 66, col. 1.]

Second appeal against a decree of the District Judge, Benares, dated the 11th November 1919.

Dr. *M. L. Agarwala*, for the Appellants.

Mr. *H. K. Mukerji* and Dr. *K. N. Katju*, for the Respondent.

JUDGMENT.—This appeal is against a decree of the learned District Judge of Benares upholding a decree of the Additional Subordinate Judge dismissing a suit for damages for malicious prosecution. The defendant-respondent made a report at a Police Station to the effect that certain persons had committed a riot and had assaulted him, being directed to do so by the plaintiffs-appellants. The Additional Subordinate Judge found that the witnesses for the plaintiffs who deposed that no such riot as that described in the report had been committed, were not worthy of credit. He found that the witnesses for the defendant who deposed that such riot had taken place were worthy of credit and he dismissed the suit for damages for malicious prosecution on the clear finding that the complaint made by the defendant was in fact true. He took a completely different view to the view taken by the Criminal Court which had found that the complaint was not substantiated.

The learned District Judge would have been better advised to have confined himself to the point to which the Additional Subordinate Judge had directed his attention. The view that he took must, however, be supported. It is as follows: He decided that inasmuch as the evidence produced by the appellants was unworthy of belief, their suit could not succeed. They set out to prove a specific case that nothing of any kind had happened as alleged in the plaint. They undoubtedly are found by the learned District Judge to have failed to prove that case.

In appeal it has been argued that all that the appellants had to do for the purpose of proving the falsity of the accusation was to put in the judgment of

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the Criminal Court which terminated in their acquittal. We do not, however, accept this view. In the words of Bowen, L. J. in *Abrath v. North Eastern Railway Company* (1): "In an action for malicious prosecution the plaintiff has to prove first that he was innocent and that his innocence was pronounced by the tribunal before which the accusation was made."

In any circumstances, we cannot disturb the finding of the learned District Judge. We accept his view that in the circumstances of this particular case the plaintiffs had failed to surmount their first obstacle inasmuch as the evidence which they produced in support of their case was unworthy of belief and did not establish their innocence. We would, therefore, dismiss this appeal with costs including fees on the higher scale.

J. P.

Appeal dismissed.

(1) (1883) 11 Q. B D. 440 at p. 455; 52 L. J. Q. B. 620; 49 L. T. 618; 32 W. R. 50; 47 J. P. 692.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1496 OF 1920.

January 12, 1922.

Present:—Mr. Justice Newbould.

ABHAIPADA SIRCAR, MINOR BY HIS BROTHER AND NEXT FRIEND RAM PADA SIRKAR AND OTHERS—PLAINTIFFS—APPELLANTS

versus

ATOR DOME—DEFENDANT—RESPONDENT.

Bengal Tenancy Act (VIII of 1885)—Transfer of Property Act (IV of 1882)—Under-tenancy—Ejectment—Law applicable.

Where it is established that the *jama* of an under-tenancy, from its inception, contained agricultural as well as homestead land, a suit to eject the under-tenant is governed by the provisions of the Bengal Tenancy Act, and not by those of the Transfer of Property Act. [p. 67, col. 1.]

Where the terms upon which a tenancy was created cannot be proved by direct evidence, the subsequent conduct of the parties may be considered with a view to determine the nature of the tenancy. [p. 67, col 2]

Appeal against a decree of the District Judge, Murshidabad, dated the 24th of March 1920, reversing that of the Munsif, 1st Court, at Berhampore, dated the 23rd of December 1918.

FACTS appear from the judgment.

Babu *Monmohan Bose*, for the Appellants.—I submit that it is for the defendant to establish that the *jama* of 10 *cottahs* contained at the time of its creation agricultural land as well as homestead. If he can conclusively prove that he can invoke the provisions of the Bengal Tenancy Act. The *onus* of proof lies upon the defendant.

I further submit that the learned Judge should not have reversed the decision of the primary Court without coming to a full and clear finding that the *jama* of 10 *cottahs* contained at its inception agricultural land. There has been no direct evidence given regarding the inception of the tenancy. So your Lordship is not to be bound by the finding of the learned Judge which he has come to on insufficient evidence. I challenge the finding by reason of its inadequacy. A mere *ipse dixit* of the lower Appellate Court cannot fetter your Lordship's decision. Your Lordship cannot read more things in the judgment than it contains. What I insist on is a remand for proper adjudication on evidence to be adduced by the defendant.

Babu *Atul Chandra Dutt* for Babu *Pepin Chandra Mullick*, for the Respondent.—I admit that the learned Judge is not happy in his language and that has created confusion in the mind of my learned friend. What can be the relevancy of *Babu Ram Roy v. Mahendra Nath* (1) as quoted by the learned Judge? The subsequent conduct of the parties also must be considered when no direct evidence is available. Remand is out of the question in view of the finding of the learned Judge in the lower Appellate Court.

Babu *Monmohan Bose* replied in short.

JUDGMENT.—This appeal is preferred against a decree of the District Judge of Murshidabad, reversing decree of the

(1) 8 C. W. N. 454.

SABAL SINGH v. SALIK RAM SINGH.

Munsif, First Court, Berhampur, for ejectment of the defendant. The facts of the case are as follows:—The land in suit is an area 4 *cottas* and two *chittaks* and forms part of a *jama* of 10 *cottahs* which at one time belonged to one Patai Sheikh and was purchased at an execution sale by the father of the plaintiffs. After his purchase the plaintiff's father sub-let a portion of it to the defendant who occupied it as homestead. The plaintiffs brought this suit on the ground that the defendant's tenancy had been terminated by notice to quit under the Transfer of Property Act. The lower Appellate Court has dismissed the suit on the ground that the Bengal Tenancy Act and not the Transfer of Property Act is applicable.

On behalf of the appellant the following statement of law in the judgment of the lower Appellate Court is not disputed: "If the defendant can establish that the *jama* of 10 *cottahs* contained at the time of its creation agricultural land as well as homestead, the contention that the Bengal Tenancy Act applies must prevail." It is contended on behalf of the appellant that though the lower Appellate Court has in the statement of the law rightly thrown the *onus* on the defendant he has in discussing the evidence shifted the burden on to the plaintiffs, and further that that Court has not come to a finding that the *jama* of ten *cottahs* contained at the time of its creation agricultural land.

There does not seem to be much substance in the first objection. There is no direct evidence as to the commencement of the tenancy. But in discussing the evidence as to the use to which the land was put since the time of Patai Sheikh the lower Appellate Court has considered the evidence on both sides and has come to a finding that since that time the *jama* of ten *cottahs* included the agricultural or horticultural land. That finding I must accept in second appeal.

The question remains whether that finding is sufficient. It is not a finding which expressly complies with the condition set out by the learned Judge on the earlier part of his judgment. There is not a distinct finding that the *jama* of ten *cottahs* contained agricultural land at the time of its creation. But reading the judgment as a whole, I hold that the learned Judge meant to come to such a finding. After coming to the finding stated above the learned Judge said: "Therefore, in accordance with the ruling in *Babu Ram Roy* v. *Mahendra Nath* (1) the defendant must be held to be an under-tenant under the Bengal Tenancy Act." The ruling cited could not be made applicable unless the tenancy contained agricultural land at the time it was created. In the case of *Bamapada Roy* v. *Midnapur Zemindary Co. Ltd.*, (2) it was held that where the terms upon which a tenancy was created cannot be proved by direct evidence the subsequent conduct of the parties may be considered with a view to determine the nature of the tenancy. I think the learned Judge by oversight has omitted to state that from the use of the land since the time of Patai Sheikh he draws a further inference that the *jama* from the time of its creation was an agricultural tenancy. Taking this view I hold his decision is right and dismiss this appeal with costs.

W. C. A. & B. N.

Appeal dismissed.

(2) 16 Ind. Cas. 376; 16 C. L. J. 322.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 177 OF 1921.

April 27, 1922.

Present:—Mr. Justice Piggott and Mr. Justice Walsh.

SABAL SINGH—DEFENDANT—APPELLANT

versus

SALIK RAM SINGH—PLAINTIFF—RESPONDENT.

Appeal, second—Finding of fact—Erroneous view of law—Finding inconsistent with facts established—High Court, power of, to interfere.

Where the finding of an Appellate Court proceeds upon an erroneous view of the law, and is inconsistent with the facts accepted by that Court as established, the High Court will interfere to set aside the finding. [p. 68, col. 2.]

First appeal from an order of the District Judge, Azamgarh.

SABAL SINGH v. SALIK RAM SINGH.

Mr. *U. S. Bajpai* for Mr. *K. N. Laghate*, for the Appellant.

Mr. *Iqbal Ahmad*, for the Respondent.

JUDGMENT.

PIGGOTT, J.—The question in issue in this suit was whether two brothers, Sarju Singh and Salik Ram Singh, were or were not members of a joint undivided Hindu family at the time of Sarju Singh's death. The Trial Court found that there had been separation and had given very strong reasons for that opinion. The learned District Judge has, on appeal, recorded a contrary finding and it has been pressed upon us that we ought to accept that as a finding of fact. He has undoubtedly endeavoured to record it as a finding of fact; but in arriving at his conclusion, he has misrepresented the law on the point and he has used expressions in his judgment inconsistent with own finding. The principal point against Salik Ram Singh, who was the plaintiff in the suit, was that he had made statements while under examination which virtually amounted to admitting that there had been separation. We know that there had been separation in residence and in mess, for Salik Ram Singh had gone to Calcutta and taken up service there, while Sarju Singh was living at home and looking after his cultivation. Sarju Singh sold a specified half share in the ancestral property, describing the same as his own share; and later on Salik Ram Singh himself sold the remainder and described it as his own share. The learned District Judge himself, in discussing the plaintiff's deposition, says that what the plaintiff deposed was that in the joint property in suit he and his brother, Sarju Singh, each had a half share. If each of them was the owner of a defined half share, then there had been a specification of shares sufficient, under the circumstances of the present case, to complete the break up of the joint family and to constitute each of the brothers a separated Hindu. It has been contended before us that the lower Appellate Court has acted upon the evidence as a whole, and there is, no doubt, some force in this argument. What the learned District Judge, however, says regarding the rest of the oral evidence is that the Munsif "admits" that the defendant's witnesses also say that Sarju Singh was joint with the plaintiff. Now, the Trial Court had noted that certain witnesses for the defendant had made statements against the defendant and in favour of the plaintiff's contention. He went on to say that those witnesses had, in his opinion, been won over by the other side and were deposing falsely. The lower Appellate Court has not said that it believes those witnesses, and it is certainly unsatisfactory in a high degree to see a carefully reasoned judgment dealt with on appeal as that of the Trial Court has been in this instance. It is sufficient, however, for us to say that, in our opinion, the finding of the lower Appellate Court proceeds upon an erroneous view of the law and that it is not a consistent finding, inasmuch as in his review of the evidence, and more particularly of the plaintiff's own deposition, the learned District Judge has recited, and apparently accepted as established, facts which would be sufficient to support the conclusion arrived at by the First Court and which are inconsistent with the finding of jointness recorded by the lower Appellate Court. Under the circumstances we think we are warranted in setting aside what we consider a clearly erroneous finding and restoring the decision of the Trial Court. We do accordingly set aside the order and decree of the lower Appellate Court and restore that of the Court of first instance, with costs throughout.

WALSH, J.—I agree. I think the case* relied upon by Mr. Uma Shanker Bajpai, although not an authority for anything but itself, as it does not purport to lay down any principle, and indeed the Judicial Commissioner from whom the appeal was brought had overruled the District Judge on a question of fact, so that their Lordships were free to take their own view of the matter, does, on the other hand, justify the view that where fundamental facts are admitted by a party inconsistent with his case and with his testimony, it does become a question of law whether, for example, jointness or separation can legitimately be found on such evidence, or to put it as their Lordships put it in the case in question:

"The conclusion in this case before us that the plaintiff was a member of a joint family is not a sound or a legitimate conclusion on the

*See *Amritrao* v. *Mukundrao*, 53 Ind. Cas. 806 (P.C.)—[*Ed.*]

facts proved and it, therefore, may be interfered with as an erroneous legal conclusion."

The learned Judge himself has done his best to support this view of the matter inasmuch as a sentence in the basic reasoning of his judgment contains a complete misstatement of the law, namely, the reference to the separate dealing of the half share in the joint property. I should not have thought it necessary to add anything to what my brother has said had it not been for the singular features of this judgment which may be due, it is true, to carelessness, but for which at present I am unable to suggest any reasonable explanation. The learned Judge uses this expression, which in itself is a misuse of language, in reference to a Judge whose judgment he is reviewing in appeal.

"The learned Munsif admits that the defendant's witnesses say that Sirju Singh was joint with the plaintiff."

A learned Judge or Munsif does not "admit," and the use of such language is totally misconceived and out of place in an Appellate Court's judgment. But the fact is that the learned Munsif was careful to state what was the sworn testimony of the defendant's witnesses to whom the District Judge refers and to add that in his opinion they were unworthy of belief because they had been got at by the other side. If that is so, it would appear that in the opinion of the Munsif there has been a certain amount of activity on the plaintiff's side independently of the proceedings in Court, and it would be well, in my opinion, if the learned Judge, to whom a copy of this judgment should be sent, would send an explanation, at any rate, to me, of the passages to which I have referred in his judgment.

W. C. A.

Appeal allowed.

LAHORE HIGH COURT.

LETTERS PATENT APPEAL No. 186 OF 1920.

December 6, 1921.

Present:—Sir Shadi Lal, Kt., Chief Justice, and Mr. Justice Harrison.

JAMNA DAS—PLAINTIFF—APPELLANT

versus

MURLI DHAR - DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 20—"Carries on business," meaning of—Joint Hindu family, members of, position of.

A man may carry on business either personally or through an agent, and although the manager of a joint Hindu family is not liable to account to the sleeping partners in precisely the same way as the manager of an ordinary business, his position approximates more nearly to that of an agent than to any other. He acts on behalf of the family and in its interests and it must be held that each individual member of the family carries on business wherever a branch of the family firm is in active existence. He is, therefore, liable to be sued even in a purely personal suit at any of these places just as a partner in an ordinary partnership is liable to be sued wherever a branch of the business exists. [p 70, col 1].

Letters Patent Appeal from an order of Mr. Justice Broadway, dated the 29th November 1920, affirming that of the Senior Subordinate Judge, Amritsar, dated the 5th January 1920.

Bakhshi *Tek Chand*, for the Appellant.

Pandit *Sheo Narain*, R. B., for the Respondent.

JUDGMENT.—The only question in this case is whether the Amritsar Courts have jurisdiction and what is the meaning to be attached to the words "carries on business" in section 20 of the Code of Civil Procedure when applied to individual members of a joint Hindu family. A suit for damages for malicious prosecution was instituted by the plaintiff Jamna Das against Murli Dhar personally in Amritsar. The plaint was returned by the Senior Subordinate Judge for prosecution in a competent Court. The plaintiff appealed and it was held by the learned Single Judge in Chambers, who heard the appeal, that the Amritsar Courts had no jurisdiction and that the plaint had been rightly returned. From this order the present appeal has been lodged. There is no dispute as to the facts. The suit is purely personal in its character and seeks damages for a tort alleged to have been committed

by the defendant who took unsuccessful proceedings against the plaintiff under section 500, Indian Penal Code, in the Hissar District. This defendant Murli Dhar and his father, Tara Chand, form a joint Hindu family carrying on a business as such with headquarters at Bhiwani in the District of Hissar. Tara Chand, the father, is the manager and as such not only directs and controls the business at Bhiwani but also a branch which exists in Amritsar. It is argued with considerable force that inasmuch as the defendant has admittedly no personal control over either branch and as the business is entirely conducted by his father, who is not responsible to him in the same way as a managing partner or an agent in a partnership based on a contract he can only be said to have had an interest in the business and that this is not the same as carrying on business. This view was accepted by the learned Judge in Chambers. Now, a man may carry on business either personally or through an agent, and although the manager of a joint Hindu family is not liable to account to the sleeping partners in precisely the same way as the manager of an ordinary business, his position approximates more nearly to that of an agent than to any other. He acts on behalf of the family and in its interests and, in our opinion, it must be held that each individual member of the family carries on business wherever a branch of the family firm is in active existence. He is, therefore, liable to be sued even in a purely personal suit at any of these places just as a partner in an ordinary partnership is liable to be sued wherever a branch of the business exists. The words used in section 20 are perfectly clear, and it is conceded by the learned Counsel for the respondent in this case that were his client a member of a partnership carrying on business at Bhiwani and Amritsar in the same way as this firm, managed by his father, carries on business he would be liable to be sued in his personal capacity in either place. He is, therefore, liable as a member of the joint Hindu family. We accept the appeal with costs and set aside the order of the learned Judge in Chambers and that of the Subordinate Court. We hold that the Subordinate Judge in Amritsar had jurisdiction to try the suit and we direct him to proceed with it and to dispose of it on the merits.

Z. K.

Appeal accepted.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1056 OF 1920.
April 10, 1922.
Present:—Mr. Justice Hafique and Mr. Justice Piggott.

PANCHAETI AKHARA MAHA NIRBANI—PLAINTIFF—APPELLANT

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—DEFENDANT—RESPONDENT.

Cause of action—Plaintiff deprived of goods by erroneous order of Magistrate—Suit for damages against Secretary of State, whether maintainable.

Plaintiff was lawfully in possession of certain ornaments as pawnee, which under the orders of a Magistrate he made over to the Police for production in Court in a criminal case: subsequently the ornaments were made over by an erroneous order of the Magistrate to the original owner. Plaintiff obtained an order from the Criminal Court directing the person to whom the ornaments were made over to re-place them in the possession of the Court, or else to make good their value; after only a trifling sum had been realised from him on account of their value, he became insolvent, whereupon the plaintiff brought the present suit for damages against the Secretary of State:

Held, that the plaint disclosed no cause of action against the Secretary of State, and that as the Criminal Courts were not the servants or agents of the Secretary of State he was not liable for damages if they made a mistake. [p. 71, cols. 1 & 2.]

Second appeal from a decree of the District Judge, Allahabad.

Dr. *Kailas Nath Katju* and Mr. *Kashi Narain Malaviya*, for the Appellant.

Mr. *Lalit Mohan Banerji*, for the Respondent.

JUDGMENT.—This was a suit for damages against the Secretary of State for India in Council. The plaintiff firm states that it was lawfully in possession as pawnee of certain ornaments; that it made them over to Gopal Ram, Court Inspector, Fyzabad, upon

his stating that the production of the same "was necessary under an order of the Magistrate in *Re King-Emperor* v. *Shambhu Dayal and Girdhari Lal* under section 420 of the Indian Penal Code, which was pending in the Criminal Court at Fyzabad." Subsequently according to the plaint, the ornaments in question were made over to their original owner, one Pashpat Nath, "by the Court of the Pargana Officer" at Fyzabad. The criminal case in question had been tried by the Court of the Assistant Sessions Judge of Fyzabad, and that was undoubtedly the proper Court to pass orders regarding the disposal of property in respect of which the offence or offences set forth in the charge tried by it had been committed. The plaintiff firm very properly applied to the Assistant Sessions Judge for relief and obtained an order from that Court directing Pashpat Nath to re place the ornaments in the possession of the Court, or else to make good their value. This would, of course, have satisfied the plaintiff; but it so happened that Pashpat Nath was unable or unwilling to re place the ornaments and that he became insolvent, after only a trifling sum had been realised from him on account of their value. The plaint asserts that "the Criminal Court at Fyzabad showed negligence and slackness in realising the remaining amount due from Pashpat Nath;" but admits that, once he had been "declared insolvent," nothing more was to be realised from him.

It is clear, therefore, from the plaint that the acts or omissions by which the plaintiff alleges himself to have been damnified were perpetrated by:—

(*i*) Gopal Ram, Court Inspector, Fyzabad.

(*ii*) The Court of the Pargana Officer at Fyzabad.

(*iii*) The Court of the Assistant Sessions Judge at the same place.

(*iv*) The Criminal Court at Fyzabad, which may or may not be identical with the second or third of the above.

It is nowhere alleged in the plaint how any of these four was acting, under the alleged circumstances, as servant or agent of the Secretary of State for India in Council, or how the said defendant is liable for damage suffered through the act of any one of them. In short, the plaint discloses no cause of action against the Secretary of State for India in Council. The case is very much on all fours with *Secretary of State for India* v. *Sukhdeo* (1); indeed the present plaintiff's position is much weaker than that of the plaintiff Sukhdeo.

The Courts below have, however, inquired into the facts of this case. It has been proved that Gopal Ram, Court Inspector, obtained possession of the ornaments under a warrant lawfully, and very properly, issued by a Court of competent jurisdition; the plaintiff has no cause of action on this ground. The return of the ornaments to Pashpat Nath was effected under an order, improperly passed by the Magistrate who had committed the criminal case for trial: the proper Court, that of the Assistant Sessions Judge, did its best to rectify the mistake. These Courts are not the servants or agents of the Secretary of State and he is not liable for damages if they make a mistake.

The suit has rightly been dismissed by both the Courts below; we dismiss the appeal with costs.

W. C. A.

Appeal dismissed.

(1) 21 A. 341; A. W. N. (1899) 151; 9 Ind. Dec. (N. S.) 926 (F. B.).

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2685 OF 1918.

December 5, 1921.

Present:—Mr. Justice Abdul Raoof and Mr. Justice Martineau.

PIRBHU AND OTHERS—PLAINTIFFS—APPELLANTS

versus

TOTA AND OTHERS—DEFENDANTS—RESPONDENTS.

Punjab Pre-emption Act (I of 1913), s. 7—Pre-emption—Custom—Proof—Fatehabad, Hissar District—Judgment based upon compromise, value of.

The custom of pre-emption does not exist in the town of Fatehabad in the Hissar District. [p. 72, col. 2.]

A judgment based upon a compromise or concession, though of some probative force, cannot be

placed on the same footing as one in which a custom was held to be proved or negatived after contest. [p. 72, cols. 1 & 2]

Imperial Oil, Soap and General Mills, Co. Ltd. Delhi v. *Misbah-ud-din*, 61 Ind. Cas. 325; 2 L. 83, followed.

Bhagwanti v. *Sohan Lal*, 116 P. R. 1908; 204 P. W. R. 1908, distinguished.

Second appeal from a decree of the District Judge, Hissar, dated the 12th June 1918, affirming that of the Subordinate Judge, Second Class, Hissar, dated the 5th November 1917.

Pandit *Nanak Chand*, for the Appellants.

Lala *Jagan Nath*, for the Respondents.

JUDGMENT.—The plaintiffs have sued for pre emption of a house in the town of Fatehbad in the Hissar District. The lower Courts have concurred in dismissing the suit on the ground that the existence of the custom of pre-emption in that town has not been proved. The view of the Trial Court was that the custom had originally existed, but had been abrogated, and that it was dying out in the seventies and eighties, since when there have been no instances of the exercise of the right. The lower Appellate Court has not expressed an opinion on this point, but has only decided that the plaintiffs have not succeeded in proving that any custom of pre-emption prevailed in the town of Fatehabad when the Pre-emption Act of 1913 was passed, and the point for determination in this second appeal is whether that decision is correct.

It is pointed out that Fatehabad is a town of Muhammadan origin, but this fact does not materially help the plaintiffs, as it does not relieve them from the burden of proving the existence of the custom.

A judgment in a contested suit of 1885 is relied upon, but as observed by the learned District Judge that suit was decided with reference to a decision in another suit a copy of the judgment in which has not been filed, and it appears that the claim was based on a condition in the *wajib-ul-arz*, which is not the case here. The judgment of 1885 is, therefore, of no value in the present case as evidence of the existence of the custom.

There are three cases of the years 1874, 1882 and 1890, in which decrees for pre-emption of houses at Fatehabad were passed on compromises, but as has been held in *Imperial Oil, Soap and General Mills Co Ld, Delhi* v. *Misbah ud din* (1), a judgment based upon a compromise or confession, though of some probative force, cannot be placed on the same footing as one in which after contest a custom was held to be proved or negatived.

The oral evidence as to the existence of the custom is scanty, and the statements of witnesses as to instances of the exercise of the right are not supported by documents, except the statement of Dulla, who says he acquired a house from one Sultan by right of pre-emption and produces the sale-deed, dated the 18th December 1895, in support of his statement. That also was a case of the vendee admitting the right of pre-emption and it is possible that the reason why Sultan re-sold the house to Dulla was that he got a higher price than the price he had himself given. He sold the house to Dulla for Rs. 200, and although the same price was entered in the deed by which he purchased the house in November 1895 only Rs. 150, were paid at the time of the registration of the deed, the remaining Rs. 50 being entered as having been received before.

Counsel for the appellants has referred to *Bhagwanti* v. *Sohan Lal* (2), in which the custom of pre-emption was held to be proved only on the strength of a few judgments in cases in which the question of custom was not fought out. But that case related to the sale of a house in Delhi City, and it was pointed out that there was ample authority for the proposition that the custom prevails very generally throughout the City of Delhi. The ruling referred to is quite inapplicable to the present case.

The plaintiffs have in our opinion not succeeded in proving the existence of the custom of pre-emption in the town of Fatehabad, and we accordingly dismiss the appeal with costs.

Z K. *Appeal dismissed.*

(1) 61 Ind. Cas. 325; 2 L. 83.

(2) 116 P. R. 1908; 204 P. W R. 1908.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER
No. 186 OF 1919.
April 5, 1922.

Present:—Mr. Justice Rafique and Mr. Justice Piggott.

THE LYALPUR SUGAR MILLS & CO. AND ANOTHER—DEFENDANTS—APPELLANTS

versus

THE RAM CHANDRA GUR SAHAI COTTON MILLS & CO., THROUGH SRI RAM—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XI, r. 14—Production of documents, non-compliance with order for, effect of.

The mere non-compliance with an order for the production of books and documents in Court, made under Order XI, rule 14 of the Civil Procedure Code, does not warrant the striking off the defence of the party which is guilty of the non-compliance of the order. [p. 75, col. 1.]

First appeal from an order of the Additional Subordinate Judge, Cawnpore.

Mr. *Kailas Nath Katju*, for the Appellants.

Mr. *B. E. O'Conor*, for the Respondent.

JUDGMENT.—There are three connected appeals before us to-day pending between the same parties, namely, Nos. 319 and 186 of 1919 and one other appeal from order which has been admitted by us to-day but which has not been numbered by the office. This last appeal which we have admitted and No. 186 of 1919 are appeals from orders. The appeal No. 319 of 1919 is a regular first appeal from an *ex parte* decree.

The facts which have given rise to the three appeals are as follows:—The parties to the three appeals are the Ramchandra Gur Sahai Cotton Mills Co., Ltd., as plaintiffs, and the Lyalpur Sugar Mills Co., Ltd., through their manager L. Jai Ram Das, and the Cotton Ginning Factory at Lyalpur through their proprietors L. Mathura Das and Thakur Das as defendants.

The plaintiff Company sued for the recovery of Rs. 32,759 8-0 as damages on the allegation that the defendants had promised to supply the plaintiff firm with 320 bales of Lyalpur cotton at Rs. 45 8 0 per maund to be delivered at Lucknow in the months of November and December 1917 and in the month of January 1918. The contract was entered into at Cawnpore on the 14th November 1917. The defendant failed to deliver the goods at the specified time. The plaintiff firm had to go into the market and purchase the bales of cotton that were required, and as in the meantime the price of the bales of cotton had gone up, the plaintiff firm suffered a loss of Rs. 32,759 8-0.

The suit out of which these appeals have arisen was instituted in the Court of the Additional Subordinate Judge of Cawnpore, on the 12th August 1918, presumably because the contract was entered into at Cawnpore and because Jai Ram Das, defendant No. 1, lives at Cawnpore and carries on his business there. Jai Ram Das purchases sugar from Messrs. Begg Sutherland & Co., Cawnpore, and carries on the business of selling sugar at Lyalpur. Thakur Das and Mathura Das admittedly live at Lyalpur where they have got a Cotton Ginning Factory. The suit was resisted on various grounds. The issues were fixed by the learned Additional Subordinate Judge on the 23rd October 1918. On the 23rd November 1918 the plaintiff firm made an application purporting to be under Order XI, rule 14. By the said application the plaintiff firm asked the Court to require the defendants to produce into Court certain books and other documents which were detailed in the application. On the 29th November 1918 the learned Subordinate Judge made an order to the effect that notice should be issued. On the 13th January 1919, a notice on the said application was issued and was served upon the Pleader for the defendants. The notice was in the form No. 6 given in Appendix C to the Code of Civil Procedure. As the notice was not complied with, a second application was made on behalf of the plaintiff firm on the 4th April 1919. The Pleader for the defendant No. 1 stated to the Court that the papers called for by the Court will be produced if all or any of them were found in the possession of Jai Ram Das. No papers seem to have been filed. On the 24th April 1919, a third application was made on behalf of the plaintiff firm to the same effect. A notice was issued which was affixed to the gate of the house of Jai Ram Das as the latter was not found at home. This application also proved infructuous. On the 2nd June 1919 a fourth application was made on behalf of

the plaintiff firm to the same effect. The learned Subordinate Judge allowed the defendant No. 1 to produce the documents called for within ten days. The order was not complied with. On the 28th July 1919 the plaintiff filed an application purporting to be under Order XI, rule 15. The learned Subordinate Judge directed that notice should issue. The notice was served upon the Pleader for defendant No. 1 on the 4th August 1919. The case came up for hearing on the 12th August 1919 and the plaintiff firm applied to the Court for an order striking off the defence of the two defendants. The learned Subordinate Judge put off the case to the 15th August 1919, directing the production of the books and the documents called for from Jai Ram Das. On the 15th August 1919, Jai Ram Das filed an application stating that he had the books with him in Court and implying that he had brought them also into Court before but stating that none of the books or documents was in any way relevant to the dispute between him and the plaintiff firm. He, however, offered to make over the books to the Court and allow their inspection. This offer was not accepted by the plaintiff firm which insisted upon its prayer to the Court to strike off the defence, and the learned Subordinate Judge acceded to the request of the plaintiff firm.

So far we have recited the facts that led to the striking off the defence of Jai Ram Das. The facts relating to the striking off the defence of Mathura Das and Thakar Das are somewhat different. On the 24th April 1919, interrogatories were filed on behalf of the plaintiff with a request that they should be served upon Mathura Das and Jai Ram Das for replies. The interrogatories for Mathura Das were served upon his Pleader. Jai Ram Das made replies to the interrogatories that were served upon him and they were filed on the 23rd May 1919. No replies were received from Mathura Das. The plaintiff firm again applied to the Court to compel Mathura Das to file answers to the interrogatories. The Pleader for Mathura Das stated that there was Martial Law at Lyalpur and he could not get into touch with his client. On the 17th June 1919, the learned Subordinate Judge made an order that the replies to the interrogatories should be filed into Court within ten days after the termination of the Martial Law at Lyalpur. On the 23th July 1919, no replies having been received, the plaintiff firm asked the Trial Court to strike off the defence of Mathura Das. The Pleader who was appearing for him stated that though Martial Law had been withdrawn yet the whereabouts of his client were not known. He had made all attempts to get into communication with him but had failed. Thereupon the case was put off to the 12th August 1919. On the 12th August 1919, the Pleader for Mathura Das stated that he had received a wire from his client that he (Mathura Das) was suffering from fever and could not reach Cawnpore in time. The Pleader asked for an adjournment which request was rejected. The defence of Mathura Das was thereupon struck off on the 12th August 1919. In respect of the application against Jai Ram Das referred to above, the learned Subordinate Judge, according to the learned Counsel for Jai Ram Das who appears before us, made an oral order on the 13th August 1919, striking off the defence of Jai Ram Das also. The written order was, however, made on the 28th August 1919. The statement of the learned Counsel for Jai Ram Das that the defence of his client was struck off really on the 15th August 1919, is borne out by the fact that the claim of the plaintiff firm was tried on the 16th August 1919 *ex parte*. The suit was tried and the 16th August 1919, and decreed *ex parte* the same day.

Jai Ram Das and Mathura Das have preferred two separate appeals from the orders striking off their defence. The appeal of Jai Ram Das is No. 186 of 1919 and the other appeal is the one that has not yet been numbered. The third appeal, *i. e.*, the one from the *ex parte* decree, No. 319 of 1919, is jointly by Jai Ram Das and Mathura Das. They contend that the orders of the learned Subordinate Judge striking off their defences are invalid in law and in any case were passed without the exercise of proper discretion.

We will take up the case of Jai Ram Das first. There is no doubt that several attempts were made by the plaintiff firm to compel Jai Ram Das to produce in Court certain documents. All the applications on behalf of the plaintiff firm except the last one dated the 28th July 1919, were applications under Order XI, rule 14. They were merely for the production of documents into-

Court. At the first blush it does appear that the conduct of Jai Ram Das was contumacious, but we find that there is evidence on the record to show that as early as the 31st May 1919 in answer to the interrogatories served upon him by the plaintiff firm he had stated distinctly that the documents that were called for from him were not in his possession. But if it be conceded for the sake of argument for a moment that Jai Ram Das was guilty of disobedience of the order of the Court, was the Court justified in striking off his defence? The order of the Court to Jai Ram Das to produce the books was an order made under Order XI, rule 14. The non-compliance of that order does not warrant the striking off the defence of the party which is guilty of the non-compliance of the order. The grounds upon which the discretion is given to a Trial Court for striking off the defence of a defendant are given in rule 21 of Order XI of the Civil Procedure Code. According to the said rule there are three grounds only upon which a Trial Court is justified in striking off the defence of a defendant or dismiss the suit of a plaintiff, namely, (1) the refusal to answer interrogatories, (2) the refusal to make discovery of documents, (3) refusal to permit inspection of documents. Now, rule 14 of Order XI of the Code of Civil Procedure does not relate either to the answering of interrogatories or the discovery or inspection of documents. The rule relating to discovery is embodied in rule 12 of Order XI and the rule relating to the inspection of documents is to be found in rule 18 of the same Order. In the present case the learned Subordinate Judge made no order either under rule 12 or rule 18 of Order XI of the Code of Civil Procedure. It is, however, contended on behalf of the plaintiff firm that the notice which was issued to Jai Ram Das was one that required inspection of documents called for from him. The form of notice to be issued under Order XI, rule 14 is given in Appendix C, Form No. 6. The notice that was issued in the present case does not comply with the Form given in Appendix C. The said Form begins thus:—

"Upon hearing ...and upon reading the affidavit of...filed...the day....."

In the present case no affidavit was filed on behalf of the plaintiff stating the reasons for which the books were summoned from Jai Ram Das or showing in what manner were they relevant to the dispute between the parties. It is, however, contended that when a set form is given by the Legislature for the issue of notice and that form is complied with, the notice, if not bad, would entail the penalty exacted by the Trial Court from Jai Ram Das. The argument may be called a technical argument. The obvious reply, a technical one also, is that the notice which we find on the record is not strictly in accordance with Form No. 6. As we find that the learned Subordinate Judge had made no order for the inspection of documents and indeed he could not have made one as the provisions of rule 18 of Order XI had not been complied with, the non-compliance of the order to produce books or documents into Court did not justify the Trial Court to strike off the defence of Jai Ram Das.

Now we take up the case of Mathura Das. The interrogatories were served upon his Pleader. There is no material on the record to show whether the Pleader sent those interrogatories to Mathura Das. It may, however, be said that if they were not sent that was the fault of the Pleader, and the omission by the Pleader would in no way affect the right of the plaintiff to demand the Court below to enforce the provisions of rule 21, Order XI against Mathura Das. However that may be, it is in evidence that Lyalpur was under Martial Law up to somewhere in the beginning of July 1919. Subsequent to the date the Pleader for Mathura Das lost touch with him and could not get into communication with him. On the 12th August 1919, before the order for striking off the defence of Mathura Das was made, his Pleader requested the Court to allow a few days to enable his client to come up to Cawnpore on the ground that his client had been ill with fever. The statement of the Pleader may or may not have been correct but we think that under the circumstances of the conditions of life in the Punjab at that time, the learned Subordinate Judge would have exercised a wiser discretion in allowing a few days' adjournment to Mathura Das. Moreover, if the case has to go back for the admission of the defence of Jai Ram Das, the trial would be quite incomplete

if the defence of Mathura Das is kept out. We, therefore, allow both the appeals of Jai Ram Das, and Mathura Das and set aside the orders of the learned Subordinate Judge, dated the 12th August and the 28th August 1919, respectively, striking off the defence of Jai Ram Das and Mathura Das. The result, therefore, is that we set aside the *ex parte* decree in the connected Appeal No. 3 9 of 1919 and also direct that the case be restored to the file of the Court below, defences from Jai Ram Das and Mathura Das received, and the case tried according to law. As to costs we direct that they should be costs in the cause including fees in this Court of all the three appeals on the higher scale.

W. C. A.

Appeals allowed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 953 OF 1921.

November 8, 1921.

Present:—Mr. Justice Scott-Smith.

SUKHA RAM—DEFENDANT—APPELLANT

versus

KOTU RAM—PLAINTIFF, NEBA RAM—DEFENDANT—RESPONDENTS.

Pre-emption—Hindu Law—Joint family—Sale by father—Necessity—Son, whether can pre-empt.

The sons in a joint Hindu family cannot maintain a suit to pre-empt a sale of joint family property made by the father as managing member of the family and which is not alleged to be otherwise than for necessity. [p. 76, col. 2.]

Pratap Narain Singh v. *Shiam Lall*, 55 Ind. Cas. 37; 42 A. 264; 18 A. L. J. 116; 2 U. P. L. R. (A) 32, relied upon.

Second appeal from a decree of the District Judge, Mianwali, dated the 23rd January 1921, reversing that of the Senior Subordinate Judge, Mianwali, dated the 10th August 1920.

Lala *Jagan Nath*, for the Appellant.

Mr. *Dev Raj Sawhney*, for the Respondents.

JUDGMENT.—Plaintiff, a Hindu shopkeeper living in a village, brought two suits for pre-emption in regard to two sales each of half a site with a *kotha* effected by his father on the same day in favour of two different vendees. The First Court dismissed the suits holding that they were collusive that the father and son were joint; that the managing member of the joint Hindu family could sell his son's share in family property, and that to allow the son to pre-empt such a sale would be tantamount to allowing him to pre-empt his own sale. The lower Appellate Court held that there had been no waiver and that there was no proof of collusion. It was of the opinion that the reason why a son in a joint Hindu family is debarred from pre-empting is because the son through his father is himself a vendor. It went on to say that the parties are certainly Aroras; but in a case like the present the onus must lie on the plaintiff (probably the defendant was meant) to prove that the strict rules of Hindu Law apply to the case and debar the son from pre-empting. It held further that the place where the property in suit was situated was a village and decreed the plaintiff's claim with costs. The defendant in each case has filed a second appeal in this Court.

Counsel for the appellant cited *Pratap Narain Singh* v. *Shiam Lall* (1) as an authority for the proposition that the sons in a joint Hindu family cannot maintain a suit to pre-empt a sale of joint family property made by the father as manager and for legal necessity. He urges that there is no reason in the present case to go deeply into the question whether there was legal necessity for the sale, because the plaintiff in his plaint never said that the sale was made without necessity. He admitted the factum of sale in each case and sued to pre-empt. Mr. Dev Raj for the respondents distinguishes the present case from the one reported as *Pratap Narain Singh* v. *Shiam Lall* (1) on the ground that the sale there was one for necessity and not against the wishes of the co-sharers. As, however, remarked above, there was no allegation of the plaintiff that the sale was not for necessity, and I do not think that this point can be raised now.

Counsel for the respondent also urges that his client did not call evidence to prove that

(1) 55 Ind. Cas. 37, 42 A. 264; 18 A. L. J. 116; 2 U. P. L. R. (A.) 32.

he was separate from his father because there was no issue on the point. It is true that there was no specific issue on this point, but the Trial Court found that the father and son were joint and in the grounds of appeal to the lower Appellate Court, while this finding was contested, no objection was taken to the fact that no issue on the point had been framed, and that the plaintiff was thereby prejudiced. A perusal of the lower Appellate Court's judgment leads to the inference that the first Court's finding that the father and son were joint was probably not argued at all, and in any case the Court accepted this finding as correct. The initial presumption is that the father and son are members of a joint Hindu family, and there is evidence on the record to show that they were, and the initial presumption does not seem to have been rebutted. As already stated, the plaintiff and his father are Arora shop-keepers and the initial presumption is that they are governed by their personal laws, and I do not think the lower Appellate Court was right in saying that the onus lay on the party alleging it to prove that the strict rules of Hindu Law apply to the case and debar the son from pre-empting. I think the rules of Hindu Law must be held to apply to the present case as there is no proof to the contrary. Plaintiff's father is presumably the managing member of the family, and *prima facie* the sale by him, which was not alleged to be otherwise than for necessity, is binding on the son, and in accordance with the decision in *Pratap Narain Singh* v. *Shiam Lall* (1) the plaintiff cannot pre-empt such a sale.

I, therefore, accept the appeals, set aside the orders of the lower Appellate Court, and restore those of the First Court dismissing the plaintiff's suits, and I direct that the plaintiff should pay the costs of each defendant throughout.

Z K & W. C A.

Appeal accepted.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 199 OF 1918.

June 21, 1921.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Buckland.

Bibi JINJIRA KHATUN AND OTHERS—DEFENDANTS—APPELLANTS

versus

MAHOMED FAKIRULLA MEA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Muhammadan Law — Wakf— Mussalman Wakf Validating Act (VI of 1913), s. 3 (b)—Wakf for payment of debts of settlor out of rents and profits of dedicated property, legality of—Provision for discharge of mortgage-debt if makes wakf *invalid—Delivery of possession, if pre-requisite for validity of* wakf—Marz-ul-maut—*Disposition of more than one-third share of property without consent of heirs, whether valid—What constitutes death-illness—Mixed question of law and fact.*

Under section 3 (*b*) of the Wakf Validating Act, it is lawful for a person professing the Mussalman faith to create a *wakf* for the payment of his debts out of the rents and profits of the property dedicated. [p. 79, col. 2.]

A *wakf* is not invalidated by reason of the circumstance that the property dedicated was under mortgage and that provision was made in the *wakf-nama* for the discharge of the mortgage-debt. [p. 80, col. 2.]

Under the Hanafi Law delivery of possession is not a pre-requisite to the validity of a *wakf*, and even if transmutation of possession is necessary, no formal delivery is essential when the settlor is himself the first *mutwalli*. [p 82, col 1.]

A Muslim who is in *marz-ul-maut* or death-illness cannot make a valid disposition of more than one-third of his property, and if he purports to make a *wakf* in such illness, unless his heirs assent, the *wakf* will affect only one-third of his estate and will be invalid in respect of the excess; this principle operates, notwithstanding that possession of the entire property dedicated has been delivered to the person nominated *mutwalli*. [p. 82, col. 2.]

In order to establish the existence of death-illness, there must be at least three conditions with regard to the illness which has caused death, namely, (*a*) proximate danger of death, so that there is a preponderance of apprehension of death; (*b*) there must be some degree of subjective apprehension of death in the mind of the sick person; and (*c*) there must be some external indicia, such as inability to attend to ordinary avocations. [p. 82, col 2.]

Whether or not a particular illness constitutes *marz-ul-maut* is primarily a question of fact but it may sometimes be a mixed question of law and fact, for instance, where the question arises whether the facts found as to the physical condition of the deceased at the date of execution of the deed constitute the essential elements of a *marz-ul-maut* as formulated by Muhammadan jurists. [p. 82, col. 2.]

JINJIRA KHATUN v. MAHOMED FAKIRULLA MEA.

Appeal against a decree of the Subordinate Judge, Rajshahi, dated the 26th March 1918.

Babus *Dwarka Nath Chuckerbutty*, *Bhudar Haldar* and *Bankim Chandra Mookerjee*, for the Appellants.

Babus *Sarat Chandra Ray Chaudhuri*, *Krishna Kamal Mitra*, *Satyendra Nath Singha* and *Indu Bhushan Majumdar*, for the Respondents.

JUDGMENT.

MOOKERJEE, J.—This is an appeal by the first two defendants in a suit instituted by the plaintiffs for a declaration that a *wakf* executed by the late Mahomed Elahi Buksh Sarkar on the 31st January 1915 is valid, that the first plaintiff is the duly appointed *mutwalli* thereof and that no title accrued to the seventh defendant under the conveyance executed in his favour by the first six defendants on the 11th April, 1916. The defendants resisted the claim upon every conceivable ground; the chief objections are indicated in the following three issues:

"6. Was Elahi Buksh Sarkar at the date of execution of the *wakfnama* suffering from death-illness? Was he physically and mentally incapable of executing the *wakfnama* when it is alleged to have been executed? Did Elahi Buksh Sarkar execute the *wakfnama*, if at all, with his free consent and with that of his heirs?

"7. Did Elahi Buksh Sarkar belong to *Shafi* sect of Muhammadan? If so, is the alleged *wakf* valid?

"8. Is the *wakfnama* propounded by the plaintiff genuine and legally valid?"

The Subordinate Judge has found in favour of the plaintiffs upon all the points in controversy and has decreed the suit. Upon the present appeal, his decree has been challenged substantially on four grounds, namely, first that the *wakf* as is indicated by its terms was illusory and inoperative in law, secondly, that the *wakf* was invalid because the settlor was at the time heavily involved in debts and the properties dedicated were under mortgage; thirdly, that the *wakf* was invalid, as possession of the properties dedicated was not transferred to the *mutwalli* during the lifetime of the settlor; and fourthly, that the *wakf* in excess of a third share was invalid, as it was executed when the settlor was suffering from *marz ul-maut* or death-illness and without the consent of his heirs.

As regards the first point, it is plain that the legality of the dedication which, it is not now contested, was in the present case made by a Hanafi Mussalman, must be tested with regard to the provisions of the Mussalman Wakf Validating Act (Act VI of 1913). This Act came into force on the 7th March 1913, and in sections 3 and 4 provides as follows:

"3 It shall be lawful for any person professing the Mussalman faith to create a *wakf* which in all other respects is in accordance with the provisions of Mussalman Law, for the following among other purposes:—

"(*a*) for the maintenance and support wholly or partially of his family, children or descendants, and

"(*b*) where the person creating a *wakf* is a Hanafi Mussalman, also for his own maintenance and support during his lifetime or for the payment of his debts out of the rents and profits of the property dedicated:

"Provided that the ultimate benefit is in such cases expressly or impliedly reserved for the poor or for any other purpose recognised by the Mussalman Law as a religious, pious or charitable purpose of a permanent character.

"4 No such *wakf* shall be deemed to be invalid merely because the benefit reserved therein for the poor or other religious, pious or charitable purpose of a permanent nature is postponed until after the extinction of the family, children or descendants of the person creating the *wakf*."

We shall now analyse the provisions of the *wakfnama*, to show that they do not contravene the requirements formulated by the Legislature. The preamble recites that the settlor is a Hanafi Mussalman and that he is anxious to attain salvation, though he also realises the paramount duty of every one to provide for the maintenance and worldly expenses of his own self and family, children and descendants. He accordingly creates the *wakf* for religious purposes, for the mainten-

ance of his own self and family, children and descendants, and also to prescribe a suitable means for the payment of all his debts. Then follow detailed rules in seven paragraphs. The first paragraph lays down that the settlor shall be *mutwalli* during his lifetime and then describes how the office of *mutwalli* shall be held by his descendants from generation to generation, or in the event of extinction of his line, by suitable persons selected by the District Judge. The second paragraph describes the expenses to be met from the gross collection of the *wakf* estate. The third paragraph provides that one-eighth of the net income is to be spent for specified religious purposes, such as, prayer in mosques, instruction in religion and morals, distribution of alms, feeding of the poor and the like. The fourth paragraph provides that one fourth of the net income is to be annually devoted for the liquidation of a mortgage debt of Rs. 20,000. After clearance of the debt, the amount is to be regularly applied in the payment of monthly allowances to poor Mussalman students. The fifth paragraph provides that one half of the net income is to be applied for the payment of maintenance allowances to the descendants of the settlor in specified proportions; on failure of the person or persons to whom allowances are directed to be paid, their share of the money is to be applied for one or more of the religious acts previously mentioned. The sixth paragraph provides that one-sixteenth of the net income shall be carried to a reserve fund for payment of rent and revenue, if at any time there should be no good collection of rent from scarcity of crops due to drought or inundation. The seventh paragraph provides that the remaining one sixteenth of the net income shall be received by the *mutwalli* as his remuneration. This summary of the leading provisions of the *wakf* leaves no room for serious controversy that the dedication cannot in any sense be deemed illusory. Although provision is made for the maintenance and support of the family, children and descendants of the settlor, the ultimate benefit is reserved for the poor and for other purposes recognised by the Muhammadan Law as religious, pious, or charitable purposes of a permanent character. Indeed, there is an immediate gift to charity of a substantial character. We hold accordingly that tested in the light of the provisions of the Mussalman Wakf Validating Act, no valid objection can be taken to the legality of the *wakf*.

As regards the second point, it is plain that under section 3 (*b*) of the Wakf Validating Act, it is lawful for a person professing the Mussalman faith to create a *wakf* for the payment of his debts out of the rents and profits of the property dedicated. This is in accord with the case of *Luchmiput Singh* v. *Amir Alum* (1), which is an authority for the proposition that a Hanafi Mussalman may execute a valid *wakf* by a deed which directs that the income of the property dedicated should be applied, in the first instance, for the payment of his debts, and after the discharge thereof, towards defined religious and charitable purposes. In an earlier case *Shahazadee Hazara Begum* v. *Khaja Hossein Ali Khan* (2) it had been held by Sir Barnes Peacock, C. J., that the existence of a mortgage at the time of creation of the endowment, does not render the endowment invalid under the Muhammadan Law. This view is supported by texts of the highest authority. Thus in the Fatawai Alamgiri (Text, Volume II, page 458, Baillie, Digest, Part I, page 563) it is stated on the authority of the Fath-ul-Kadir (Text, Volume II, page 638):

"It is not a condition that the property dedicated should be free from the rights of others (*hakh-ul-ghair*) as in the case of pledge and bailment, so that if one were to give a lease of his land and were then to make a *wakf* of it before the expiration of the term, the *wakf* would be binding according to its conditions, and the contract of lease would not be voided, but on the expiration of the term the land would revert to the purposes to which it was dedicated. In like manner, if a man were to mortgage his land, and then dedicate it before redeeming it, the *wakf* would take effect, but the land would not be withdrawn in the same way from the mortgage, and if it should remain for years in the hands of the mortgagee and then be redeemed, it would revert to the uses for which it was made *wakf*. And if the mortgagor should die before redemption, yet if he should leave sufficient inheritance to redeem the land, it is to be redeemed and the *wakf* would take effect. But if he should not leave enough for

(1) 9 C. 176; 12 C. L. R. 22; 4 Ind. Dec. (N. S.) 769.
(2) 12 W. R. 493; 4 B. L. R. A. C. J. 86.

that purpose, the land may be sold and the *wakf* would become void. In the case of a lease, when either the lessor or lessee dies, the lease becomes void, and the *wakf* immediately takes effect; so in the Fath-ul Kadir."

The statement in the Durr-ul-Mukhtar (Text page 417, tr, Brijmohan Dayal, page 358) is expressed in similar terms:

'*Wakf*, during his (the dedicator's) death-illness, has the same effect as gift during that period, that is, it is valid to the extent of a third (of the dedicator's estate) when possession is delivered. Now if the *wakf* can take effect out of a third (of the dedicator's estate) or (his) heir sanctions it, it would take effect in full, otherwise it would fail so far as it exceeds the third. If the heir sanctions it in part, it would be vaild to that extent. *Wakf* created by one who has mortgaged his property and is in bad circumstances as well as by an ill person who is heavily indebted is ineffectual, but not by a debtor who is not ill, provided he creates it before his becoming incompetent (for dedicating his property on account of his heavy debts). If a dedicator who is indebted provides for the payment of his debts out of the usufruct, the *wakf* shall be valid, but should he make no such provision, the debt shall be paid out of surplus income, after meeting the expenses of the trust economically. If he dedicates the property for the benefit of a person other than himself; then the income of the dedicated property shall belong to him exclusively for whom it is dedicated—Fatwa of Ibn-i-Najeem.

I say that Ibn-i Najeem has said that the debt must be heavy, because if it is not heavy, dedication shall be valid to the extent of a third of the dedicator's estate after payment of debts, in case the dedicator has got heirs, otherwise in respect of the whole of it. If a Kazi sells the endowed property (to pay off the debts) and then some money is found, another land shall be purchased instead of the one sold. The whole of this discussion is to be found in the Is'af, under the Chapter on Wakf by Sick People.

In the Wahbaniah it is said:

"If one dedicates mortgaged property and then redeems it is lawful. If he dies leaving behind money sufficient for redemption, no change (in the dedication) shall be necessary; that is to say, if he does not leave behind so much money, the *wakf* would fail or (the defraying of the expenses of the trust out of) the usufruct will be suspended (till payment of debt).

I say that in the Maroczat of Mufti Abu Saud it is recorded that he was enquired as to whether it was valid for a man to dedicate his property for the benefit of his descendants and thus avoid payment of his liabilities. His reply was that it is not valid and binding and that Kazis are forbidden from enforcing and registering such trusts so far as the liabilities extend. So remember this."

In our opinion, there can be no room for real doubt that the *wakf* in the present case is not invalidated by reason of the circumstance that the property dedicated was under mortgage and that provision was made in the *wakfnama* for the discharge of the mortgage-debt.

As regards the third point, it has been urged that the *wakf* must be pronounced invalid, in the absence of conclusive evidence to show that the possession of the properties dedicated was transferred to the *mutwalli* during the lifetime of the settlor. There is some divergence of opinion among classical Mussalmān jurists on the question of the elements essential for the completion of a valid *wakf*. Under Hanafi Law, a *wakf* is completed, (*a*) according to Abu Yusuf, by the mere declaration; (Hedaya tr. Hamilton and Grady, pages 233, 239, 240, Baillie, Part I, pages 551, 591), *Doyal Chund Mullick* v. *Syud Kerumut Ali* (3); (*b*) according to Imam Muhammad, it is completed, only if after the declaration a *mutwalli* is appointed and possession is delivered to him; *Muthukana Ana Ramanadhan Chettiar* v. *Vada Levvai Marakayar* (4), (*c*) according to Abu Hanifa, it is completed, except in the case of a testamentary *wakf*, only when a decree of the Court declares that the property is the subject of a *wakf*, but not before; this is analogous to the *in jure cessio* of Roman Law and the *fines* of early English Law; (Hedaya tr. Hamilton and Grady, page 233; Baillie, Part I, page 550). In *Doe d. Jaun Beebee* v. *Abdullah Barber* (5), Ryan,

(3) 16 W. R. 116.

(4) 6 Ind. Cas. 1; 34 M. 12; 8 M. L. T. 16; 20 M. L. J. 254; (1910) M. W. N. 180.

(5) (1838) Fulton 345; 1 Ind. Dec. (o. s.) 848.

C. J., and Grant, J., held, after reference to the Muhammadan Law officers, that the exposition of Hanafi Law by Abu Yusuf on this point should be adopted, in other words, that a valid *wakf* is created by declaration of endowment by the owner and delivery of possession is not essential. This decision, so far as we have been able to trace, does not appear to have been doubted in this Court, and was followed in *Ramzan Mistri* v. *Zahur Hossain* (6), as an authority for the proposition that the appointment of a *mutwalli* is not essential to the validity of a *wakf*. It may also be observed that in *Khziah Hossain Ali* v. *Shahzadee Hazara Begum* (7), Mr. Justice Kemp, whose opinion prevailed against that of Mr. Justice Markby and was upheld on appeal under the Letters Patent *Shahazadee Hazara Begum* v. *Khaja Hossain Ali Khan* (2), observed that decisions are primarily given according to Abu Yusuf and next according to Imam Muhammad; and this preference to the opinion of Abu Yusuf is supported by the statement in the Fatawai Alamgiri (Text, Volume II, pages 454-455). Reference may also be made to the following passage from the Suzzat-ul-Fatawa, page 430:

"Though according to Muhammad, consignment of the dedicated property and separation of it (from the other properties of the *wakf*) are necessary to the completion of a *wakf*, according to Abu Yusuf, the *wakf* becomes absolute and binding, like emancipation, on the mere declaration of the *wakf*, and his right therein becomes extinguished at once. And in the Khulasa it is laid down that the jurists of Balkh decide according to the rule laid down by Abu Yusuf, and Sadr-ush-Shahid has stated that the Fatwa is according to him; and in the Fath-ul-Kadir it is mentioned that Abu Yusuf's opinion is the accepted doctrine and in the Munnieh it is stated that the Fatwa is with Abu Yusuf, and this is the rule accepted by the jurists of Balkh. But the Bokharites have adopted Muhammad's opinion. And in the Shar-i-Vikayah and the commentary of Mulla Khusru (the Durrar ul-Ahkam) it is laid down that the Fatwa is with Abu Yusuf. In some places, it is mentioned in the Khanieh (Fatawai Kazi Khan) that the Fatwa is with Muhammad. But in the Muhit it is laid down that the universality of our jurists have adopted the rule laid down by Abu Yusuf—and this is correct."

In a recent case in the Allahabad High Court, however, *Muhammad Aziz-ud-din Ahmad* v. *Legal Remembrancer* (8), where the decision in *Doe d. Jaun Beebee* v. *Abdullah Barber* (5) was not brought to the notice of the Court, preference was given to the opinion of Imam Muhammad. We do not see sufficient reason to depart from the rule which was enunciated more than eighty years ago by the Supreme Court and is not shown to have been ever successfully challenged. We notice that the question was raised but not actually decided in *Banubi* v. *Narsingrao* (9), inasmuch as, in the circumstance of that case, there was neither declaration of *wakf* nor delivery of possession; a mere intention to set apart property for charitable purposes was clearly not sufficient to create a valid *wakf*: *Mulla Veettil* v. *Subramania Ayyar* (10). In the present case, there is a further difficulty in the path of the appellants. Here the settlor had appointed himself as the first *mutwalli* and in such a contingency, no formal delivery of possession from himself to himself would be necessary even according to Imam Muhammad: *Abdul Raiak* v. *Bai Jimbabai* (11). We must further remember that the *wakfnama* was executed on the 31st January 1915, and the settlor died on the 15th April 1915. It can hardly be expected that during this short period, there could be many transactions indicative of transmutation of possession. But such evidence as there is on the record points to the conclusion that, after the execution of the *wakfnama*, the settlor held the dedicated property, not as owner but as *mutwalli*. The direct oral evidence on the point is corroborated by the collection papers, the counterfoils of rent-receipts, the plaints in rent suits and the power of-attorney which have been produced to show that after the date of the *wakfnama* Elahi Buksh held

(6) 18 Ind. Cas. 241.
(7) 12 W. R. 344.

(8) 15 A. 321; A. W. N. (1893) 109; 7 Ind. Dec. (N. S.) 922.
(9) 31 B. 250; 9 Bom. L. R. 91.
(10) 35 Ind. Cas. 877; 31 M. L. J. 431.
(11) 14 Ind. Cas. 988; 14 Bom. L. R. 295.

and managed the endowed property in the character of *mutwalli*. There is consequently no room for the application of the principle which has sometimes been recognised, namely, that where the declaration of a *wakf* is not acted upon by the settlor and its objects are not given effect to, it may be presumed that the *wakf* was not completed or that the settlor had no *bona fide* intention to create a *wakf*; *Delrus Banoo Begum* v. *Nowab Syud Asgur Alli Khan* (12), *Zowleka Bibi* v. *Syad Zynul Abedin* (13). We hold accordingly that delivery of possession was not a pre-requisite to the validity of the *wakf* in the present case, and that even if transmutation of possession was necessary, no formal delivery was essential, as the settlor was himself the first *mutwalli*. The third ground consequently fails.

As regards the fourth point, it has been urged that the *wakf* was invalid to the extent of a two thirds share inasmuch as it was executed by the settlor in death-illness without the consent of the future heirs. The Subordinate Judge negatived this contention as, in his opinion, the evidence did not establish that the settlor was in death-illness at the time of execution of the deed of *wakf*. Before we refer to the evidence on the point, the requisites of the Muhammadan Law on the subject may be usefully re-called here. It is well-settled that gifts made by a Mussalman during *mars-ul-maut* or death illness cannot take effect beyond a third of the surplus of his estate, after payment of funeral expenses and debts, unless the heirs give their consent, after the death of the donor, to the excess taking effect: *Ibrahim Goolam Ariff* v. *Saiboo* (14), nor can such gifts take effect if made in favour of an heir, unless the other heirs consent thereto after the donor's death: *Khajooroonissa* v. *Rowshan Jehan* (15), *Bafatun* v. *Bilaiti Khanum* (16). Similarly, a *wakf* made in death-illness is valid only to the extent of a third of the net estate left by the deceased, unless the heirs consent: Baillie, Part I, page 601, Part II, page 212; *Ali Husain* v. *Fazal Hussain Khan* (17). The substance of the matter is that a Muslim who is in *mare ul maut* or death-illness cannot make a valid disposition of more than one-third of his property, and if he purports to make a *wakf* in such illness, unless his heirs assent, the *wakf* will affect only one third of his estate and will be invalid in respect of the excess; and it is important to add that this principle operates, nothwithstanding that possession of the entire property dedicated has been delivered to the person nominated *mutwalli*. In order to establish the existence of death illness, there must be at least three conditions with regard to the illness which has caused death, namely, (*a*) proximate danger of death, so that there is a preponderance of apprehension of death; (*b*) there must be some degree of subjective apprehension of death in the mind of the sick person; and (*c*) there must be some external indicia, such as inability to attend to ordinary avocations. Whether or not a particular illness constitutes *mare ul-maut* is primarily a question of fact, as stated by Lord Robertson in *Ibrahim Goolam Ariff* v. *Saiboo* (14), but it may sometimes be a mixed question of law and fact, for instance, where the question arises whether the facts found as to the physical condition of the deceased at the date of execution of the deed constitute the essential elements of a *mare ul-maut* as formulated by Muhammadan jurists. The leading authorities in this Court which support these propositions are the cases of *Hassarat Bibi* v. *Golam Jaffar* (18) and *Fatima Bibee* v. *Ahmad Baksh* (19), which was affirmed by the Judicial Committee in *Fatima Bibi* v. *Ahmed Baksh* (20). In the case last mentioned, the three elements emphasised were (1) illness, (2) expectation of a fatal issue, and (3) certain physical incapacities which indicate the degree of the illness. The second condition, it was pointed out, cannot be presumed to exist from the existence of the first, while the incapaci-

(12) 15 B. L. R. 167; 23 W. R. 453.
(13) 6 Bom. L. R. 1058 at p. 1063.
(14) 35 C. 1 at p. 22; 34 I. A. 167; 6 C. L. J. 695; 9 Bom. L. R. 872; 4 A. L. J. 572; 11 C. W. N. 973; 17 M. L. J. 408; 2 M. L. T. 479; 4 L. B. R. 154 (P. C.).
(15) 3 I. A. 291; 2 C. 184; 26 W. R. 36; 1 Ind. Dec. (N. S.) 412 (P. C.).
(16) 30 C. 683.
(17) 23 Ind. Cas. 291; 36 A. 431; 12 A. L. J. 863.
(18) 3 C. W. N. 57.
(19) 31 C. 319.
(20) 35 I. A. 67; 35 C. 271; 7 C. L. J. 133; 12 C. W. N. 314; 18 M. L. J. 6; 10 Bom. L. R. 50 (P. C.).

ties indicated in the third condition (with perhaps the single exception of the case where a man cannot stand up to say his prayers) are more or less of an empirical character, based upon an imperfectly developed science of diagnosis and cannot possibly serve as infallible signs of death-illness. The importance of the subjective element was emphasised in the course of argument and will be found developed in the texts set out by Mahomed Yusuf in his Tagore Law Lectures on Marriage, Dower and Divorce, Volume III, paragraphs 2919 2924, 2945 2947 This view, however, is repudiated by Sir Abdur Rahim in his Tagore Law Lectures on Mahammadan Jurisprudence (page 255) where reference is made to *Kulsom Bibee* v. *Golam Hossain* (21). A view similar to that adopted in this Court has been taken in the Bombay High Court in the cases of *Sarabai* v. *Rabiabai* (22) and *Rashid Karmalli* v. *Sherbanoo* (23) by the Allahabad High Court in the cases of *Labhi* v. *Bibbun* (24), *Muhammad Gulshere* v. *Marian Begam* (25), *Mashud Hasan* v. *Anwar Husain* (26), *Muhammad Sayeed* v. *Muhammad Ismail* (27), *Nazar Husain* v. *Rafeeq Husain* (28), *Khursheed Hussain* v. *Faiyaz Hussain* (29), *Shaikh Muhammad* v. *Khudija Bibi* (30), *Wazir Jan* v. *Altaf Ali* (31), *Fazal Ahmad* v. *Rahim Bibi* (32) and by the Patna High Court in *Fazlur Rahman* v. *Muhammad Umar* (33). (See also Durrul Mukhtar tr. Dayal, page 411. Hedaya tr. Hamilton and Grady, page 685 and Baillie, Part I, pages 551-552). We have now to consider, whether the evidence shows that, in the words of Lord Robertson in *Ibrahim Goolam Ariff* v. *Saiboo* (14) the *wakf* was made "under the pressure of the sense of imminence of death." The deed of *wakf*, as we have seen, was executed on the 31st January 1915 and was registered on the following day. The defendants rely chiefly upon documentary evidence to show that from the beginning of November 1914 to the middle of January 1915, Elahi Bux was ill and that he was laid up again in the second week of March 1915. The defendants have also adduced oral evidence to show that Elahi Bux was ill continuously from November 1914 to April 1915 when his death took place. The Subordinate Judge has carefully analysed the oral evidence and has come to the conclusion that the persons who have come forward to depose in favour of the defendants cannot be regarded as witnesses of truth. After examination of this evidence in detail, we see no reason to doubt that the Subordinate Judge correctly estimated its value, specially as the witnesses, almost without exception, are not free from bias. As regards the documentary evidence, it appears that in a suit instituted by Elahi Bux against one Ataraddin Mandal and others for arrears of rent, the defendants cited him as a witness. The result was that on the 3rd November 1914 Elahi Bux applied for time to give his evidence, and four days later, he prayed that as he was an old man of 77, bedridden with fever for a week, he might be examined on commission. This was supported by an affidavit from *kabiraj* Sris Chandra Sen who certified that he was suffering from chronic intermittent fever; this *kabiraj* has been examined as a witness in this case. An order was made for the issue of a commission, but a postponement was obtained, as the Pleader was unwell on the date fixed (7th March 1915). Thereupon the Commissioner went to examine Elahi Bux on the 14th March, 1915 but he was asked to postpone the examination, as the illness had increased and the patient had very little hope of surviving. This was supported by a certificate from *kabiraj* Satis Chandra Sen stating that Elahi Bux was confined to bed from fever, piles and pain, that he was unable to speak and that there was danger of death if he gave his deposition. Neither the Commissioner nor the *kabiraj* has been examined as a witness, and the statements in the report by the Commissioner to the Court and in the certificate given by the *kabiraj* are

(21) 10 C. W. N. 449.
(22) 30 B. 537; 8 Bom. L. R. 35.
(23) 31 B. 264; 9 Bom. L. R. 252.
(24) 6 N. W. P. H. C. R. 159.
(25) 3 A. 731; A. W. N. (1881) 48; 2 Ind. Dec. (N. S.) 407.
(26) 1 Ind. Cas. 403; 6 A. L. J. 503.
(27) 8 Ind. Cas. 834; 7 A. L. J. 1176; 33 A. 233.
(28) 12 Ind. Cas. 730; 8 A. L. J. 1154.
(29) 23 Ind. Cas 253; 36 A. 289; 12 A. L. J. 417.
(30) 22 Ind. Cas. 807; 12 A. L. J. 132.
(31) 9 A. 357; A. W. N. (1887) 32; 5 Ind. Dec. (N. S.) 672
(32) 51 Ind. Cas. 638; 40 A. 238; 16 A. L. J. 158.
(33) 43 Ind. Cas. 196; 3 P. L. W. 282.

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not admissible in evidence. But, the statements, even if admitted, do not show the condition of Elahi Bux on the 31st January 1915 when the *wakfnama* was executed. The Subordinate Judge has further observed that Elahi Bux was perhaps reluctant to give evidence and that the allegations as to the state of his health were not improbably exaggerated. This finds some support in the evidence adduced by the plaintiffs, which relates to a point of time much nearer to the date of execution of the *wakfnama* than the evidence of the incidents mentioned by the witnesses of the defendants. The evidence led by the plaintiffs shows that in January 1915 Elahi Bux went to the house of his father-in-law at Rajarampore, which involved a journey by bullock cart over 12 to 14 miles of road. One of these journeys was shortly before, while the other was shortly after, the 31st January 1915. On his return journey, he lost a silver betel-pot and on the 6th February 1915, he lodged information at the Police Station. He had also an altercation on the way with Kadir Bux, a witness in this case, who laid an information with the Police against Elahi Bux and his peon on the 21st January 1915. There can thus be no doubt on the oral evidence, supported by reliable documentary evidence, that between the 21st January and the 6th February 1915 the state of health of Elahi Bux was such that he was able to go from village to village to see his friends and relations, to arbitrate in the settlement of disputes of other people, and to follow the ordinary avocations of life. In cases of this character, when direct evidence of the state of health of the settlor on the date of the deed is not available, the evidence of antecedent and subsequent conditions of the settlor should converge to that point of time; this test is well-satisfied in the present case. Even if it be assumed that Elahi Bux was ill in November and December 1914 and in the first week of January, 1915, and further that he was ill again from the middle of March till his death in the middle of April, the validity of the *wakfnama* executed on the 31st January 1915 cannot be successfully impeached on the ground of *marz ul maut*, when there is positive evidence to show that from the middle of January to the middle of February 1915, which includes the date of execution of the deed, he was in a fairly good state of health. In such circumstances, it cannot be urged that the *wakfnama* was executed under the pressure of the sense of imminence of death. We hold accordingly that the conclusion of the Subordinate Judge on this part of the case cannot be successfully challenged.

The result is that the decree of the Subordinate Judge is affirmed and this appeal dismissed with costs.

BUCKLAND, J.—I agree and have nothing to add.

B. N.

Appeal dismissed.

MADRAS HIGH COURT.
CIVIL APPEAL No. 118 OF 1920.
April 21, 1921.
Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer.
NAGA RAJA—PLAINTIFF—APPELLANT
versus
DEVA RAJA KARNANTHAYA BELLALA—DEFENDANT—RESPONDENT.

Pattams, *nature of*—Pattam *property*—*Junior members of* pattam's *family*—*Maintenance, right of*—*Appropriation of* pattam *property for private purpose, legality of.*

Pattam is in some respects analogous to the *stanom* in Malabar. But it is not like the latter a mere dignity, but rather partakes of the nature of a religious office. The office is conferred by the Maghava villagers. Although they are by custom bound to bestow it on a member of the *aliyasanthana* family, yet on the non-existence of any such member, they can bestow it on any body they like. [p. 85, cols 1 & 2; p. 86, col. 1; p. 87, col 1.]

Junior members of the family of a *pattam* holder cannot claim maintenance out of the *pattam* properties. [p. 85, col 2.]

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Per *Spencer, J.*—The *pattam* properties being properties attached to a religious office, any agreement by the *pattam* to appropriate them for private purposes is illegal. [p. 87, col. 2.]

Appeal against a decree of the Court of the Subordinate Judge, South Kanara, in Original Suit No. 21 of 1917.

Mr. *B. Sitarama Rao*, for the Appellant.

Mr. *K. Yegnanarayana Adiga*, for the Respondent.

JUDGMENT.

SADASIVA AIYAR, J.—The plaintiff is the appellant. He brought this suit for maintenance against his brother, the defendant, on the ground that both parties belonged to an *aliyasanthana* family and that the defendant was in possession of the family properties as Yejman of the family and failed to give him maintenance. The defendant contended that he was not in possession of any property as Yejman of the family but only of certain properties as the person appointed by the Kulur Magane community to the *pattam* of Kulur Bidu. The second issue raised was "whether the suit properties belong to the *aliyasanthana* family of which the defendant is Yejman or to Kulur Bidu *pattam* as alleged by the defendant."

At the trial, the plaintiff seems to have argued that, though the properties belonged to the Kulur Bidu *pattam*, the *pattam* itself belonged to the family, and hence the properties also belonged to the family; and for this contention he relied upon the Vyavasta Patra, Exhibit A, dated 1899, executed between the defendant and the father of the plaintiff and of the defendant who was the previous *pattamdar*. This document, according to the plaintiff, made both the *pattam* and the property attached to it the family property of the plaintiff's mother's branch of their *aliyasanthana* family. This *pattam* right has to be conferred by the Maghava villagers though they are bound by custom to bestow it upon a member of the *aliyasanthana* family to which the last holder belonged; and, on the non-existence of any such member, they can bestow it on anybody they like. This *pattam* is indeed in some respects analogous to the *stanom* in Malabar. But from the evidence it appears that it is not (like a *stanom*) a mere dignity to which no obligations or duties are attached. On the other hand, the plaintiff himself in his evidence as plaintiff's witness No. 1 says: "My father resigned the Kulur Bidu *Pattam* as he could not attend to the ceremonies there—the three ceremonies I have mentioned above;" then he says in another place, "There are annual ceremonies to be performed by the *pattam*-holder Mahalaya, Kambla and Paddarada Mahinoma." Then he says as regards the "Nema" ceremony. "The Nema ceremony lasts three days. All the Maghava people have to be invited for the ceremony." It appears from the defence evidence that several other ceremonies, —Ashtami, Vinayaka Chathurthi and others, have also to be performed by the *pattam* office-holder at some expense. The villagers who installed the *pattam*-holder in his office have to be invited and fed, or at least, given cocoanuts according to the evidence. Thus, whereas the *stani* succeeds to the *stanom* by reason of his being the next eldest member of the family next to the deceased *stanee*, that is not the case with this *pattam* dignity which rather partakes of the nature of an office to which the villagers appoint a man after an elaborate ceremony and the duties of which office are defined and entail expense out of the income derived from the lands forming the emoluments of the office.

As I said, the plaintiff admits that his father resigned the office because he was unable to perform the duties attached to it. That was in 1894; and the defendant was appointed to the office at once during his father's lifetime.

The next question is whether junior members of the family of the *pattam* holder can claim maintenance out of the income of the *pattam* lands. As I said, the holder of a *pattam* is in a less advantageous position than the holder of a *stanom*, so far as his rights are concerned in the properties attached to the *pattam*. So far as the holder of a *stanom* is concerned, he becomes cut off for the time being from connection with his main Tarwad; the other members of his Tarwad have no right whatever to or in the *stanom* properties. It seems to me that *a fortiori* the plaintiff cannot claim any interest in the *pattam* properties and it follows that he has no right to get maintenance out of the income of the properties. But it was argued that

by reason of the arrangement, agreement or settlement under Exhibit A, dated 1899, the defendant became liable to treat these properties as his *aliyasanthana* family properties, and hence the plaintiff was entitled to claim maintenance out of their income. One answer advanced against this contention by Mr. Adiga (for the respondent) was that, as religious duties were attached to the office, the properties cannot lawfully be made the subject of any agreement by the holder of the office changing their nature so as to allow secular rights of maintenance to be claimed out of their income. Abdur Rahim, J., and myself, in a case decided at the end of last year, Civil Miscellaneous Second Appeal No. 21 of 1920 differed on the question whether the properties attached to a religious office can be attached and can form the subject of alienation by Court sale or private sale provided the service continues to be performed, and whether the alienation would be valid during the lifetime of the office-holder (judgment-debtor or alienor). The decision in that case has been appealed against under the Letters Patent.

Assuming, however, that even though the office of *pattam* has religious duties attached to it, and the properties can be alienated so as to be effective during the lifetime of the office-holder, the next question is whether Exhibit A was intended to effect such an alienation. Mr. Adiga argued that it was not so intended even according to its terms, though the Subordinate Judge was of opinion that it was intended thereby to so convert the *pattam* property into family property. There is much to be said in favour of Mr. Adiga's contention as the *pattam* and the properties are treated alike as intended to be held *in the joint family right of the heirs of the defendant according to the aliyasanthana law* of inheritance in the branch of the defendant's mother. It is difficult to believe that the *pattam* which belonged and could belong to one member of the family at a time was itself intended to be made the common property of the family. If so, the property attached to it which cannot be separated from it could not have been intended to be enjoyed as family property while the *pattam* can only be enjoyed by one member whom the Maghava villagers appoint to the office. Then the provision of the agreement, Exhibit A, that so far as the accretions out of the income are concerned they should be treated as family properties and not merely to regulate the succession to the *pattam* and the properties into family properties. The true construction of Exhibit A on this point is, however, not free from difficulty. I shall consider the case, therefore, on the footing of that. Exhibit A was intended to convert the properties into *aliyasanthana* family properties and not merely to regulate the succession to the *pattam* so as to preserve it and the enjoyment of the attached properties in the *aliyasanthana* family. I shall here dispose of another minor contention of the appellant that Item No. 1 alone was attached to the *pattam* and that items Nos. 2 and 3 were not attached to the *pattam*. I think the matter is concluded against the appellant's contention by the very document, Exhibit A, which describes all the three properties as belonging to the *pattam*. Further the same contention was raised by the junior members of the previous *pattam* office holder in 1840 and was negatived—See Exhibits B and C.

Then we have to consider the question whether Exhibit A can be treated as an alienation by way of settlement or sale in favour of the family by the defendant. So far as sale is concerned, the consideration mentioned in Exhibit A has been found to be clearly fictitious; for the wife's family is not a party to the deed, as the plaintiff's and the defendant's father who professes to have entered into the transaction in the interests of his wife's family is not according to law a member of his wife's family at all. Secondly, taking it as an unilateral deed of settlement by the defendant in favour of the mother's *aliyasanthana* family, I think that there is sufficient internal evidence in the recitals of the document itself which support the evidence of the defendant that he executed the document not by his free will and consent but owing to the undue influence brought to bear upon him by his father.

I, therefore, agree with the lower Court's finding that this deed was not voluntarily executed by the defendant and that he could impeach its validity as a defendant.

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In the result I would dismiss the appeal with costs.

SPENCER, J.—The learned Subordinate Judge has found on the second issue that the suit properties appertained to the Kulur Bidu Pattam and not to the *aliyasanthana* family of which the defendant is the Yejman. In support of this finding he relies on a good deal of documentary and oral evidence to which we have been referred in the arguments in appeal. I have no doubt he was right in his conclusion that the properties appertained to the *pattam*.

The argument advanced for the appellant that the *pattam* belongs to the family is negatived by the previous history referred to in the lower Court's judgment and in the judgments in the litigations of 1851, Exhibits B, C and I. That history contains instances where the Maghava villagers have installed *pattam* holders selected from the family of the last *pattam*-holder, and failing lineal heirs in that family, have appointed persons from outside the family.

The appellant relies on Exhibit A, a document signed by the defendant and his father at the time when the defendant succeeded to the office. Mr. B. Sitarama Rao argued that this agreement or settlement gave his client a good title at least for the lifetime of the defendant, and that it was too late for the respondent to repudiate it as being executed under undue influence as he did not set up such a case at the trial. The Subordinate Judge treated this Exhibit A as a purchase of membership in the *pattam* family and he held that it was invalid for want of consideration. The document itself is termed a deed of settlement. Whether it is an agreement or a family settlement, its purpose is clearly to appropriate for family purposes the property which belongs absolutely to the *pattam* and to alter the recognised custom of the trust under which the property had hitherto been enjoyed and managed. It states that "the extra immoveable and moveable properties belong to the self-acquisition of the *pattam*-holder and should be carried on under the joint permission of the family of those who acquired the same; it should not be subjected to the power of the *pattam* holder." In another place the defendant and the persons who are his heirs are declared to have a right of inheriting the property as joint heirs of all his rights and interests according to the *aliyasanthana* law. As the Subordinate Judge observed, this document evidences an intention on the part of the defendant's father to create rights to the *pattam* and properties in all his children and to convert the *pattam* properties into family properties. An appropriation for private purposes of properties attached to a religious office is clearly illegal and even a trustee who mortgages the trust property for his own purposes can subsequently as a trustee impeach the validity of the transaction and avoid the alienation in the interests of the trust, as we held in *Seni Yasin Sahib* v. *Kadur Ekambara Iyer* (1).

I am, therefore, of opinion that Exhibit A is not valid even for the lifetime of the defendant and that the defendant is not now estopped from repudiating the validity of that transaction. The lower Court's decision is right and the appeal must be dismissed with costs.

M. C. P.

Appeal dismissed.

(1) 54 Ind. Cas. 407; 37 M. L. J. 698; 26 M. L. T. 441; 10 L. W. 672.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1640 OF 1919.

December 15, 1921.

Present:—Justice Sir N. R. Chatterjea, Kt., and Mr. Justice Panton.

Sreemutty SASHIMUKHI DASI—PLAINTIFF—APPELLANT

versus

Sreemutty MONMOHINI DASI AND OTHERS—DEFENDANTS—RESPONDENTS.

Evidence—Attesting witness denying attestation—Other evidence, whether can be relied on—Document, proof of.

In order to prove a document an attesting witness was called, who stated that he was not an

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attesting witness, that he put his name as a witness after the execution of the document. The Appellate Court found as a fact relying upon the evidence of other witness that the attesting witness who said that he had not seen the execution did, as a matter of fact, see it and was an attesting witness, that the document was executed in the presence of that witness:

Held, that, having regard to the findings arrived at, the document was proved. [p. 88, col. 2.]

Appeal against a decree of the District Judge, Bankura, dated the 6th of March 1919, reversing that of the Subordinate Judge of that district, dated the 20th of August 1917.

FACTS appear from the judgment.

Dr. *D. N. Mitter*, (with him Babu *Bijoy Kumar Bhattacharjee*), for the Appellant.—The plaintiff is the appellant. The point is whether the deed of gift has been properly attested or not. The lower Appellate Court has found against me. I submit there being a gift to an idol the law of endowments does not apply, the idol is capable of holding and owning property. That being so, the deed ought to have been properly attested according to law. Refers to *Pallayya* v. *Ramavadhanulu* (1), *Jadu Nath Singh* v. *Sita Ramji* (2), *Shamu Patter* v. *Abdul Kadir Rowthan* (3), Gour's Transfer of Property Act, 1882, on section 123.

Babu *Sarat Chandra Ray Choudhury* (with him Babu *Mohesh Chandra Banerjee*, for Babu *Bejoy Kumar Chatterjee*), for the Respondents.—The document does show that the property was not dedicated to the idol. The donor simply said that only for the expenses of the two *pujas* he reserved those properties and also the right of collection of rents, etc. to himself and his successors. There is a distinction between dedication and a gift. The former would imply endowments and trusts. Refers to *Manchershaw* v. *Ardeshir* (4). After the dedication a trust is created. He must either make a gift or a settlement appointing trustees. The deed has been named *nirupan patra*. These are the two modes by which a person can make over property to idol. The case in *Jadu Nath Singh* v. *Sita Ramji* (2) does not apply. I submit the present deed was not a deed of gift but of settlement creating a trust. Law requires attestation only in case of deed of gift under section 123, Transfer of Property Act. Assuming that sections 68 and 71 of the Evidence Act apply, I submit the deed has been legally proved. I submit the fact of my not having called other attesting witnesses would not stand in the way of my proving the document by other evidence.

Dr. *D. N Mitter* replied in brief.

JUDGMENT.—Upon the findings arrived at, we think that the attestation of the document, even taking it as a deed of gift, has been sufficiently proved.

The attesting witness, who was called, stated that he put his name as a witness after the execution of the document; in other words, that he was not an attesting witness. But the District Judge has found upon the evidence that the document was executed in the presence of that witness. The evidence, therefore, of the other witness was relied upon by the learned District Judge not for the purpose of proving execution of the document but for proving that the attesting witness who said that he had not seen the execution did as a matter of fact see it and was an attesting witness. The learned Judge also refers to the evidence of Hem Chandra, another attesting witness, examined at an earlier stage of the suit, namely, when the application for leave to sue as a pauper was made.

We think, having regard to the findings arrived at, that the document was proved. The appeal must accordingly be dismissed with costs.

The Court-fees in this Court will be recovered by Government from the appellant.

B. N.

Appeal dismissed.

(1) 13 M. L. J. 364.

(2) 42 Ind. Cas. 225; 44 I. A. 187; 21 C. W. N. 953; 22 M. L. T. 52; 20 O. C. 200; 19 Bom. L. R. 687; (1917) M. W. N. 605; 26 C. L. J. 309; 39 A. 553; 4 O. L. J. 586 (P. C.).

(3) 16 Ind. Cas. 250; 35 M. 607; 16 C. W. N. 1009; 23 M. L. J. 321; 12 M. L. T. 338; (1912) M. W. N. 935; 10 A. L. J. 259; 14 Bom L. R. 1034; 16 C. L. J. 596; 39 I. A. 218 (P. C.).

(4) 10 Bom. L. R. 1209 at p. 1210.

KALI CHARN v. JAGGU.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 3227 OF 1918.

December 21, 1921.

Present:—Mr. Justice Broadway and Mr. Justice Martineau.

KALI CHARN—DEFENDANT-VENDEE—APPELLANT

versus

JAGGU, MINOR, THROUGH MUKH RAM—PLAINTIFF

RAM GOPAL AND ANOTHER—DEFENDANTS VENDORS—RESPONDENTS.

Hindu Law—Joint family—Alienation by father—Suit to set aside alienation by son—Burden of proof—Refund of purchase-money—Possession.

A son in a joint Hindu family is entitled to set aside an alienation by his father of ancestral property which has not been effected for the payment of an antecedent debt or for any family necessity. He is not bound to prove that the purchase-money was taken by the father for immoral purposes.

Bahadur Singh v. *Desraj*, 53 P. R. 1901; 62 P. L. R. 1901; *Ram Dayal* v. *Ajudhia Prasad*, 28 A. 328; A. W. N. (1906) 40; 3 A. L. J 81; *Madan Gopal* v. *Sati Prasad*, 40 Ind. Cas. 451; 39 A. 485; 15 A. L. J. 425, relied upon.

Nor is he bound to refund the purchase-money.

Koer Hasmat Rai v. *Sunder Das*, 11 C. 396; 10 Ind. Jur. 26; 5 Ind Dec. (N. S.) 1023, dissented from.

Ram Dayal v. *Suraj Mal*, 23 Ind. Cas. 891; *Madan Gopal* v. *Sati Prasad*, 40 Ind. Cas. 451; 39 A. 485; 15 A. L. J. 425, relied upon.

In such a case the son can maintain a suit for joint possession of the property alienated, being himself a co-parcener in the property.

Madan Gopal v. *Sati Prasad*, 40 Ind. Cas. 451; 39 A. 485; 15 A. L. J. 425, relied upon.

Second appeal from a decree of the District Judge, Delhi, dated the 10th November 1918, varying that of the Senior Subordinate Judge, First Class, Delhi, dated the 8th July 1918.

Lala *Moti Sagar*, R. S., and Lala *Sardha Ram*, for the Appellant.

Mr. *Des Raj Sawhney*, for the Respondents.

JUDGMENT.—The house in suit was sold by Ram Gopal and his brother Nikka, defendants Nos. 1 and 2, to Kali Charn, defendant No. 3, and the son of Ram Gopal sued for possession of the house contending that there was no necessity for the sale. He was given a decree for possession of half of the house (on account of Ram Gopal's share) by the First Court, and for possession of the whole house by the lower Appellate Court, which found that the family was a joint Hindu family, that the sale was not effected for payment of debts and that no necessity for it had been proved. The vendee has preferred a second appeal to this Court.

The first contention put forward on behalf of the appellant is that the plaintiff cannot challenge the alienation by his uncle, Nikka, but there is no force in this contention in view of the finding that the family is a joint Hindu family. The property belongs to the joint family, and Nikka has no defined share in it until partition takes place, so that the transaction cannot be split up and the sale by Nikka treated separately from the sale by his brother.

The second contention is that the plaintiff is not entitled to a decree unless he shows that the purchase-money was taken for immoral purposes. This contention is not correct. Rulings to the effect that a money-decree obtained against a Hindu father can, if the debt is not illegal or immoral, be enforced by a sale of the co-parcenary estate and is binding on the son, are not in point, as there is in the present case no question of the execution of any decree obtained against Ram Gopal. The question is as to the right of the son to set aside an alienation by his father of the ancestral property which has not been effected for the payment of an antecedent debt or for any family necessity, and the authorities are clearly in the plaintiff's favour, see *Bahadur Singh* v. *Desraj* (1), *Ram Dayal* v. *Ajudhia Prasad* (2) and *Madan Gopal* v. *Sati Prasad* (3).

Next it is contended that the plaintiff cannot succeed without refunding the purchase-money, but this contention also is one with which we cannot agree. *Koer Hasmat Rai* v. *Sunder Das* (4), which is cited in support of it, was dissented from in *Ram Dayal* v. *Suraj Mal* (5) and in *Madan Gopal* v. *Sati Prasad* (3), in which a contrary view was taken.

Lastly, it is argued that as Ram Gopal is alive his son is not entitled to a decree for possession of the house, but only to a

(1) 53 P. R. 1901; 62 P. L. R. 1901.
(2) 28 A. 328 A. W. N. (1906) 40; 3 A. L. J. 81.
(3) 40 Ind. Cas 451; 39 A. 485; 15 A. L. J. 425.
(4) 11 C. 396; 10 Ind. Jur. 26; 5 Ind. Dec. (N. S.) 1023.
(5) 23 Ind. Cas. 891.

decree declaring the alienation to be invalid. This point was not taken in the grounds of appeal in the lower Appellate Court, and as the plaintiff is himself a co parcener in the property we think he can maintain a suit for possession. It was, in fact, held in *Madan Gopal* v. *Sati Prasad* (3), where the sale by the father was not for family necessity or for the payment of debts, that his sons were entitled to recover the property.

The plaintiff is, however, entitled only to joint, and not to exclusive, possession, and in this respect the decree requires to be modified.

We accept the appeal and alter the decree to one for joint possession of the house. The appeal having failed except in respect of this slight modification, the appellant will pay the plaintiff-respondent's costs throughout.

Z. K. *Appeal accepted.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 604 OF 1920.

January 4, 1922.

Present:—Mr. Justice Newbould and Mr. Justice Cuming.

DINANATH DAS AND ON HIS DEATH HIS HEIRS AND LEGAL REPRESENTATIVES KRIPANATH DAS AND OTHERS—DEFENDANTS—APPELLANTS

versus

GOPAL CHANDRA DAS AND OTHERS—PLAINTIFFS—RESPONDENTS.

Lease, construction of—Lessee's right to build—Boundaries well-defined in the lease—Area in lessee's possession less than that stated in the lease—Encroachment, whether permissible.

The portion of a lease which governed the lessee's right to build was as follows:—"You shall not be competent to make big excavations but you shall be competent to construct *pucca* wall, *pucca* privy and *pucca* plinth of the tin *ghur*":

Held, that reading the clause as a whole, it was the intention of the parties that the lessee's right to erect permanent structures should be limited to those specified in the condition, and that the condition amounted to a prohibition to build any other structures than those expressly mentioned. [p. 91, col. 1.]

The fact that the amount of land of which a lessee was given possession is less than the area stated in the lease, would give the lessee no right of encroachment beyond the well-defined boundaries given in the lease. [p. 91, col. 1.]

Appeal against a decree of the Officiating Subordinate Judge, Jalpaiguri, dated the 20th of December 1919, modifying that of the Munsif, First Court at that place, dated the 18th September 1918.

FACTS appear from the judgment.

Babu *Nagendra Nath Ghose*, for the Appellants.—The document should be construed in favour of the grantee and not in favour of the grantor. That is a well known canon of interpretation. I am not precluded from raising a wall. All preventions are expressly mentioned. Moreover a wall does not require big excavation. I am prevented from making big excavations only. My second submission is that oral evidence has been wrongly admitted. When the terms of the document are perfectly clear, no oral evidence should have been admitted. The provisions of section 91 of the Indian Evidence Act are explicit on this point.

The area in possession of my clients is less than what is stated in the document and so my clients were justified in encroaching on the lessor's lands.

Babu *Santosh Kumar Bose*, for the Respondents.—The other side laid stress on the word *bhitti* which they said meant also a wall. Now they veer round. Moreover if they had a right to build a wall that would have been mentioned in the lease. We are to look to the intention of parties as it is revealed by the document. As to boundaries, in a competition between boundaries and area, the former are to prevail.

As to evidence, oral evidence can be properly admitted if it does not vary the terms of the document.

Babu *Nagendra Nath Ghose* briefly replied.

JUDGMENT.—This appeal arises out of a suit in which the plaintiffs-respondents have obtained a decree directing removal of a wall. The finding is that the wall must be removed on two grounds; partly by reason of its encroachment on the land in the possession of the plaintiffs and partly because it is built on the land leased to the defendant from the plaintiffs under a lease which prohibits them from erecting a *pucca* wall on the land.

The main point in this case is the question of the construction of the lease. The portion of the lease which governs the defendants' right to build is as follows: "You shall not be competent to make big excavations but you shall be competent to construct *pucca* wall, *pucca* privy and *pucca* plinth of the tin *ghur*." In the lower Courts the only contention that appears to have been raised on this point was that the Bengali word which has been translated as plinth also meant wall. Here it is contended that these words do not prohibit construction of a wall and that the lower Courts have wrongly treated the exceptions as if they were the principal terms of the document. But we think, reading that clause as a whole, it was the intention of the parties that the defendants' right to erect permanent structures should be limited to those specified in this condition, and that this condition amounts to a prohibition to build any other structures than those expressly mentioned.

There is no force in the contention that the defendants were justified in encroaching on other land of their lessor because the amount of land of which he was given possession was less than the area stated in the lease. This will give him no right to encroachment beyond the well-defined boundaries which there were on the south of the land.

The last point urged was that evidence has been wrongly admitted in order to explain the terms of the document. It seems that the point in dispute was as to the meaning of a particular word in the document and such evidence might perhaps be admitted under section 98 of the Evidence Act. In any case we hold in interpreting the document without any consideration of the evidence that the decisions of the lower Courts on this point are correct.

The appeal is accordingly dismissed with costs.

E. N.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2247 OF 1919.

February 8, 1922.

Present:—Justice Sir N. R. Chatterjea, Kt., and Mr. Justice Pearson.

AMIRADDIN MAHAMAD—DEFENDANT—APPELLANT

versus

SANKAR BORMAN—PLAINTIFF—RESPONDENT.

Surrender—Bengal Tenancy Act (VIII of 1885), s. 86 (b)—Tenant, if can surrender after he had transferred his interest—Mortgage by tenant—Subsequent surrender in favour of landlord, how far operative—Surrender, if wholly invalid—Surrender, whether assignment.

A person who has parted with his interest in property, cannot deal with that interest by surrendering it in favour of the landlord and he cannot confer upon the landlord a higher right than he could have passed to any other person by assignment. [p. 92, col. 2.]

A surrender by the tenant after he has dealt with a portion of the holding in favour of another person amounts to no more than an assignment in favour of the landlord. But there is no reason why the landlord should be in a worse position than if the assignee were a third party and why he should not acquire all the interest which was left in the tenant at the date of the surrender. [p. 92, col. 2.]

Appeal against a decree of the Officiating Subordinate Judge, Jalpaiguri, dated the 25th of June 1919, reversing that of the Munsif, First Court at that place, dated the 28th of February 1917.

FACTS appear from the judgment.

Babu *Krishna Kamal Maitra*, for Babu *Ramakanta Bhattacharji*, for the Appellant.—The question is whether the surrender was valid. Reads section 86 (*b*) of the Bengal Tenancy Act. The tenant after he had parted with his interest in the tenancy could not defeat the right of the transferee by having recourse to surrender. The law on the subject is now settled. Refers to *Mohsenuddin* v. *Bhogaban Chandra* (1), *Ram Udar Singh* v. *William Cox* (2). The surrender in favour of the landlord in the present case

(1) 61 Ind. Cas 413; 32 C. L J. 286; 25 C. W N. 29; 48 C. 605.

(2) 27 Ind. Cas. 564; 19 C. W. N. 238.

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is wholly invalid. He has acquired no title under it. Even if it be held that the surrender was not entirely void, it cannot be disputed that the landlord took subject to the rights of the defendant as mortgagee, or, in other words, there was surrender only of the equity of redemption. The plaintiff, therefore, who claims through the landlord cannot have a higher right. Refers to *Mahammad Nassaruddin Sarcar* v. *Sheikh Isab* (3).

Babu *Brojolal Chuckerbutty* (with him Babu *Hemendra Nath Bose*), for the Respondent.—The surrender cannot be entirely void. After the mortgage the tenant mortgagor could certainly deal with the interest still left in him. In this respect the landlord could not be in a worse position than that of a third person. The surrender only operated as an assignment of the interest of the tenant. Refers to *Sailash Chandra Bose* v. *Umesh Chandra Rudra* (4).

Babu *Krishna Kamal Maitra*, in reply.—The plaintiff at any rate should be directed to redeem the mortgage in this suit, otherwise my rights under the mortgage would be barred. There is no legal bar to my getting that relief in the present suit.

JUDGMENT.—The land in this case formed part of a *jote* which originally belonged to one Pasha Bama who mortgaged the entire *jote* to the defendant on the 30th September 1902. After his death, his widow Batashi surrendered the entire holding to the landlord in January 1903. A portion of the *jote*, namely, the disputed land, was settled with Dhunda Das by the landlord and the plaintiff claims the disputed portion by purchase of the tenancy of Dhunda Das on the 28th December 1910. The defendant claims the land under a *kabala* from Batashi, widow of Pasha Bama, executed on the 19th March 1915 in satisfaction of the mortgage which had been executed by Pasha in favour of the defendant.

The plaintiff granted a *dur-chukani* settlement in respect of the land to Batashi and Dhunda Das and in execution of a decree for arrears of rent against them purchased the disputed land. He obtained possession through the Court but did not obtain actual possession, having been dispossessed from the land by the defendant.

The suit is, therefore, one for recovery of possession on declaration of the plaintiff's title.

In the case of *Mohsenuddin* v. *Bhagaban Chandra* (1), the Full Bench has held that, when an occupancy *raiyat* has transferred part of his non-transferable holding, he is not competent to surrender to his landlord the portion so transferred either by surrender of that portion alone or by surrender of the whole, inclusive of such portion.

There is no doubt that a person who has parted with his interest in property, cannot deal with that interest by surrendering it in favour of the landlord and he cannot confer upon the landlord a higher right than he could have passed to any other person by assignment. The interest of the defendant in the disputed property as mortgagee, therefore, cannot be affected by the surrender in favour of the landlord. That is also laid down in clause (*b*) of section 86 of the Bengal Tenancy Act.

The learned Pleader for the appellant, however, contends that the surrender in favour of the landlord is wholly invalid and confers no title whatever upon him. We are unable to accept this contention as sound.

A surrender by the tenant after he has dealt with a portion of the holding in favour of another person amounts to no more than an assignment in favour of the landlord. But there is no reason why the landlord should be in a worse position than if the assignee were a third party and why he should not acquire all the interest which was left in the tenant at the date of the surrender.

In the present case, at the date of the surrender, Batashi was in possession of the *jote* and she had a right to it, subject only

(3) 27 Ind. Cas. 1003; 21 C. L. J. 185.
(4) 57 Ind. Cas. 574; 24 C. W. N. 573.

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to the mortgage in favour of the defendant; and all the rights she had, she surrendered in favour of the landlord. The landlord thereupon was entitled to possession of the *jote* and to hold it subject to the rights of the mortgagee. It is true that the defendant obtained possession but he was not a mortgagee in possession. Batashi had no right to convey nor confer any right to possession after the surrender in favour of the landlord in 1905. We are unable, therefore, to hold that the defendant is entitled to resist the claim for possession as against the plaintiff who claims under a settlement from the landlord.

The learned Pleader for the appellant has strongly pressed upon us to order the plaintiff to redeem the mortgage in this suit. But, apart from other considerations, the landlord who acquired the equity of redemption under the surrender is not the plaintiff. The plaintiff obtained a settlement of *only a portion* of the *jote*, namely, the disputed land from the landlord and we do not see how the plaintiff can be directed to redeem the entire mortgage.

The appeal must accordingly be dismissed. We make no order as to costs.

N. K.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 580 OF 1920.

January 12, 1922.

Present:—Mr. Justice Newbould.

NAIMUDDIN SORKAR AND OTHERS —DEFENDANTS—APPELLANTS

versus

IMANI MONDAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 2 (2)—Decree—Order absolving defendant from liability to pay mesne profits—Appeal.

An order made upon the objection of a defendant and after hearing the parties, absolving him from the liability to pay mesne profits is a "decree" within the meaning of section 2 (2) of the Civil Procedure Code, and as such is appealable. [p. 94, col. 1.]

Appeal against a decree of the Subordinate Judge, Bogra, dated the 23rd of December 1919, reversing that of the Munsif, First Court at Bogra, dated the 7th of April 1919.

FACTS appear from the judgment.

Babu *Atul Chandra Gupta*, for the Appellant.—I submit that the learned Subordinate Judge is wrong in thinking that the Munsif's order is not a final order, but is only an interlocutory order. *Bhup Indar Bahadur Singh* v. *Bijai Bahadur Singh* (1) cannot be distinguished from the present case and that case clearly governs this case. I submit that it is clearly a decree. And the definition of the term 'decree' in the present Civil Procedure Code makes the thing quite clear and unambiguous. So far as the defendants were concerned they were absolved from any liability. Reads section 2, Civil Procedure Code. Refers to *Ram Kirpal* v. *Rup Kuari* (2), *Beni Ram* v. *Nanhu Mal* (3), *Raja of Ramnad* v. *Velusami Tevar* (4).

Babu *Bejan Kumar Mookerjee*, for the Respondents.—The order of the learned Munsif cannot but be treated as an interlocutory order. It could not have been challenged by

(1) 23 A. 152; 2 Bom. L. R. 978; 27 I. A. 209; 5 C. W. N. 52; 10 M. L. J. 290; 7 Sar. P. C. J. 788 (P. C.).

(2) 6 A. 269; 11 I. A. 37; 4 Sar. P. C. J. 489; 3 Ind. Dec. (N. S.) 718.

(3) 7 A. 102; 11 I. A. 181; 4 Sar. P. C. J. 564; 4 Ind. Dec (N. S.) 138.

(4) 59 Ind. Cas. 880; 48 I. A. 45; 19 A. L. J. 168; 40 M. L. J. 197; 13 L. W. 290; (1921) M. W. N. 51 33 C. L. J. 218; 25 C. W. N. 681; 23 Bom. L. R. 701 29 M. L. T. 345 (P. C.).

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way of appeal. Reads Order XX, rule 12, Civil Procedure Code, it is a preliminary decree. It was an order preparatory to the passing of the final decree. Refers to *Bharte Indu* v. *Yaqub Husain* (5), and *Ramini Debi* v. *Promotho Nath* (6). The present case tallies with *Bharte Indu* v. *Yaqub Husain* (5).

It does not come under section 2 of Civil Procedure Code as it does not conclusively determine all questions at issue.

Bhup Indar Bahadur Singh v. *Bejai Bahadur Singh* (1) is clearly distinguishable, there the order was passed in execution proceedings. There cannot be a series of decrees in a suit to be challenged piecemeal by way of appeal.

Babu *Atul Chandra Gupta* was not called upon to reply.

JUDGMENT.—This is an appeal against the decision of the Subordinate Judge of Bogra remanding a case for assessment of mesne profits.

The question that arises in this appeal is whether any appeal lay to the Subordinate Judge in this matter. The plaintiffs-respondents brought a suit for declaration of their *raiyati* right to an eight-annas odd share in a certain holding alleging that they were purchasers from some of the heirs of one Sona. In that suit heirs of Sona were made defendants and also one Baso and defendants Nos. 6 to 12, the present appellants, were joined as being in possession of the land. Their pleas were that they were *burgadars* of some plots under Baso and also mortgagees of Baso in respect of some plots. The suit was dismissed by the Court of first instance. On appeal that decision was reversed and the suit decreed. The plaintiffs' title to the share claimed was declared and they were granted a decree for possession after partition. It is also directed that defendants Nos. 6 to 12 would not be ejected from the land and that the decree in the suit would in no way prejudice the mortgage right, if any, of these defendants.

The case was then sent back to the lower Court for partition and determination of the amount of mesne profits. When the case came back before the Munsif's Court the plaintiffs gave up their right to partition. On the 9th January 1919 an objection was taken by defendants Nos. 6 to 12, the present appellants, that they were not liable for mesne profits. That objection was heard in the presence of the parties and the Munsif held that the order of the Subordinate Judge remanding the case did not include defendants Nos. 6 to 12 and absolved them from the liability of paying the mesne profits. He ordered accordingly that the mesne profits against the remaining defendant should be ascertained and a Commissioner was appointed for this purpose. On the 7th April 1919 after the Commissioners' report had been received the Munsif finally disposed of the case and passed an order dismissing the claim for mesne profits as against defendants Nos. 6 to 12 on contest and dismissing it as against the other defendants for non-prosecution.

The contention on behalf of the appellants is that the order of the 9th January was a decree against which an appeal should have been preferred, and that no appeal having been preferred against that order it had become final before the appeal was presented to the lower Appellate Court. In my opinion that contention must be upheld. The order of the 9th January definitely determined that these defendants were not liable for mesne profits. In the case of *Bhup Indar Bahadur Singh* v. *Bijai Bahadur Singh* (1) it was held by the Judicial Committee of the Privy Council that an order deciding the period for which mesne profits could be recovered was a decree within the meaning of the definition in section 2 of the Code of Civil Procedure then in force. Since then there has been an alteration of the definition of the decree in the Code of 1908. But the alteration is to make it wider than before. The order now under consideration was an order finally deciding that these defendants were not liable for any mesne profits. That appears to me to be as much a final adjudication as the order which was considered by the Judicial Committee in the case to which I have referred.

Taking this view this appeal must be decreed on the preliminary point raised and it is unnecessary to consider the lower Appellate Court's order on its merits.

(5) 18 Ind. Cas. 701; 35 A. 159; 11 A. L. J. 120.
(6) 27 Ind. Cas. 317; 20 C. L. J. 476 at p. 480; 19 C. W. N. 755.

Accordingly I decree this appeal, set aside the order of the lower Appellate Court and restore the decree of the Court of first instance. The appellants will get their costs in this and lower Appellate Court.

W. C. A.

Order set aside.

LAHORE HIGH COURT.

MISCELLANEOUS SECOND CIVIL APPEAL NO. 1355 OF 1919.

January 17, 1922

Present :—Mr. Justice Abdul Raoof and Mr. Justice Harrison.

MUHAMMAD RAFIQ—DEFENDANT—APPELLANT

versus

Khawaja QAMAR DIN—PLAINTIFF AND ILAM DIN—DEFENDANT—RESPONDENTS.

Contract Act (IX of 1872), s. 247—Partnership based on contract—Minor, whether can create.

Although under section 247 of the Contract Act a minor may be admitted to the benefits of a partnership, and, if so admitted, his share is liable, but where the partnership is based on contract, the privilege conferred by the section does not give him the power to create a firm, that is to say, a partnership based on contract must be in existence before he can be admitted to its benefits, for he cannot be admitted to what does not exist. [p. 98, col. 1.]

Miscellaneous second appeal from an order of the District Judge, Lahore, dated the 17th April 1919, reversing that of the Subordinate Judge, First Class, Lahore, dated the 20th November 1918.

Sheikh *Nias Muhammad*, for the Appellant.

Lala *Rama Nand*, for the Respondents.

JUDGMENT.—The plaintiff purports to sue the firm Muhammad Rafiq-Ilam Din for recovery of certain moneys said to be due on account of transactions which took place in the year 1917. The firm is sued through Muhammad Rafiq and is shown as consisting of two members only. The transactions in question took place while Muhammad Rafiq was a minor and the plaintiff claims to recover from his share of the partnership property on the strength of section 247 of the Contract Act. The suit was originally dismissed on the ground that Muhammad Rafiq being a minor at the time the firm was created and also having been a minor at the time of the transactions, he could in no way be held liable. On appeal the District Judge relying on *Gopi Mal Durga Das* v. *Jain Bank of India Limited* (1) has held that a minor can enter into a partnership in the sense that he can, acting with another major person, create a partnership and, has remanded the case for decision under Order XLI, rule 23.

On second appeal it is pointed out that the only other member of the partnership was a stranger Ilam Din, that this was not a case of a family partnership or of a Hindu joint family as the so called partners are Muhammadans and in no way related to each other and that, although section 247 provides that a minor may be admitted to the benefits of a partnership, it does not cancel or revoke section 11 of the Contract Act and make it possible for a minor simultaneously to create a partnership and to admit himself to the benefits of the same. We find this contention to be sound and convincing. Counsel for the respondent has quoted many rulings such as *Makhun Lall Dutt* v. *Ram Lall Shaw* (2), *Mollow, March & Co.* v. *Court of Wards* (3), *Palaniappa Chetty* v. *Official Assignee of Madras* (4) and *Raghunath i Tarachand* v. *Bank of Bombay* (5), but nowhere do we find any authority for the proposition that a minor is given the power to contract. Reliance is also placed on *Gopi Mal-Durga Das* v. *Jain Bank of India Limited* (1) the authority quoted by the learned District Judge. This was a case of a Hindu joint family in which the father and his minor son carried on the business of the firm, and it explains that a minor can act as an agent under section 184 of the Indian Contract

(1) 45 Ind. Cas. 17; 38 P. W. R. 1918; 17 P. L. R. 1918.

(2) 3 C. W. N. 134 at p. 139.

(3) 18 W. R. 384; 10 B. L. R. 312; I. A. Sup. Vol. 89; 3 Sar. P. C. J. 169; 9 Moo. P. C. (N. S.) 214; 17 E. R. 495.

(4) 36 Ind. Cas. 787; 20 M. L. T. 565; (1917) M. W. N. 150.

(5) 2 Ind. Cas. 173; 34 B. 72 at p. 87; 11 Bom. L. R. 255.

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Act and can bind the firm. The words of section 247 of the Contract Act are that a minor "may be admitted to the benefits of partnership" and, if so admitted his share is liable. If, however, the partnership be based on contract as is alleged to be the case here, the privilege conferred on the minor by section 247 will not give him the power to create a firm, in other words, a partnership of this nature must be in existence before he can be admitted to its benefits, for he cannot be admitted to what does not exist. It is clearly established law that a contract made by a minor is not only voidable but void, and whatever may be the position of a minor member of a Hindu joint family, where the partnership is not created by contract, and the minor at birth automatically becomes a co-sharer in a case such as this the minor cannot be admitted and his share, if any, cannot be held liable, inasmuch as the partnership to which he is alleged to have been admitted was not and could not be in existence until he had done an act which he was legally disqualified from doing and which would have been void *ab initio*.

We, therefore, accept the appeal and setting aside the order of remand we restore the order of the Trial Court. The costs of the defendant Muhammad Rafiq will be paid throughout by the plaintiffs.

W. C. A.

Appeal accepted.

PATNA HIGH COURT.
CIVIL REVIEW No. 2 OF 1922.
April 12, 1922
Present:—Mr. Justice Das and Mr. Justice Bucknill.

NILMONI CHAUDHURI—APPELLANT—APPLICANT

versus

KEDAR NATH DAGA—RESPONDENT—OPPOSITE PARTY.

Compromise by Counsel—Withdrawal by client—Consent order perfected—Court's discretion—Acquiescence by client.

Counsel has an apparent authority to compromise in all matters connected with an action and not merely collateral to it and if he acts within his apparent authority and the other party has no notice of any limitation or restriction on that authority, the client will be bound by the agreement made by his Counsel and embodied in some order or judgment of the Court. [p. 10', col. 2; p. 102, col. 1.]

Per *Das, J.*—Where a consent is given by a Counsel under some misapprehension as to the wishes of his client, the latter may withdraw it before the consent order is drawn up and perfected, but not afterwards. [p. 102, col. 2.]

The Court has very large discretion in the matter before the order is drawn up. But once the order is actually drawn up and perfected the discretion is at an end. [p 102, col. 1.]

Lewis v. *Lewis*, (1890) 45 Ch. D. 281; 59 L. J. Ch. 712; 63 L. T. 84; 39 W. R. 75, *Neale* v. *Gordon-Lennox*, (1902) A. C. 465; 71 L. J. K. B. 939; 87 L. T. 341; 51 W. R. 140; 66 J. P. 757; 18 T. L. R. 791, *Strauss* v. *Francis*, (1866) 1 Q. B. 379 at p. 385; 7 B. & S. 365; 35 L. J. Q. B 133; 12 Jur. (N. S) 486; 14 L. T. 326; 14 W. R. 634, *Swinfen* v. *Swinfen*, (1856) 18 C. B. 485; 139 E. R. 1459; 25 L. J. C. P. 303; 27 L. T. (O. S.) 220; 107 R. R. 381; *Swinfen* v. *Swinfen*, (1857) 1 C. B. (N. S.) 364; 140 E. R. 150; 26 L. J. C. P. 97; 3 Jur. (N S.) 85; 28 L. T. (O. S.) 233; 5 W. R. 203; 107 R. R. 699; *Swinfen* v. *Swinfen*, (1857) 24 Beav 549; 53 E R. 470; 27 L. J. Ch. 35; 3 Jur. (N. S.) 1109; 6 W. R. 10; 116 R. R. 219, distinguished.

The mere fact that a consent order is hard is no ground for reviewing it. [p. 102, col. 2.]

The Counsel of a party to a suit entered into a compromise agreeing to deposit a certain sum of money in Court under the mistaken belief that he had the permission of his client to do so. The client who was present in Court stood by without making any protest, and even tried to raise up the required sum. Failing, he applied to set aside the consent order after the same had been drawn up and perfected:

Held, that the order could not be set aside as not only the application had been made long after the consent order had been perfected but the applicant, in so far as he had tried to raise the sum required, had acquiesced in the same. [p. 102, col. 1.]

Application for review of the decision of Mr. Justice Das and Mr. Justice Bucknill, dated the 11th November 1921.

Messrs. *K. S. Sen*, *A. C. Sen* and *A. B. Mukherji*, for the Appellant-Applicant.

Messrs. *Manuk*, *S. P. Sen* and *B. N. Mitter*, for the Respondents-Opposite Party.

JUDGMENT.

DAS, J.—This is an application for setting aside a consent-decree passed by this Court on the 11th November 1921. The circumstances are these:—The opposite party instituted a suit against the applicant in the Court of the Subordinate Judge of Dhanbad for specific performance of certain agreements and also for recovery of a sum of Rs. 6,05,642-11-0. Pending the disposal of that suit the plaintiff applied for, and obtained an

order, appointing the applicant as the Receiver of a certain colliery business which was the subject-matter of the litigation between the parties. Against that order of the learned Subordinate Judge the applicant preferred an appeal to this Court. That appeal came on for hearing on the 5th November and Mr. Hasan Imam, appearing on behalf of the appellant, the applicant before us, made certain proposals for settlement. Mr. Manuk on behalf of the opposite party suggested that the case should stand over till the 11th November 1921 in order to enable the parties to consider those terms or any alternative terms that might be suggested. The matter accordingly stood adjourned till the 11th November 1921. On that date a consent order was passed to the effect that the appellant would deposit in the Court of the Subordinate Judge of Dhanbad on or before the 16th January 1922 the sum of Rs. 6,05,642 to answer any decree that might be passed against him in that suit and that on such deposit being made the order appointing him the Receiver of the colliery business would be discharged, but that on his failure to bring into Court the said sum on or before the 16th January 1922 the appeal would stand dismissed. This consent order was passed on the 11th November 1921 and on the 9th January 1922 the present application for setting aside the consent order of the 11th November 1921 was presented to this Court. The petition alleged that one Ramratan Das, who was in fact a broker but who represented himself to be the *karpardas* of the applicant, gave instructions to Mr. Hasan Imam on behalf of the applicant and that Mr. Imam in proposing the terms of settlement to the Court acted on instructions given to him by Ramratan Das and not in exercise of that authority which was vested in him as an Advocate of the applicant. It was suggested in the petition that Mr. Imam acted under a misapprehension in so far as he thought that Ramratan Das was authorized by the applicant to propose those terms to the Court and that, as Mr. Imam's consent was given under a misapprehension, there was in reality no consent at all and that accordingly the consent-decree ought to be set aside. The whole basis of the petition, as I have stated, is that Ramratan Das was a broker and not a *karpardas* of the applicant and had no authority from the applicant to propose any terms of compromise on his behalf and that as Mr. Imam acted entirely on the instructions given to him by Ramratan Das the consent decree could not stand. As I shall presently show, the introduction of the name of Ramratan Das has raised an entirely false issue in the case; for it now appears that on the 11th November 1921 when the consent order was in fact passed by this Court, it was not Ramratan Das who came to Patna from Calcutta to give instructions to Mr. Imam but one Provash Babu who admittedly looks after the applicant's business and was undoubtedly authorized to give instructions to Mr. Imam. The applicant has certainly shown a want of candour in so far as he has concealed the part which Provas Babu took in the matter from the Court in his petition. We are told that this petition was drafted in a Solicitor's office in Calcutta. I am loath to believe that any Solicitor of any position would deliberately give a wrong impression to the Court if the facts were disclosed to him. I am of opinion that the false issue which the applicant has deliberately raised in his petition has by no means improved his case.

The petition then states that new circumstances arose subsequent to the passing of the consent order which made it impossible for the applicant to bring into Court such a large sum of money within the period fixed in the consent order. This paragraph again suggests, and the evidence in the case makes it perfectly clear, that the applicant tried his best to give effect to the consent order and that the application was presented only when it became clear to the applicant that the money could not be raised so as to enable him to bring into Court such a large sum of money on or before the 16th January 1922. It is only necessary to mention at this stage that the order which was passed by consent on the 11th November 1921 was duly drawn up and entered before the application was presented in this Court on the 9th January 1922.

The evidence shows that when the first proposal was made by Mr. Imam for settlement it was Ramratan Das who gave instructions to Mr. Imam on behalf of the applicant. Having given those instructions he left for Calcutta on the night of the 5th November. When the case came up for hearing on the 11th November, it was not Ramratan Das

who came from Calcutta to instruct Mr. Imam. Provas Babu, who, as I have stated, is undoubtedly the agent of the applicant, was in Court and it was in his presence and not in the presence of Ramratan Das that Mr. Imam offered the terms which were accepted by Mr. Manuk. I am of opinion that the question whether Ramratan Das had authority from the applicant is entirely irrelevant; we have only to enquire whether Provas Babu took the responsibility for the terms of settlement that were proposed to the Court on the 11th November. Provas Babu's evidence in this Court is that when he came to Patna on the 11th November he was wholly unaware of the fact that any terms of settlement had been proposed to the Court on the instructions of Ramratan Das. I find it difficult to accept this testimony. Ramratan Das did give certain instructions to Mr. Imam and Mr. Imam did propose certain terms to the Court. Ramratan Das left for Calcutta immediately after and it is admitted that he saw the applicant as well as Provas Babu in Calcutta. It is admitted that Ramratan Das informed them that the case would be taken up on the 11th November. I find it difficult to believe that Ramratan Das failed to tell them that certain terms of settlement had been proposed to the Court by Mr. Imam on his instructions. There is no suggestion that Ramratan Das deliberately acted to the prejudice of the applicant. He undoubtedly thought that a settlement was best for the parties and though he may have exercised an authority which he never had in fact, there is no explanation why he should not have told the applicant exactly what happened in Court on the 5th November. Babu Abani Bhusan Mukherji, a leading Vakil of this Court who appeared in the case with Mr. Imam has made a statement to this Court and we entirely accept that statement. He says in his statement that Provas Babu told him that it was not possible to bring into Court such a large sum of money within so short a time and that Abani Babu told Provas Babu that the other side would probably not accept the terms which had been proposed by Mr. Imam. Abani Babu's impression as to what happened on the 11th November is as follows:—"On the 11th before the Hon'ble Judges came to Court Mr. Manuk in Court room said that he agreed to the terms. This came upon Provas Babu as a surprise; but I advised Provas Babu to try and agree to it since the other side was agreeable, on the ground that the matter had advanced too far; the proposal had gone from us and it would not be wise to back out of it now and that judging from the rate at which they had been working and selling coal, I thought it would be possible for them to deposit the money if they tried honestly. Provas Babu said it would be difficult to put together such a large sum within such a short time; but I thought that in the interests of the client it would not be proper to recede at that stage and tried to make him submit to the terms. Provas Babu kept quiet and I understood him to agree. Thereupon I instructed Mr. Imam that the client was agreeable." I accept the statement as an accurate representation of what actually happened in Court. The question still remains that Provas Babu kept quiet and allowed his Counsel, Mr. Imam, to make the proposal in Court on the 11th November. He made no attempt to tell Mr. Imam, although he was actually present in Court, that the terms were such as could not be carried out. On the contrary, he went to Calcutta and made a genuine effort to raise the money. Circumstances, however, changed over which the parties had no control which made it impossible for the applicant to raise the money in Calcutta. The fact remains, however, that between the 11th November 1921 and the 9th January 1922 there was not only no challenge by the applicant on the consent order of the 11th November 1921, but, on the contrary, there was a submission to that order in the sense that the applicant tried to raise the money to enable him to carry out the order.

What then is the position? Two propositions are well-settled; first, that express authority is not needed for a Counsel to enter into a compromise within the scope of the suit; and secondly, that where there is limitation of authority and that limitation is communicated to the other side, consent by Counsel outside the limit of his authority would be of no effect. But the position is one of difficulty where the limitation is known to the other side or where Counsel acts on instructions as to a compromise under a misapprehension and not in exercise of that authority which is vested in him as an Advocate of the party to the litigation. It was urged before us by Mr.

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P. K. Sen that in this case Mr Imam did not purport to exercise his discretionary authority at all; but that he purported to act on instructions and that as he was wholly unaware of the fact that his client had stated to his Vakil Abani Babu that it would be impossible for him to carry out the terms of the consent order; his consent was given under an entire misapprehension so that there was in reality no consent at all. Mr. Sen relied upon *Swinfen* v. *Swinfen* (1) in all its stages, on *Lewis* v. *Lewis* (2) and on *Nundo Lal Bose* v. *Nisturini Dassi* (3). So far as *Swinfen* v. *Swinfen* (1) is concerned, the subsequent case of *Prestwich* v. *Poley* (4) declined to refer to it as a decision which is to afford a guide in any case not similarly circumstanced. In *Swinfen* v. *Swinfen* (1) the circumstances were these: On the 15th March 1856, an issue directed by the Master of the Rolls, in a suit in Chancery of *Swinfen* v. *Swinfen* (1) to try the validity of the Will of one Samuel Swinfen, deceased, came on for trial before Cresswell, J, and a special Jury at the Assizes at Stafford. Negotiations for settlement took place between the leading Counsel for the respective parties at the close of the first day of the trial and ultimately certain terms were agreed upon and embodied in a memorandum which was signed by them in the presence of the Attorneys on both sides. The terms were that the estate was to be conveyed by the plaintiff to the defendant free of incumbrance, if any, created since the death of Samuel Swinfen and that the defendant was to secure to the plaintiff an annuity for her life on the estate of £ 1,000 a year. This memorandum was embodied in an order of *nisi prius*, which was afterwards made a rule of Court. In order to give effect to the compromise the defendant's Solicitor addressed several letters to the plaintiff's Solicitor for certain documents and was ultimately informed by the plaintiff that she was not disposed to carry out the terms of compromise on the ground that the arrangement was made not only without her sanction but directly in opposition to her wishes. Thereupon the defendant obtained a rule calling upon Mrs. Swinfen, the plaintiff, to show cause why an attachment should not be issued against her for disobedience of the rule of Court. This was the first stage of the case and the decision of these proceedings is reported as *Swinfen* v. *Swinfen* (5). The application failed on a technical ground, namely, that it was not shown that there was personal service of the rule and a personal demand of performance before the rule was obtained; but Cresswell, J. in delivering the judgment came to the conclusion that the compromise was binding on Mrs. Swinfen. In the course of his judgment the learned Judge said as follows:—

"I think it would be most fatal to the due administration of justice, if we were to allow the authority of Counsel to be thus questioned. And there is not any hardship or inconvenience in this: for, if the client or the Attorney has any reason to think that the Counsel is taking a course that will prejudice his interests, he may withdraw his brief, and so put an end to his authority to represent the client before the Court." I may mention that in the case before us there was at no time any express dissent on the part of Provas Babu. All that he did was to make his protest not to Mr. Imam but to Abani Babu and then remained silent when it was pointed out to him by Abani Babu that it was possible for them to raise the money if they "tried honestly." He suffered the consent-decree to be passed without making any protest to Mr. Imam although he was sitting behind Mr. Imam and made an effort to comply with the terms of settlement. In my opinion the case of *Swinfen* v. *Swinfen* (5) as reported in 18 Common Bench is against the contention of Mr. Sen.

The next stage of *Swinfen* v. *Swinfen* (5) is reported in 1 Common Bench, 1 New Series, 364; 140 E. R. 150. The application was again made for attachment of the plaintiff for disobedience of the rule of Court after effecting personal service on her. One of the learned Judges, Crowder, J. was of opinion that attachment should not issue inasmuch as there was no real consent on behalf of the plaintiff. He found that the

(1) (1857) 24 Beav. 549; 53 E. R. 470; 27 L. J Ch. 35; 3 Jur. (N. S) 1109; 6 W. R. 10; 116 R. R. 219.

(2) (1890) 45 Ch. D. 281; 59 L. J. Ch. 712; 63 L. T. 84; 39 W. R. 75.

(3) 27 C. 428; 4 C. W. N. 169; 14 Ind. Dec. (N. S.) 282.

(4) (1865) 18 C. B. (N. S.) 803; 144 E. R. 632; 34 L. J. C. P. 189; 12 L. T. 390; 11 Jur. (N. S.) 583; 13 W. R. 758; 144 R. R. 683.

(5) (1856) 18 C. B. 485; 139 E. R. 1459; 25 L. J. C. P 303; 27 L T. (O S.) 220; 107 R. R. 381.

(6) (1857) 1 C. B. (N. S) 364; 140 E. R. 150; 26 L. J. C. P. 97; 3 Jur. (N. S.) 85; 28 L. T. (O. S.) 233; 5 W. R. 203; 107 R. R. 699.

plaintiff, before the commencement of the litigation, had rejected an offer much more advantageous in its terms than those contained in the agreement in question and that she had refused again to entertain the proposition when recommended to her by her Counsel after the adjournment of the case on the first day. He thought that there was express dissent on her part and that there was no authority in her Counsel to settle the case on her behalf. This was the view of Crowder, J., but the other learned Judges who heard the case were of a different opinion. But, having regard to the well-known practice that it is impossible for a Court to treat a party as guilty of contempt for refusing to perform an agreement by which one member of the Court thinks the party is not bound, the Court, although the majority of the Judges was clearly of opinion that the plaintiff was bound by the agreement, discharged the rule. This case again does not support the contention of Mr. Sen.

The last stage of this case is reported in 24 Beav. 549; 53 E. R. 470 [*Swinfen* v. *Swinfen* (1)]. This was a decision in Chancery in a supplemental bill filed by Capt. Swinfen who was the defendant in the original action, praying that Mrs. Swinfen might be decreed specifically to perform the agreement for a compromise. The Court came to the conclusion that a client may become bound by a compromise entered into by his Attorney without his authority but not repudiating it within a reasonable time. The facts found by the Court were that the compromise was unauthorised by the plaintiff and was effected without the instructions of his Attorney and that, as there was no subsequent acquiescence, the bill by the defendant in the action for specific performance of the compromise could not be entertained. Now, in my opinion, a suit for specific performance of an agreement stands on a different footing from an application to set aside a consent order. A plaintiff is not entitled as of right to a decree for specific performance and various questions can properly be taken into consideration by a Court in deciding whether an agreement should be specifically performed which do not arise in an application for setting aside a decree. It is open to a Court in an action for specific performance to say that the bargain is a hard one and that there is real hardship in the matter and that the plaintiff should be left to his remedy at law. This was at the bottom of the judgment pronounced by the Master of the Rolls in the case; but though the decision cannot be claimed as an authority by a party seeking to set aside a consent-decree on the ground that the Counsel had no authority to enter into the compromise, the Court in *Prestwich* v. *Poley* (4) refused to recognize the decision of the Master of the Rolls as a guide in any case not similarly circumstanced—the case is against the contention of Mr. Sen in so far as it recognizes that unless the repudiation is prompt and within a reasonable time the compromise would bind the party. In the case before us the repudiation was not only not prompt but actually came only after the applicant discovered that owing to change of circumstances, which took place subsequent to the date of the consent order, it was impossible for him to comply with that order. I am unable, therefore, to look upon *Swinfen* v. *Swinfen* (1) as in any way assisting the argument of Mr. Sen.

The next case is that of *Lewis* v. *Lewis* (2). Kekewich, J., held that although a compromise entered into by Counsel under the authority implied by their employment is binding on the client, and cannot be upset by the Court, a compromise entered into in intended pursuance of terms consented to by the client but by misapprehension not strictly following them, is not binding on the client. It was argued by Mr. Sen that there was a clear misapprehension in the mind of Mr. Imam in so far as he thought that his client desired him to settle the case on the terms proposed by him. It is necessary to mention that the decision of Kekewich, J. was pronounced in a motion on behalf of the plaintiffs for leave to withdraw their consent to the order which purported to be a consent order on the ground that there was misapprehension in the mind of the Counsel. This motion was made before the order was actually drawn up and entered. *Neale* v. *Gordon-Lennox* (7) also supports the argument that there is very large discretion in the Court before the order is actually drawn up and entered. The action was for damages for slander and libel on

(7) (1902) A. C. 465; 71 L. J. K. B. 939; 87 L. T. 341; 51 W. R. 140; 66 J. P. 757; 18 T. L. R. 791.

the allegation that the defendant had made serious imputations against the plaintiff's character. Before the case came up for trial Sir Edward Clarke, the plaintiff's leading Counsel, proposed certain terms of settlement to his client. The terms were written out by Sir Edward Clarke himself and were handed over to the plaintiff and they were as follows : " Defendant stating by her Counsel that she never imputed or meant to impute anything against the moral character of the plaintiff and is satisfied that there is no ground for any such imputation.

" Case referred to.....to say what should be done between the parties in satisfaction of all matters in difference between them.

" Case referred to.....to say what sum, if any, should be paid by the defendant in compensation for the matters complained of in this action."

It will be noticed that alternative terms were suggested by Sir Edward Clarke to his client. If the first alternative was accepted by the defendant there was no question of any sum being paid by the defendant in compensation for the matters complained of in the action. But it required the defendant to state that she never imputed or meant to impute anything against the moral character of the plaintiff and was satisfied that there was no ground for any such imputation. The other alternative assumed the correctness of the allegations of the plaintiff and left the question of compensation to arbitration. At the bottom of these terms the plaintiff wrote the words :— 'I consent to either alternative Sir Edward Clarke adopts." There was clearly a limitation of Counsel's authority, but this limitation was not made known to the defendant's Counsel. The defendant, however, refused to disclaim all imputations and after an interview with the learned Judge an order was drawn up in the following terms :—" It is ordered that the whole of this cause be tried before H. F. Dickens, Esqr., K. C., as Official Referee, who shall have all the powers of certifying and amending of a Judge of the High Court of Justice, and shall direct judgment to be entered and otherwise deal with the whole action pursuant to Order XXXV ." In other words, the whole action was referred to the arbitration of Mr. Dickens. Before the order was actually drawn up and entered, the plaintiff took steps to set it aside and the House of Lords came to the conclusion that the learned Judge in the Trial Court who did set it aside and restore the cause to the list for trial acted with great propriety. Mr. Sen strongly relied upon this case and argued that where there is in fact a limitation of authority the consent given by Counsel outside the limits of his authority would not bind his client irrespective of the question whether that limitation is communicated to the other side or not. On the other hand, *Strauss* v. *Francis* (8) establishes that a compromise which is within the Counsel's apparent authority, that is to say, a compromise within the scope of the suit, is binding on the client notwithstanding he may have dissented unless this dissent was brought to the knowledge of the opposite party at the time: *Holt* v. *Jesse* (9) lays down that though a consent given by Counsel in the presence and with the sanction of his client may be withdrawn before the order is drawn up, if given through inadvertence, it cannot be withdrawn where the matter was fully understood at the time and the client shortly afterwards changes his mind. In this case there is no doubt that the client did fully understand what the compromise was about and that he changed his mind not shortly afterwards, but only when he found that it was impossible for him to comply with the consent order. This case entirely supports the contention of Mr. Manuk.

There is, however, an apparent conflict between *Strauss* v. *Francis* (8) and *Neale* v. *Gordon-Lennox* (7). This conflict was explained in the case of *Shepherd* v. *Robinson* (10). The learned Judges in *Shepherd* v. *Robinson* (10) accepted the proposition as well settled that Counsel has an apparent authority to compromise in all matters connected with the action and not merely collateral to it ; and that if he acts within his apparent authority and the other party

(8) (1866) 1 Q. B. 379 at p. 385; 7 B. & S. 365; 35 L. J. Q. B. 133; 12 Jur. (N. S.) 486; 14 L. T. 326; 14 W. R. 634.

(9) (1876) 3 Ch. D. 177; 46 L. J. Ch. 254; 24 W. R. 879.

(10) (1919) 1 K. B. 474; 88 L. J. K. B. 873; 120 L. T. 492; 35 T. L. R. 220.

has no notice of any limitation or restriction on that authority, the client will be bound by the agreement made by his Counsel and embodied in some order or judgment of the Court. In reference to *Neale* v. *Gordon-Lennox* (7), the learned Judges said that that case belonged to a different line of cases which decided that before a consent order has been drawn up and perfected, the consent given by Counsel or Solicitor may be withdrawn by the client if the Counsel or Solicitor give it under a misapprehension. This, in my opinion, is the real distinction between *Neale* v. *Gordon-Lennox* (7) and *Strauss* v. *Francis* (8). The Court undoubtedly has very large discretion in the matter before the order is actually drawn up and perfected but there is no such discretion where the order has in fact been drawn up and perfected. As was pointed out in *Shepherd* v. *Robinson* (10), the real question in each case is to see within which class the particular case falls.

There is no doubt whatever that the application in the present case was made long after the order was drawn up and perfected. There is also no doubt, in my mind, that the applicant not only did not repudiate the consent given on his behalf by Mr. Imam but acquiesced in it in so far as he tried to raise the money in order to enable him to comply with the order. I am of opinion, therefore, that the applicant is not entitled to an order setting aside the consent order of the 11th November 1921.

It was urged by Mr. Sen that it has been the settled practice of the Calcutta High Court to set aside consent orders in applications for review and it was urged that the case is a particularly hard one for his client and that this Court ought to set aside the consent order. It may be assumed that an application for review would lie to set aside a consent order; but the question still remains whether grounds have been made out by the applicant which would induce this Court to set aside the consent order. In my opinion there are no grounds for review. I quite agree that there are certain terms in the order which has been passed by the learned Subordinate Judge which are very hard on the applicant and although we can give no directions upon the learned Subordinate Judge in these proceedings, we would urge upon him the necessity of altering those terms to some extent. We are informed, for instance, that the Receiver has been directed to file his accounts monthly. I have no doubt whatever that this would have the effect of hampering him in his business. In my experience half yearly accounts are usually required from the Receiver and I think that if an application be made by the petitioner to the learned Subordinate Judge, the learned Subordinate Judge ought to consider whether it is not a sufficient protection for all the parties concerned if the Receiver is directed to bring his accounts into Court half yearly. But although the Court may properly require the Receiver to file his accounts half yearly he ought to be required to send abstracts of the receipts and disbursements of the property in his hands every three months to the plaintiff. He ought further to be required to supply to the plaintiff once every three months a copy of the completed contracts which have been entered into by him. Any order which may have the effect of compelling him to disclose the agreement into which he may enter before those agreements have matured into complete contracts might seriously embarass him in his business. These are the matters which I think the learned Subordinate Judge ought to seriously consider if a proper application is presented to him by the plaintiff. But the fact that the order which has been passed by the learned Subordinate Judge is undoubtedly hard on the Receiver is no ground for reviewing the consent order of the 11th November 1921.

This application must fail and we refuse it with costs. Hearing fee fifteen gold *mohurs*.

BUCKNILL, J.—This was an application made by one Nilmoni Chowdhuri who is the defendant in an action brought against him by one Kedarnath Daga in the Court of the Subordinate Judge of Dhanbad in the District of Manbhum in connection with a claim for a very large sum of money which the plaintiff alleged had been advanced to the defendant relative to an agreement for sale of a colliery.

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There is no doubt that there was a serious dispute between the parties; the defendant, however, maintained that the real issue between them was merely a matter of account. The plaintiff, on the ground that the defendant was trying to dispose of the property in question and on other grounds, applied to attach the defendant's colliery before judgment and for the appointment of a Receiver, pending the hearing of the suit; and, as a result of this application, the Subordinate Judge called upon the defendant to show cause why the property should not be attached and why a Receiver should not be appointed *pendente lite*; and he granted an *ad interim* attachment pending the hearing of the application. When the matter on the 1st of September 1921 came up before him, the Subordinate Judge made an order appointing the defendant as Receiver. From this order the defendant appealed to this Court and a Rule was issued upon the plaintiff to show cause why an *ad interim* stay of the execution of the order appointing the Receiver should not be allowed.

Now, it is very important to note what took place, the matter was finally brought up before this Bench, for, it is from that that the present application now arises; it is accordingly necessary to review shortly what actually occurred. During the course of the hearing it was agreed by Counsel purporting to act on behalf of the defendant and by Counsel for the plaintiff that the defendant would deposit in Court on or before the 16th January 1922 the amount claimed by the plaintiff in order to satisfy any decree which might be passed against him in the suit and that, in the event of his failure to do so, the Rule *nisi* would be discharged and the appeal dismissed with costs; and on this basis this Bench on the 11th November 1921 passed an order accordingly. The matter, however, did not rest there, for on the 9th January 1922 the defendant filed the present petition in which he asks that the order passed by this Court on the 11th of November 1921 should be reviewed (that is to say, set aside) on the ground that the individual who purported to represent him and who purported to agree to the terms of the order was in no way authorised so to do. The individual referred to was one Ramratan Das. It is noticeable, however, that the defendant in his petition, whilst pointing out that Ramratan Das had no authority to assent to the terms of the agreement also indicates that, owing to various circumstances such as strikes, demand for higher wages, and the insufficient supply of Railway waggons which had occurred subsequent to this Court's order, he had found it almost impossible to collect and deposit the agreed sum in Court. The authority of Counsel for the defendant to enter into any such arrangement as had been embodied in the order of this Bench was under these conditions seriously challenged on behalf of the defendant; and, the facts, therefore, demanded a close investigation. A considerable volume of evidence upon affidavit was adduced by both parties, whilst, in addition, this Bench thought fit to have before it for examination the individual named Ramratan Das to whom reference has already been made, another gentleman named Provas Chandra Ray who is an employee in the defendant's firm and who was present at the Court at a very material date when the question of the terms of the order of the 11th November 1921 were under discussion; in addition to this, the defendant himself was also examined. I do not think that it is necessary for me to analyse closely the evidence which had been given. I have read and carefully considered it all and I have come, without difficulty, to the conclusion that the attitude which is now taken up by the defendant is without justification. It is, I think, sufficient to say that Ramratan Das who was the defendant's broker came to Patna on November the 5th last in connection with the proceedings taken by the defendant in this Court against the order of the Subordinate Judge; he was accompanied by a clerk in the defendant's firm, Ramratan Das had a consultation with his Counsel and says that he (Ramratan Das) suggested that if an adjournment could be obtained the money could be collected by the defendant and deposited in Court. As a result of this the matter was adjourned till the 11th *idem* and Ramratan Das returned to Calcutta; he states that he did not inform his principal of what had taken place at Patna; I regret to have to say that I cannot believe this statement. On

the 11th November Ram Ratan Das did not return to Patna; but, on that date, the defendant was here represented by Provas Chandra Ray, who, to use his own expression, "looks after the defendant's cases" He also had a consultation with his legal advisers; and, although he says *now* that he did not agree to the arrangement made by his Counsel and which formed the basis of the order of November 11th, there is no doubt whatever in my mind that he did in fact, even though it may be somewhat reluctantly, acquiesce. The matter having been dealt with in the manner in which I have before indicated, this gentleman returned to Calcutta. There is no doubt that he told his master what had been done but no protest so far as I can see was ever raised until the present application was filed. In my own view there is no doubt that what really took place was that there was in the mind of the defendant no thought of repudiating what had been agreed until it may have been found that the collection of the sum to be deposited presented perhaps more difficulty than had been anticipated or demanded somewhat greater sacrifices than had been expected.

For these reasons I think that this application should be rejected with costs. The order of the 11th November 1921 of this Court will, therefore, stand, but, as the money has not been paid in, the result is that the Rule issued by this Court stands discharged whilst the appeal stands dismissed. But although that is so, the order of the Subordinate Judge appointing the Receiver should, in my opinion, be modified in certain respects as have been detailed by my learned brother.

N. K. & N. H.

Application rejected.

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS PETITION No. 3372 OF 1920.

January 31, 1922.

Present:—Mr. Justice Oldfield and Mr. Justice Venkatasubba Rao.

ALAMURI SITARAMASWAMI—PLAINTIFF—PETITIONER

versus

Sreemath PRATIVADI BHAYANKARNAM ANNAM VENKATA RAGHAVACHARYULU IYYAVARLUM GARU AND OTHERS—DEFENDANTS—RESPONDENTS.

Probate and Administration Act (V of 1881), s. 92—Executors—Power to act alone—Direction in the Will—"Several," meaning of—Renewal of barred debt—Executor, competency of.

Under section 92 of the Probate and Administration Act, two out of three executors are competent to act alone unless the Will contains "a direction to the contrary." [p. 105, col. 1.]

The word "several" in section 92 of the Act does not mean "possessing powers to act severally". This meaning is inconsistent with the use of the word in ordinary parlance. [p. 105, col. 1.]

An executor is competent to renew a barred debt. Probate and Administration Act should not be read as superseding the previous law, merely because it is silent on this point. [p. 105, col. 1.]

Gopal Narain Mozoomdar v. *Muddomutty*, 14 B. L. R. 21, dissented from.

Jethibai v. *Putlibai*, 17 Ind. Cas. 722; 14 Bom. L. R. 1020, followed.

Petition, under rule VIII of the Agency Rules, Godavari, praying that in the circumstances stated therein, the High Court will be pleased to direct the Government Agent, Godavari at Cocanada, to review his decision, dated the 18th August 1920, in Appeal Suits Nos. 9 and 12 of 1920, on his file preferred against a decree of the Assistant Agent, Polavaram Division, in Original Suit No. 71 of 1919.

Messrs. *T. R. Ramachandra Iyer* and *T. Ramachandra Row*, for the Petitioner.

Messrs. *D. Appa Row* and *G. Lakshmanna*, for the Respondents.

ORDER.—The question raised by this appeal is whether the plaintiff-appellant is entitled to recover on a pro-note, which is the third renewal of the pro-note originally executed by a deceased testator, those renewals having been given by two out of three executors appointed by his Will.

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The first objection taken to the plaintiff's case is that two out of the three executors were not competent to act alone. That is negatived by section 92, Probate and Administration Act, V of 1881, unless the defendants-respondents can show that the Will contains in the words of the section, "a direction to the contrary." We have read the Will, but cannot find any such direction in it, either express or implied.

It is then said that section 92 deals only with several executors and that the word 'several' there means "possessing powers to act severally." We have been shown no authority whatever for this contention, which is inconsistent with the ordinary use of the word 'several' in ordinary parlance.

The third question raised by the appeal is more important. It is whether an executor is competent to renew a barred debt. We have not been shown any ground, on which cases of renewal of a barred debt can be distinguished from cases of payment. Authority on the latter class of cases are available: *Tillakchand Hindumal* v. *Jitamal Sudaram* (1), *Administrator-General* v. *Hawkins* (2) and *Samuel Pillai* v. *Ananthanatha Pillai* (3), the two last mentioned dealing with the competence, not of an executor, but of an administrator, although that is not relied on as affording ground for any distinction. On the other side *Gopal Narain Mozoomdar* v. *Muddomutty* (4) has been cited; but we are unable to follow that decision in preference to those already mentioned, two of which were given in this Court. It is true that all these decisions were given before the enactment of the Probate and Administration Act. But we find that in *Jethibai* v. *Putlibai* (5), Beaman, J. stated *obiter* that an executor could renew a barred debt; and there is no reason for holding that the Probate and Aministration Act should be read as superseding the previous law in virtue of its silence on a point of this importance. We have also considered whether the authorities above mentioned, which are based on *Norton* v. *Frecker* (6) and other English cases are open to question, because of the difference between the English and Indian Law of Limitation and the obligation of the Court under the latter to take objection founded on it. In *Administrator-General* v. *Hawkins* (2), however, this point was expressly considered and was overruled. We have been referred to no later authority than those specified, but in the circumstances we see no reason for refusing to follow them. We, therefore, hold that the two executors were entitled to give the suit pro-note in renewal of the previous note or notes which had become barred.

That is sufficient for the disposal of this petition and we need not deal with the further question raised by the plaintiff, whether another note not yet referred to by us and given by the testator's widow was binding on the estate and could afford a valid starting point for limitation.

In these circumstances, the petition must be allowed and the Agent must be directed to review his judgment and decree in the light of the foregoing. Costs throughout of the plaintiff and the first defendant, *i. e.*, petitioner and first defendant, will follow the result and will be paid from the estate. It follows that the third respondent's memorandum of objections is dismissed with costs.

M. C. P.

N. H. & N. K.

Petition allowed.
Memo. of objection dismissed.

(1) 10 B. H. C. R. 206.
(2) 1 M. 267; 1 Ind. Jur. 367; 1 M. L. R. 343; 1 Ind. Dec. (N. s.) 177.
(3) 6 M. 351; 2 Ind. Dec. (N. s.) 525.
(4) 14 B. L. R. 21.
(5) 17 Ind. Cas. 722; 14 Bom. L. R. 1020.
(6) (1737) 1 Atk. 524; 26 E. R. 330.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2604 OF 1913.

January 2, 1914.

Present:—Mr. Justice Carnduff and Mr. Justice Richardson.

NILAMBAR GHOSH AND ANOTHER—DEFENDANTS—APPELLANTS

versus

MIR MOHASANUDDIN—PLAINTIFF—RESPONDENT.

Landlord and tenant—Zemindar's *right* o *create intermediate tenure between* zemindary *and* putni,

There is nothing to prevent a *zemindar* from creating a tenure between the *zemindary* and a *putni* which has already been created under it.

Raj Kumar Mazumdar v. *Probal Chandra Ganguli*, 9 C. W. N. 656, followed.

Appeal against a decree of the Subordinate Judge, Dacca, dated the 23rd April 1913, affirming that of the Munsif, Dacca, dated the 9th December 1912.

Babus *Surendra Chandra Sen* and *Traikokyanath Ghosh*, for the Appellants.

JUDGMENT.—Following the decision of this Court in *Raj Kumar Mazumdar* v. *Probal Chandra Ganguli* (1) by which we are bound, rather than the *obiter dictum* pronounced in *Jarraw Kumari Saheba* v. *Hanifuddin Akanda* (2) we dismiss this appeal under Order XLI, rule 11, Civil Procedure Code.

B. N.

Appeal dismissed.

(1) 9 C. W. N. 656.
(2) 4 Ind. Cas. 471; 14 C. W. N. 389.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 959 OF 1919.
January 11, 1922.
Present :—Mr. Justice Abdul Raoof and Mr. Justice Harrison.

TIKKAN RAM—PLAINTIFF—APPELLANT
versus
BOSA RAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Court-fee—Possession, suit for—Decree, subject to payment of certain sum—Appeal—Civil Procedure Code (Act V of 1908), s. 149—Deficient Court-fee on memo. of appeal—Extension of time.

Where a decree for possession is granted subject to the payment by the plaintiff of a specified sum, and the plaintiff appeals seeking the removal of this condition, the memorandum of appeal must bear a Court-fee stamp calculated on the amount required to be paid under the decree. It is immaterial in what form the suit was originally brought. [p. 107, col 1.]

Wadhawa Singh v. *Sundar Singh*, 59 Ind. Cas. 667; 21 P. W. R. 1921, relied upon.

Where an appellant deliberately undervalues his relief in appeal and affixes a wholly inadequate Court-fee on his memorandum of appeal, and where after the mistake is pointed out and while he still has time to correct the same, he deliberately refuses to do so, he is not entitled to any extension of time under section 149 of the Civil Procedure Code. [p. 107, col 2.]

Amtul Qadir v. *Muhammad Yusaf*, 49 Ind. Cas. 871; 37 P. W. R. 1919; 8 P. L. R. 1919; *Ram Sahay Ram Pandey* v. *Lakshmi Narain Singh*, 42 Ind. Cas 675; 3 P. L. J. 74; 5 P. L. W. 18; *Saidunnessa* v. *Tejendra Chandra Dhar*, 44 Ind Cas. 398; *Lekh Ram* v. *Ramji Das*, 57 Ind. Cas. 215; 1 L. 234, relied upon.

Second appeal from the decree of the District Judge, Mianwali, dated the 6th December 1918, reversing that of the Senior Subordinate Judge, Mianwali, dated the 26th July 1918.

Dr. *Nand Lal*, for the Appellant.

Mr. *T. D. Khanna* and Lala *Jagan Nath*, for Bosa Ram, for the Respondent.

JUDGMENT.—The plaintiff in this case, Tikkan Ram, sued for possession of an area of land mortgaged by his predecessor in-title without payment of any sum and he alleged that one Bosa then in possession was a trespasser. The decree prayed for was given by the First Court, but on appeal it was held that this man Bosa had acquired a share in the mortgage and that the plaintiff was only entitled to obtain possession after payment of Rs. 967 to him. He was, therefore, given a decree conditional on payment of this sum. From this order he presents this second appeal.

The date of the decree of the District Judge is the 6th December 1918. The appeal was presented on the 3rd March 1919, a Court fee of Rs. 3 6-0 being placed upon it. On the 5th March 1919, the office pointed out the mistake and called for the balance of the Court fee of Rs. 69 6 0. On the 14th March 1919, Counsel replied that the appeal was correctly stamped. On the 19th March 1919, the office pointed out once more that further Court-fee was required. On the 22nd April 1919, Counsel again replied that the Court-fee paid was correct and the office once more returned the appeal. On the 1st May 1919 the deficiency was made up. Counsel for the respondents takes a preliminary objection that under section 149, Civil Procedure Code, time cannot be extended as there was no *bona fide* mistake and the appeal cannot be heard. Counsel for the appellant contends that the appeal as originally presented was correctly stamped and the points to be decided are whether this is so or not, and, if not, whether time can be extended.

TIKKAN RAM v. BOSA RAM.

The contention is that, although it would be necessary to pay stamp on the amount directed to be paid by the lower Appellate Court as a condition precedent to possession being given if the suit had been in the form of a redemption suit, inasmuch as the plaintiff asserted that the defendant Bosa was a trespasser and not a mortgagee, the stamp should be calculated at 30 times the *jama* and not on the sum ordered to be paid. We are of opinion, however, that it is quite immaterial in what form the suit was originally brought, provided the decree against which the appeal is presented attaches a definite condition as to the payment of a specified sum. Where a decree is in such a form, the relief sought being the removal of this condition precedent, Court-fee must be paid on the amount so fixed. The position has been clearly explained in *Wadhawa Singh* v *Sundar Singh* (1), in which the facts were precisely similar to those now before us. "The plaintiffs had sued for possession of certain land without payment of anything to the defendants, (as the plaintiff has done here). The decree of the lower Appellate Court was one for possession on payment of Rs. 160, mortgage-money, in other words, it was a decree for redemption. In appeal to this Court the plaintiffs asked that they should be given a decree for possession without payment of anything. The proper Court-fee stamp upon the memorandum of appeal was an *ad valorem* one upon the amount of the mortgage-money."

As to whether under these circumstances there can be said to have been any *bona fide* mistake the authorities are unanimous, and we find that in *Amtul Qadir* v. *Muhammad Yusuf* (2), *Ram Sahay Ram Pandey* v. *Lakshmi Narain Singh* (3), *Saidunnessa* v. *Tejendra Chandra Dhar* (4), and finally in *Lekh Ram* v. *Ramji Das* (5), a Division Bench judgment of this Court, the matter has been settled beyond all doubt, and we extract the following quotation:—"In reply to these arguments Mr. Gokal Chand states that when filing the appeal he consulted the law upon the subject and found the unreported Bombay case and the Allahabad case and considered them authorities of some value in spite of the existence of Punjab and other judgments. We cannot believe that a Counsel of the experience and qualifications of Mr. Gokal Chand could have had the remotest doubt as to the law governing his case. Objections were taken by the office when the appeal was put in and he must have studied the law with great care especially when he discovered the somewhat obscure Bombay judgment. At the time when he put in his appeal, as far as this Court is concerned, not only was the law laid down in *Banwari Das* v. *Nathu Shah* (6), but this judgment had been approved in *Chuni Lal* v. *Beli Ram* (7), and another judgment of this Court *Mansa Ram* v. *Umra* (8) was undoubtedly known to Counsel. The plain facts of the matter are that the appellant, who appears to be somewhat impoverished, to suit his own convenience deferred the payment of Court-fee in spite of the knowledge conveyed to him by his Counsel of the correct fee payable. So far, therefore, from a *bona fide* mistake having been made the omission in this case was deliberate. We, therefore, agree with the contentions and authorities cited by Counsel for the respondent that this is not a case in which an extension of time should be granted."

Mutatis mutandis these remarks apply to this case also. Not only did Counsel deliberately undervalue his relief and put on a wholly inadequate Court-fee, but after the mistake had been pointed out, and while he still had time to correct the same, he deliberately refused to do so. We find, therefore, that the appeal is not properly stamped and that no extension can be allowed under section 149, Civil Procedure Code, and we dismiss the appeal with costs.

Z. K. & W. C. A.

Appeal dismissed.

(1) 59 Ind. Cas. 667; 21 P. W. R. 1921.
(2) 43 Ind. Cas. 871; 87 P. W. R. 1919; 8 P. L. R. 1919.
(3) 42 Ind. Cas. 675; 3 P. L. J. 74; 5 P. L. W. 18.
(4) 44 Ind. Cas. 398.
(5) 57 Ind. Cas. 215; 1 L. 234.
(6) 9 Ind. Cas. 673; 5 P. R. 1911; 48 P. L. R. 1911; 59 P. W. R. 1911.
(7) 30 Ind. Cas. 104; 53 P. R. 1915; 166 P. W. R. 1915; 58 P. L. R. 1916.
(8) 11 Ind. Cas. 198; 134 P. W. R. 1911; 213 P. L. R. 1911.

JOHAR MULL BHUTRA v. BHUPENDRA NATH BASU.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2682 OF 1917.

June 28, 1921.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Buckland.

JOHAR MULL BHUTRA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

BHUPENDRA NATH BASU AND OTHERS—DEFENDANTS—RESPONDENTS.

Specific performance, suit for, against vendor of real estate—Lis pendens—*Landlord and tenant*—*Zemindar, power of, to interpose intermediate holder between himself and his tenant*—*Power of intermediate holder to realise rent from the tenant.*

A suit for specific performance of a contract for transfer of the immoveable property operates as *lis pendens*, in other words, in a suit against the vendor of real estate for specific performance, his conveyance of the legal title after suit was brought would not suspend the proceeding or defeat the title under the decree of the Court. Consequently, when such a suit for specific performance is ended by a final decree transferring the title, that title relates back to the date of the agreement on which the suit is based and the Court will not permit its decree to be rendered nugatory by intermediate conveyances. [p. 110, col. 1.]

A *Zemindar* or tenure-holder who has carved out a tenure or under-tenure, as the case may be, is competent to interpose between himself and his tenant, an intermediate holder who may realise the rent payable to himself by his original tenant. [p. 110, col. 2.]

A landlord who has created a tenancy is still competent to carve out another tenancy from the interest he has reserved and interpose the same between himself and his first tenant, subject to the qualification that he cannot thereby prejudice the position of the first tenant, take away or destroy the value or effect of the prior interest transferred, or, limit its extent or restrain its operation. [p. 112, col. 1.]

The defendants had been tenants under *S.* for a long series of years in respect of a *maurasi mokarari* holding. While thus in occupation as tenant, *S.* granted to the plaintiff a *maurasi mokarari* lease of a large tract of land inclusive of the defendant's holding:

Held, that the plaintiff was entitled to recover from the defendants the rent of the holding which would have been otherwise payable by them to *S.* [p. 110, col. 2.]

(Case-Law considered.)

Appeal against the decree of the Subordinate Judge, First Court, Hooghly, dated the 30th May 1917, reversing that of the Munsif, Third Court, Howrah, dated the 9th July 1915.

FACTS appear from the judgment.

Babu *Bipin Behari Ghose* (with him Babus *Bhupendra Kumar Ghose*, *Pronatha Nath Bannerjee* and *Rama Prasad Mookerjee*), for the Appellants, after stating the facts of the case submitted,—as regards the second half of the property, that the *kobala* in favour of the defendants by the Santras during the pendency of the suit for specific performance against the latter, could not override the decree in that suit and the plaintiffs' title related back to the date of the agreement: refers to *Pramatha Nath Roy* v. *Jagannath Kishore Lal Singh* (1). The lower Appellate Court was wrong in holding that the plaintiffs' predecessor could not create an intermediate interest between themselves and the defendants. They were entitled to carve out any portion of their right to receive rent from the defendants. There is no direct authority on the point, but reference may be made to *Raj Kumar Majumdar* v. *Probal Chandra Ganguli* (2), *Madhu Sudan* v. *Debendra Nath* (3). See also *Ram Anant Singh* v. *Shankar Singh* (4).

Babu *Dwarka Nath Chakravarti* (with him Babu *Kanai Dhon Dutt*), for the Respondents.—The two rights are identical. The defendants are *maurasi mokarari* tenants and the plaintiffs' lease is also a *maurasi mokarari* one. These are co-ordinate rights and the plaintiff cannot claim rent from the defendants.

[MOOKERJEE, J.—Assuming that you are a *maurasi mokarari* tenant, are you not bound to pay rent?

Yes, I am. But I should pay rent to a person having the right to receive rent from me *i.e.*, having a superior right: refers to *Kalam Sheikh* v. *Panchu Mandal* (5); also *Jarrow Kumari Saheba* v. *Hanifuddin Akanda* (6).

MOOKERJEE, J.—Cannot the landlord carve out a portion of his right?]

Yes, he can. But it has to be seen what sort of right is created—is it carving out a portion of his right, or is it creating

(1) 16 Ind. Cas. 359; 17 C. L. J. 427.
(2) 9 C. W. N. 656.
(3) 7 C. L. J. 23 (Short Notes).
(4) 30 A. 369; A. W. N. (1908) 152; 5 A. L. J. 423.
(5) 2 B. L. R. A. C. J. 252; 11 W. R. 128; 1 Ind. Dec. (N. S.) 876.
(6) 4 Ind. Cas. 471; 14 C. W. N. 389.

a co-ordinate right? If it be the latter, the document would be infructuous.

JUDGMENT.

MOOKERJEE, J.—This is an appeal by the plaintiffs in a suit for recovery of arrears of rent of a tract of homestead land. The rent is claimed at the rate of Rs. 7-6 annas 12½ *gandas* per annum for the years 1318 to 1320 B S., and for the first nine months of the year 1321. It is not disputed that Sri Narain Santra, Jagan Nath Santra, Raj Narain Santra and Deb Narain Santra were owners of the disputed land in equal shares. There is also no controversy that the contesting defendants held the land as tenants under the Santras at the rate of rent mentioned in the plaint. The plaintiffs claim to have derived title from the Santras, as to one half of the property, under a conveyance dated the 3rd August 1911, and as to the other half, under a permanent lease dated the 15th February 1907. The defendants resisted the claim on a three-fold ground, namely, first, that the alleged title of the plaintiffs as purchasers was inoperative, because the interest of their vendors had passed away to strangers before the date of their conveyance; secondly, that the alleged title of the plaintiffs as tenure-holders was inoperative, because the defendants had obtained a conveyance of the identical share from the Santras before the lease to the plaintiffs and, thirdly, that if the title of the plaintiffs was found to have been subsisting at the date of the suit and the title of the defendants was negatived, the plaintiffs were still not entitled to realise rent from the defendants, as both of them held as tenants of co-ordinate rank under the Santras. The Trial Court found partially in favour of the plaintiffs and decreed the suit to that extent. On appeal, the Subordinate Judge has reversed this decision. On the present appeal, the following points have emerged for consideration from the arguments addressed to us; first, did the plaintiffs acquire the title of the Santras as to one-half of the land, under their conveyance dated the 3rd August 1911, secondly, did the plaintiffs acquire, under their permanent lease from the Santras dated the 15th February 1907 such an interest in the other half of the land as must have priority over the interest acquired by the defendants under their conveyance from the Santras dated the 25th April 1910; thirdly, does the relationship of landlord and tenant exist between the parties, in view of the nature of the lease-hold interest created by the Santras in favour of the plaintiffs under the lease dated the 15th February 1907, and the character of the tenancy of the defendants which is alleged to have been held under the Santras at a uniform rate of rent since at least 1854.

As regards the first question, there is no room for controversy that the plaintiffs did not acquire the title of the Santras in one-half of the land under their purchase dated the 3rd August 1911. It appears that the interest of their vendors had been sold away in execution proceedings on the 17th June 1898 and the 17th March 1899. At the time of the sale by the Santras to the plaintiffs on the 3rd August 1911, they had no title to convey Consequently, on the most favourable view of the case, the claim of the plaintiffs for recovery of arrears of rent cannot possibly be sustained in excess of a half share.

As regards the second question, it is plain that the defendants did not, under their conveyance from the Santras, dated the 2nd February 1910, acquire a title which could prevail over that of the plaintiffs. It appears that on the 15th February 1907 two of the Santras granted a *mourasi mokarari* lease to the plaintiffs in respect of all their properties in the village of Santragachi, for a premium of Rs. 17,800 at an annual rent of Rs. 1,200. Eighty-five parcels were specified in the Schedule and it was expressly stated that if there after any other parcel of land was discovered to have been omitted by mistake a supplementary deed would be executed in respect thereof. The contingency contemplated happened. It was discovered that the tenancy now in dispute had been left out by mistake from the list of *mourasi mokarari* tenancies in the Schedule to the lease. The Santras, however, failed to execute the requisite supplementary deed in the terms of their agreement. The result was that on the 8th July 1909, the plaintiff sued the Santras to enforce specific performance of the agreement. That suit was decreed on the 25th April 1910. It was during the pendency of this litigation that the Santras sold away their interest on the

2nd February 1910 to the present defendants. It is manifest that the defendants were purchasers *pendente lite* and the interest they purchased was bound by the decree in the suit for specific performance. It was ruled by this Court in the case of *Moti Lal Pal* v. *Preo Nath Mittra* (7) that a suit for specific performance of a contract for transfer of immoveable property operates as *lis pendens*, in other words, in a suit against the vendor of real estate for specific performance, his conveyance of the legal title after suit was brought would not suspend the proceeding or defeat the title under the decree of the Court. The obvious reason for this is that if when the jurisdiction of the Court has once attached, it could be ousted by the transfer of the defendant's interest, there would be no end to litigation and justice would be defeated. Consequently, when such a suit for specific performance is ended by a final decree transferring the title, that title relates back to the date of the agreement on which the suit is based, and the Court will not permit its decree to be rendered nugatory by intermediate conveyances. The same view was adopted in the case of *Pramatha Nath Roy* v. *Jagannath Kishore Lal Singh* (1). There is consequently no escape from the position that the title of the plaintiffs which was established by the decree made in their favour in the suit for specific performance relates back to the 15th February 1907, the date of the *mourasi mokarari* lease granted to them by the Santras. The inference follows that the conveyance taken by the defendants from the Santras on the 2nd February 1910, does not afford them effective protection against the claim of the plaintiffs based on their leasehold title dated the 15th February 1907.

At regards the third question, it is clear that the position which results from our determination of the previous points lies in a nutshell. The defendants have been tenants under the Santras for a long series of years; they assert, indeed, that the holding is *mourasi mokarari*, that is, held from generation to generation at a fixed rent. While the defendants were thus in occupation as tenants, their landlords, the Santras, granted to the plaintiffs on the 15th February 1907, a *mourasi mokarari* lease of a large tract of land inclusive of the disputed area. The plaintiffs claim to recover from the defendants the rent which would have been otherwise payable to the Santras. The defendants answer that the tenancy of the plaintiffs is co ordinate in rank with their own tenancy, and the plaintiffs cannot consequently be deemed to be their landlords. Here we may state parenthetically that the plaintiffs do not admit that the tenancy of the defendants is *mourasi mokarari;* but we shall assume for our present purpose that the defendants have in fact the status alleged by them. We are of opinion that even on this assumption, the defendants have no answer to the claim of the plaintiffs, because a Zamindar or tenure-holder who has carved out a tenure or under-tenure, as the case may be, is competent to interpose, between himself and his tenant, an intermediate holder who may realise the rent payable to himself by his original tenant. This proposition is recognised in a series of cases in this Court. In *Raj Kumar Majumdar* v. *Probal Chandra Ganguli* (2) it was ruled that a Zamindar, who had created a *patni* had power to grant away a portion of his remaining rights and to create a tenure intermediate between himself and the *patnidar* with the result that the intermediate holder would become entitled to demand the rent which the *patnidar* would have been otherwise bound to pay to the superior landlord. The Court pointed out, however, that the interposition of such an intermediate interest could not operate in derogation of the rights of the original *patnidar* or degrade him to the rank of a *dar-patnidar*. The essence of the matter was that while the relationship of landlord and tenant originally existed between the Zemindar and the *patnidar*, after the interposition of the intermediate tenure, the new tenure-holder became tenant under the Zemindar at the same time that he himself became the landlord of the *patnidar*. This decision is not opposed to the case of *Kalam Sheikh* v. *Panchu Mondal* (5). There the defendant was under-tenant is respect of lands which his lessor held under a *mudafat* from the Zemindar. Subsequently, the lessor left and the Zemindar gave to the defendant

(7) 3 Ind. Cas. 696; 9 C. L. J. 96; 13 C. W. N. 226.

a *patta* for part of the lands covered by the *mudofat*, and, later on, to the plaintiff a *patta* for the whole land covered by the original *mudofat*. The plaintiff instituted a suit against the defendant for a *kabuliyat* at an enhanced rate. The defendant answered that there was no relationship of landlord and tenant between himself and the plaintiff. Mr. Justice Dawarka Nath Mitter upheld this contention not on the ground that the Zemindar could not interpose the plaintiff as lessee between himself and the defendant, but on the ground that upon a true construction of the lease granted to the plaintiff, it could not be maintained that the Zemindar had assigned to him any of his rights to recover or enhance the rent reserved in the *patta* he had granted to the defendant. We are not unmindful that an apparently contrary view was indicated in the case of *Jarraw Kumari Saheba* v. *Hanifuddin Akanda* (6) where the earlier decision in *Raj Kumar Majumdar* v. *Probal Chandra Ganguli* (2) was not brought to the notice of the Court. But the *dictum* in that case does not controvert the proposition that when a Zemindar or tenure holder has created a tenure or under tenure, he is still competent to interpose between himself and his grantee an intermediate tenure or under-tenure. The *dictum* rather casts doubt upon the applicability of this general rule to the case of *patni taluks* whose incidents are governed by the special rules formulated in Regulation VIII of 1819; it is also plain that the doubt was expressed, because no authority had been cited to support the view that a Zemindar could lawfully create a permanent tenure between his own interest and a *patni taluk* of the first degree. In the case before us, the status of the defendant is not that of a *patnidar*, and consequently we are not pressed by the considerations which carried weight with the Court in the case of *Jarraw Kumari Saheba* v. *Hanifuddin Akanda* (6). Apart from this, we find that the decision in *Raj Kumar Majumdar* v. *Probal Chandra Ganguli* (2) was accepted as good law by Mr. Justice Sarada Charan Mitra in *Madu Sudan* v. *Debendra Nath* (3) and *Ram Kanai* v. *Fakir Chand* (8) and in the case of *Nilamber Ghosh* v. *Mir Mohasanuddin* (9) when Carnduff and Richardson, JJ., were pressed by the apparent conflict between the decision in *Raj Kumar Majumdar* v. *Probal Chandra Ganguli* (2) and *Jarraw Kumari Saheba* v. *Hanifuddin Akanda* (6) they followed the earlier decision as binding on them. The view we take is also supported by the decision in *Ram Anant Singh* v. *Shankar Singh* (4). In that case, Sir John Stanley, Chief Justice, held that where a lessor executes two concurrent leases of the same property, that is to say, two leases in which the term of the second commences before the term of the first has expired, the second lessee is to be taken as the assignee of the lessor's interest during the concurrent portion of the terms, and the lessor, after the execution of the second lease, can recover rent only from the second and not from the first lessee. The Chief Justice referred to the decision of Baron Parke in *Harmer* v. *Bean* (10) which shows that the operation of a concurrent lease of the kind is to transfer part of the reversion of the landlord to the lessee, so that after the execution of such concurrent lease, the landlord cannot recover as against the first lessee any rent due thereafter. To the same effect is the decision in *Burrowes* v. *Gradin* (11) where Wightman, J., ruled that a mortgagee may maintain an action for use and occupation against a party who was tenant to the mortgagor before the mortgage, although subsequently to the mortgage, the mortgagor had made an alteration in the promises mortgaged and in the amount of rent. The same principle was recognised by Lord Alverstone, C. J. in *Wordsley Brewery Co.* v. *Halford* (12) when he ruled that a landlord who, during the currency of a yearly tenancy, grants a lease of the premises to a third person cannot, during the term granted by such lease, give the yearly tenant notice to quit; in support of this principle, reliance was placed upon *Doe d. Agar* v. *Brown* (13) in which Lord Campbell, C. J., had held

(8) 8 C. W. N. 438.

(9) 67 Ind. Cas. 105; 34 C. L. J 77.
(10) (1853) 3 C. & K. 307.
(11) (1843) 1 Dowl. & L. 213; 12 L. J. Q. B. 333; 67 R. R. 853.
(12) (1904) 90 L. T. 89.
(13) (1853) 2 El. & Bl. 331; 95 R. R. 580; 22 L. J. Q. B. 432; 17 Jur. 1161; 118 E. R. 791.

that where a party entitled to a remainder in tail expectant upon the determination of a life estate, grants a term of years to commence immediately, the grantee, without entry, takes an immediate vested estate carved out of the remainder, so that the conveyance is as effectual as if attornment had been made by the tenant of the particular estate. This was overlooked by Pagewood, V. C., in *Edwards* v. *Wickwar* (14) but was re-affirmed by Ridley and Lush, JJ. in *Horn* v. *Beard* (15). Indeed it is now settled law that if, after a lease has been granted, another lease of the same premises is granted, the term being concurrent with that of the existing lease, the concurrent lease, provided it is made by deed, operates as a grant of the reversion upon the existing term. If the concurrent term is equal to or exceeds the residue of the existing term, the concurrent lessee is entitled to the rent for the whole of such residue and afterwards to possession for the remainder, if any, of his own term; if the concurrent term is less than the existing term, the concurrent lessee is entitled to the rent during his own term; *Neale* v. *Mackenzie* (16). The principles thus expounded and applied justify the inference that a landlord who has created a tenancy is still competent to carve out another tenancy from the interest he has reserved and interpose the same between himself and his first tenant, subject to the qualification that he cannot thereby prejudice the position of the first tenant, take away or destroy the value or effect of the prior interest transferred, or, limit its extent or restrain its operation, for the maxim applies that no man can derogate from his own grant, which has sometimes been regarded as in essence of a formulation of a principle of estoppel. This may be illustrated by a concrete example. *A*, a Zemindar, settles a tract of vacant land with *B*, an agriculturist, with a view to enable him to bring it under cultivation. *A* cannot thereafter settle the same parcel with *C*, so as to entitle *C* to enter into actual occupation and cultivate the land. But there is no reason why *A* should not grant a settlement to *C*, and thereby enable *C* to realise from *B* the rent which would otherwise be payable by *B* to *A*. Tested from this point of view, how do the parties to this litigation stand? The defendants were originally tenants directly under the Santras; assume for the purpose of argument, and for that purpose alone, that their tenancy was held at a fixed rate of rent from generation to generation. On the 15th February 1907, the Santras granted to the plaintiffs a permanent lease of all their lands in the village, including the lands covered by the tenancy of the defendants; this authorised the plaintiffs to realise rent from all tenants who might be in occupation including *mourasi mokarari* tenants. It is difficult to appreciate on what principle the view can possibly be maintained that the plaintiffs are not competent to realise, as they seek to do by this suit, the rent which would have been otherwise payable to the Santras. It is plainly immaterial that the defendants assert that they themselves, as also the plaintiffs, have *mourasi mokarari* rights. When the Santras granted a lease to the plaintiffs, they did not derogate from their previous grant, and the plaintiffs do not allege that the lease in their own favour has in any manner operated to the detriment of such rights as might have been actually possessed at the time by the defendants. It is consequently needless to investigate whether the defendants hold a *mourasi mokarari* tenancy, for even on the assumption that their allegation is well founded, it does not afford an answer to the claim of the plaintiffs.

The result is that this appeal is allowed, the decree of the Subordinate Judge set aside, and that of the Court of first instance restored. The appellants are entitled to all costs in this Court as also in the Court of the Subordinate Judge inclusive of the costs of the review proceedings.

BUCKLAND, J.—I agree.

Appeal allowed.

(14) (1866) 1 Eq. 403; 35 L. J. Ch. 309; 12 Jur. (N. S.) 158; 14 W. R. 363.
(15) (1912) 3 K. B. 181; 81 L. J. K. B. 935; 107 L. T. 87.
(16) (1836) 1 M. & W. 747; 46 R. R. 478; 2 Gale 174; 6 L. J. (N. S.) Ex. 263; 150 E. R. 635.

CHANDI CHARAN v. NABIN CHANDRA.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1469 OF 1919.

November 30, 1921.

Present :—Justice Sir N. R. Chatterjea, Kt., and Mr. Justice Panton.

CHANDI CHARAN CHOWDHURY AND ON HIS DEATH HIS HEIR AND LEGAL REPRESENTATIVES TRIPURA CHARAN CHOWDHURY AND OTHERS—DEFENDANTS—APPELLANTS

versus

NABIN CHANDRA DE—PLAINTIFF—RESPONDENT.

Sale—Mortgage—Transaction, whether sale or mortgage—Intention of parties—Surrounding circumstances.

The question whether a transaction is a sale or a mortgage must be determined with reference to the intention of the parties as gathered from the document and the surrounding circumstances. [p 114, col 2]

In 1899, *D.* executed a deed in respect of certain property in favour of *P.*: immediate possession was delivered to *P.*: and the documents of title were also delivered to him: there was a stipulation in the deed that if *D.* paid the principal amount of the purchase-money within three years from the date of execution of the deed, the property would be given up by *P.*: there was no mention in the deed of interest to be paid on the principal sum at the time of the re-purchase, but it was provided that in the event of *D.* not paying the purchase-money within three years, the sale would become absolute. No money was paid within the term limited. In 9.6 *D.* brought a redemption suit and the question was, whether the transaction was a deed of sale with a condition of re-purchase, or a deed of mortgage by conditional sale:

Held, that the transaction was a sale out and out and not a mortgage: it was not a mortgage because there was no relation of debtor and creditor between the parties. [p. 115, col 2]

Bhagwan Sahai v. *Bhagwan Din*, 12 A 387; 17 I. A. 98; 5 Sar. P. C. J. 557; 6 Ind Dec. (N. S) 992 (P. C.), *Jhanda Singh* v. *Wahid-ud-din*, 36 Ind. Cas. 38; 21 C. W. N. 66; 31 M. L. J. 750; 20 M. L. T. 529; 14 A. L. J. 1189; 38 A. 570; (1916) 2 M W. N. 570; 19 Bom. L. R. 1; 5 L. W. 189; 25 C L. J. 524; 10 Bur L T 131; 43 I. A. 284 (P. C.), *Balkishen Das* v. *W. F. Legge*, 22 A. 149; 27 I. A. 58 at p 65; 4 C. W. N. 158; 2 Bom. L. R. 528; 7 Sar. P. C. J. 601; 9 Ind. Dec. (N. S) 1130 (P. C.), referred to.

Appeal against the decree of the Additional Subordinate Judge, Chittagong, dated the 22nd of April 1919, modifying that of the Munsif, Second Court at Satkania, dated the 10th of December 19.7.

FACTS appear from the judgment.

Babu *Jogesh Chandra Ray* (with him Babu *Paresh Chandra Sen*), for the Appellants.—The defendants are the appellants. The appeal arises out of a suit for redemption. The defendant No. 9 executed a deed of sale in favour of defendants Nos. 1 and 2 and father of defendant No. 7 on 5th May 1899. The plaintiff's case is that he has purchased the property on 24th February 1916, from defendant No. 9 for Rs. 800. The lower Appellate Court found that the mortgagor was entitled to 8 annas of the property and, therefore, the plaintiff also was entitled to it. The deed is described as one of an out and out sale with a clause that if the vendor paid the purchase money within three years from the date of the document, the vendee would return the property. The present suit was brought in 1916. My submission is that the deed is not one of mortgage but an out and out sale. Refers to *Bhagwan Sahai* v. *Bhagwan Din* (1), *Kinuram Mondol* v. *Nitye Chand Sirdar* (2), *Maung Kyin* v. *Ma Shwe La* (3), *Jhanda Singh* v. *Wahid ud din* (4).

Babu *Narendra Kumar Das*, for the Respondent.—The cases cited by the other side do not apply. The intention of the parties is clear and the facts and circumstances taken together show that the parties treated it as a deed of mortgage. Refers to *Abdul Gaffur* [*Shozadi Bibi*] v. *Sheikh Jamal* (5). The intention of the parties ought to be gathered from the facts. The learned Judge has also considered the conduct of the vendee. Refers to *Mahomed Mozaffer Ali* v. *Asraf Ali* (6), *Palaniappan* v. *Subbaraya Gounden* (7), *Kalpu Rai* v. *Beni Madho Sahu* (8). The property was mortgaged for Rs. 800. I purchased it for Rs. 2,400. So that there has not ever been an adequate consideration for the deed. Refers to *Wajid Ali Khan* v. *Shafkat Husain* (9).

(1) 12 A. 387; 17 I. A. 98; 5 Sar. P. C. J. 557; 6 Ind. Dec (N. S.) 992 (P. C.).

(2) 11 C. W. N. 403; 6 C. L. J. 203.

(3) 42 Ind. Cas. 64; 22 C. W. N. 257; 15 A. L. J. 825; 33 M L. J. 648; 3 P. L. W. 185; 6 L. W. 777; 23 M. L. T. 38; 27 C. L. J. 175; 20 Bom. L. R. 278; (1918) M. W. N. 300; 45 C. 320; 9 L. B. R. 114; 11 Bur. L. T. 21; 44 I. A. 236 (P C.).

(4) 36 Ind. Cas. 38; 21 C. W N. 66; 31 M. L. J. 750; 20 M. L. T. 529; 14 A. L. J. 1 89; 38 A. 570; (1916) 2 M W. N. 570; 19 Bom L. R 1; 5 L. W. 189; 25 C. L. J. 524; 10 Bur. L T. 131; 43 I A. 284 (P C).

(5) 21 Ind Cas 90; 17 C. W. N. 1013, 18 C. L. J. 228.

(6) 25 Ind. Cas. 93.

(7) 22 Ind. Cas 4; 14 M. L. T. 579; (1914) M. W. N. 222; 1 L. W. 80.

(8) 37 Ind. Cas. 835.

(9) 7 Ind. Cas. 911; 33 A. 122; 7 A. L J. 993.

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Babu *Jogesh Chandra Roy*, replied inbrief.

JUDGMENT.—The appeal arises out of a suit for redemption.

The defendant No. 9 executed a deed of sale in favour of defendants Nos. 1 and 2 and the father of defendant No. 7 on the 5th May 1899. There was a stipulation in the *kabala* that if the vendor paid the purchase-money within three years from the date of the execution of the document, the property would be given up by the vendee. The question which is involved in the appeal is whether the transaction was a deed of sale with a condition for re purchase or a deed of mortgage by conditional sale.

The Court below held that it was the latter and accordingly gave a decree for redemption in favour of the plaintiff. The defendants have appealed to this Court.

It is stated in the deed that the vendor was selling absolutely the lands after receiving Rs. 800, the real price. It then states :—" Becoming entitled to my rights in the above-mentioned lands sold to you and having possessed them through tenants or in *khas* possession as in my case and realising rents from tenants according to the *touzi* signed by me, by paying Government revenue and by mutation of your names, you and your sons and grandsons, enjoy, possess and deal with them in any way you like and shall be in proprietary right by realisation of arrears of rent due to me according to the *touzi*. At no time whatever shall I or my Sakulya heirs have or lay any claim to the lands sold..... Be it also known that if your principal amount be paid up within three years, you will release the deed of sale and the lands described. If money cannot be paid within the time as limited above, then this deed of sale having been regarded as a deed of absolute sale your *kharida maliki* (proprietary) rights will accrue up on the lands above mentioned."

No money was paid within the term limited, *viz.* 3 years.

In coming to the conclusion that the transaction was a mortgage the Court below has relied mainly upon two points; the first is that the words used in connection with the payment of the amount within three years are the "principal amount," and secondly, that if the money be not paid within the time limited, the *kabala* will be regarded as a deed of absolute sale. These were held to be indications of the transaction being a mortgage.

We do not think, however, that they are sufficient, by themselves, for holding that it was a mortgage.

The word "principal" was also used in the document before their Lordships in the case of *Bhagwan Sahai* v. *Bhagwan Din* (1). Then as to the deed of sale being regarded as a deed of absolute sale in the event of the money for re-purchase not being paid and the *kharida maliki* rights being absolute, we think all that it means is that, after the expiry of the period limited, namely, three years, no claim could be advanced for re-purchasing the property and the words used in the document were, we think, having regard to the other terms of the document, so used in order to indicate that there was a chance of the property being liable to be reconveyed if the money was paid within three years. It does not show, however, that there was a relation of debtor and creditor between the parties and there is no doubt that there could not be a mortgage unless there was a debt.

In the present case, immediate possession was delivered to the vendee, and the documents of title were also delivered to him. The price paid was stated in the deed to be the real price and there was no mention of interest to be paid on the principal sum at the time of re-purchase. The vendee purchased the stamp for the conveyance and after the conveyance had been executed, the vendor got himself registered in the Collectorate. These are strong indications to show that the transaction was not a mortgage.

We have been referred to a large number of cases by both sides but the question whether the transaction is a sale or a mortgage must be determined with reference to the intention of the parties as gathered from the document and surrounding circumstances. Necessarily, therefore, each case must turn upon the terms of the documents and particular circumstances. As already pointed out, in the case of *Bhagwan Sahai* v. *Bhagwan Din* (1) there was also a clause for payment within 10 years of the principal, the difference being that in the present case the payment was to be made within three years; in the other it was within ten years.

There is no doubt that the vendee in the case before their Lordships agreed to recon-

vey the property out of kindness by a subsequent agreement and that fact is mentioned in the judgment but that is not the only ground of decision of their Lordships

The principle laid down in the case of *Bhagwan Sahai* v. *Bhagwan Din* (1) has been followed in a number of cases and we do not think that the case of *Balkishen Das* v. *W. F. Legge* (10) lays down anything to the contrary. The ground of decision in *Balkishen Das* v. *W. F. Legge* (10) appears to have been that the real effect of the deeds was to consolidate the debt due on the factory account with the principal sum mentioned in the first deed, and thus to give the bankers a security on the *taluk* for the debt due on the factory accounts. This, as Lord Davey, in delivering the judgment of the Board, said " gives the transaction the character of a mortgage so far as the factory accounts are concerned, and if it is to some extent a mortgage, it may well be held to be so entirely."

In the case of *Jhanda Singh* v *Wahid-ud-din* (4) notwithstanding the fact that there was a stipulation, (in the event of the vendee not taking the money from the vendor), that the latter would be entitled to deposit the amount in Court, their Lordships held that it was not a mortgage but a sale out and out. It was pointed out that the first portion of the document provided that the repurchase could only take place after the lapse of 10 years and that the latter portion provided that if the vendors were not ready to purchase the property within the aforesaid time, they would have no claim to the property after the expiry of the period of ten years and the vendees would then have every power in respect of the property. This last clause seems to be similar to the clause contained in the document in the present case, namely, that in the event of the vendor not paying the purchase money within three years, the sale shall become absolute.

We were referred to the cases of *Wahid Ali Khan* v. *Shafkat Husain* (9), *Abdul Gaffar [Shasadi Bibi]* v. *Sheikh Jamal* (5) and *Mahomed Mozaffer Ali* v. *Asrat Ali* (6) on behalf of the respondents.

These cases, however, are distinguishable. In the first all the terms and the surrounding circumstances do not appear from the report. It appears, however, that there was a separate agreement of even date with the deed of sale that whenever the consideration would be re-paid on the expiry of 6 years from the date of sale, the property would be reconveyed, and further that if the remaining amount of consideration money was paid within 6 years, the property would be reconveyed, and the learned Judges in view of the language of the two deeds held that the transaction was a mortgage. In the second, as well as in the third case, there was no change of possession and the consideration for the sale was inadequate. As already pointed out, each case must turn upon the terms of the particular document and the circumstances.

Having regard to the circumstances which we have noticed above, we think that the deed in the present case is a deed of sale out and out and not a mortgage.

The decrees of the Court below will accordingly be set aside and the suit dismissed without costs in all Courts as no costs were allowed in either of the Courts below.

W. C. A. *Decree set aside.*

(10) 22 A. 149; 27 I. A. 58 at p. 65; 4 C. W. N. 158; 2 Bom. L. R. 523; 7 Sar. P. C. J. 601; 9 Ind. Dec. (N. S.) 1130 (P. C.).

PRIVY COUNCIL.

APPEAL FROM THE MADRAS HIGH COURT.

January 17, 1922.

Present:—Lord Buckmaster, Lord Atkinson, Mr. Ameer Ali and Sir Lawrence Jenkins.

MAHOMED IBRAHIM ROWTHER —APPELLANT

versus

Shaikh IBRAHIM ROWTHER AND OTHERS—RESPONDENTS.

Muhammadan Law—Lubbai Muhammadans—Inheritance—Females, whether excluded from succession—Custom—Usage—Burden of proof—Proof—Custom and election to abide by old law.

Among the Lubbai Muhammadans, who are converts from Hinduism, there is no custom or usage excluding females from succession. [p. 120, col 2.]

There may be a custom at variance even with the rules of Muhammadan Law, governing the succession in a particular community of Muhammadans. But the custom must be proved and the burden of proving it lies on the party asserting it. [p 118, col 2.]

It is of the essence of special usages, modifying the ordinary law of succession that they should be ancient and invariable: and it is further essential that they should be established to be so by clear and

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unambiguous evidence. It is only by means of such evidence that the Courts can be assured of their existence, and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends. [p. 118, col. 2]

Abdul Hussein Khan v. *Bibi Sona Dero*, 43 Ind. Cas. 806; 45 I. A. 10; 16 A. L. J. 17; 4 P. L. W. 27; 34 M. L. J. 48; 22 C. W. N. 353; 23 M. L. T. 117; 27 C. L J. 240; 1 P. L. R. 1918; 20 Bom. L. R. 528; 45 C. 450; 12 S. L. R. 104 (P. C.), *Ramalakshmi Ammal* v. *Sivanantha Perumal Sethurayar*, 14 M. I. A. 570; 17 W. R. 552; 12 B. L. R. 396; Suth P. C. J. 603; 3 Sar. P. C. J. 108; 20 E R. 898, relied upon.

Obiter—In their essential characteristics, custom and an election to abide by the law of the old status differ fundamentally as sources of law. [p. 118, col. 1.]

Abraham v. *Abraham*, 9 M. I. A. 195; 1 W. R. P. C. 1; 1 Suth. P. C. J. 501; 2 Sar. P. C. J. 10; 19 E. R. 716, referred to.

Appeal from a decree of the Madras High Court, (Sir John Wallis, C J. and Srinivasa Ayyangar, J.), dated 12 August 1915 (in Appeal Suit No 106 of 1914) and printed as 30 Ind. Cas. 806, reversing a decree of the Subordinate Judge, Coimbatore.

FACTS.—The parties to the appeal are Lubbai Muhammadans of the Sunni sect residing in the Coimbatore District. The appellant brought the suit to recover his share in the estate of Mahomed Husain Rowther, as the heir of his daughter, Ponnuthayee. The respondents contested the suit on the ground that by a certain custom in the community females were excluded from inheritance and that the appellant as the heir of Ponnuthayee, is not entitled to a share.

The Subordinate Judge held against the custom set up and decreed the suit. On appeal, the High Court reversed the decree of the Subordinate Judge and dismissed the appellant's suit. Hence the present appeal.

The facts and the terms of the pleadings in the case are fully set out in the judgment of the Judicial Committee.

Mr. *Dube*, for the Appellant.—The High Court is clearly wrong in finding that the custom was established in this case. The evidence mainly consisting of decisions of Courts from 1877 up to date, proves that there was no custom excluding females from inheritance in the community to which the parties belong. *Mirabivi* v. *Vellayanna* (1) approved in *Abdul Hussein Khan* v. *Bibi Sona Dero* (2). Under section 16 of the Madras Civil Courts Act, III of 1873, all questions regarding inheritance, marriage or any religious usage or institution shall be decided by the Muhammadan Law or by custom having the force of law. The custom alleged is not established.

The respondents were not represented.

(1) 8 M. 464; 9 Ind Jur. 26; 3 Ind. Dec (N. s) 377.

(2) 43 Ind. Cas. 806; 45 I. A. 10; 16 A. L. J. 17; 4 P. L. W. 27; 34 M. L J. 48; 22 C. W. N. 353; 23 M. L. T. 117; 27 C. L. J. 240; 1 P. L. R. 1918; 20 Bom. L. R. 528; 45 C. 450; 12 S. L. R. 104 (P. C.).

JUDGMENT.

SIR LAWRENCE JENKINS.—This is an appeal from a decree dated the 12th August 1915 of the High Court at Madras reversing a decree of the Subordinate Judge of Coimbatore, dated the 7th January 1914.

The litigants are Lubbai Muhammadans of the Sunni sect, and the contest is as to the devolution of the estate of Mahomed Hussain Rowther. He died in 1904 leaving a widow and three sons and also two daughters named Ponnuthayee and Sulaiha Bi.

Ponnuthayee died in September 1905 leaving a husband and a daughter. They are the plaintiffs in this suit. The defendants are the three sons of Mahomed Hussain Rowther, his widow and the two children of Sulaiha Bi who was dead at the institution of this suit.

The plaintiffs claim shares in Mahomed Hussain's estate as heirs of Ponnuthayee, and they are supported by the children of Sulaiha Bi, who make a similar claim as heirs of their mother. The contesting defendants are the three sons and their mother.

The decision of the rival claims depends upon whether the devolution of Mahomed Hussain's estate is governed by Muhammadan Law as the plaintiffs contend or by a rule of descent excluding females as the contesting defendants maintain.

Though it is common ground that Mahomed Hussain and the litigants are Muhammadans, the contesting defendants seek to escape from the course of devolution this would ordinarily involve by setting up what they describe as an immemorial custom and ancient usage.

In paragraphs 15, 16 and 17 of their written statement, they plead as follows:—

"15. It has been the immemorial custom and ancient usage in the Muhammadan families in the district of Coimbatore in general and in the families of these defendants and the relations in particular that they have followed the Hindu Law as regards the law of property and succession and partition. Only the male

members are entitled to succeed to the properties of their ancestors and females are excluded from inheritance when there are males. Besides, it is also the custom in the Muhammadan families to give some amount including jewels at the time of or immediately after marriage to the female members in lieu of their shares, and consistently with that usage defendants' father gave jewels, cash and other moveables worth about Rs. 4,000 to the mother of the second plaintiff immediately after the marriage and the plaintiffs' conduct in not adverting to this in the plaint is fraudulent.

"16. According to that immemorial custom and usage the plaintiffs have no right to claim a share in the share of Ponnuthayee Ammal while Ponnuthayee Ammal herself had no share,

17. "It has been the custom also in the family of the plaintiffs."

On the settlement of issues the following (amongst others) were ordered to be tried :—

"(1) Are parties to suit governed by Hindu Law and whether Ponnuthayee, mother of the second plaintiff, was not entitled to her share in the estate of her deceased father Mahomed Hussain Rowther?

"(8) Whether the custom set out in paragraph 15 of the written statement is true and valid? and if so, was the claim of Ponnuthayee satisfied in accordance therewith?"

At the hearing an additional issue was framed at the request of the contesting defendants which raised the question as to whether the suit was barred by an earlier decision. It calls for no discussion now as their Lordships see no reason to dissent from the concurrent determination of the lower Courts that this issue must be answered in the negative.

And thus the only question that remains for decision is as to this alleged custom or usage. The plea which professes to formulate it has been forcibly criticised by the learned Subordinate Judge in the course of his careful and discriminating judgment. He points out that in its wider assertion it is untenable, and even in its narrower form it is not established. He might even have gone further and pronounced the pleading bad.

In the result he held that the devolution was governed by Muhammadan Law and declared the plaintiffs entitled to the share claimed.

The defendants appealed, and to meet the criticism of the Subordinate Judge they narrowed the definition of the custom. The 9th ground is that "the Court below ought to have found the custom alleged at any rate as regards the Labbai community residing in the villages mentioned in the written statement."

On appeal the High Court reversed the decision of the Subordinate Judge and dismissed the suit. The learned Chief Justice, instead of treating the custom or usage as a matter for proof by the contesting defendants, held in effect that the Labbai Muhammadans in that part of India at the date of their conversion from Hinduism to the Muhammadan faith elected to retain the Hindu rule excluding women, and that the real question in this suit was whether the plaintiffs had proved an abandonment of the Hindu rule of exclusion.

Viewing the evidence in this light the Chief Justice held the evidence oral and documentary sufficient to show that the defendants' family had adhered, with perhaps most of the Labbais of the neighbourhood, to the Hindu rule excluding the succession of females.

Mr. Justice Srinivasa Ayyangar was more guarded in his opinion. Citing a passage from the judgment in *Ganindra Deb Raikat* v. *Rajeswar Das* (3) as a guide to the standard of proof required, he regarded it as probable that "many of the Labbais being recent converts from Hinduism retained the mode of devolution of property according to Hindu usages even after their conversion."

He accordingly considered that the evidence to which he made special reference taken along with the evidence of the general prevalence of the practice was sufficient to prove the family custom set up.

But it is a misapprehension of the passage cited to treat it as a guide to the standard of proof in this case. There the question at issue was whether in the family then under discussion there was a legal power to adopt. Had its members been Hindus they would have been

(3) 12 I. A. 72 at p. 81; 11 C. 133; 4 Sar. P. C. J. 610; 9 Ind. Jur. 277; 5 Ind. Dec. (N. S.) 1063 (P. C.).

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governed by Hindu Law and there would have been this power. But though they affected to be Hindus, that in fact was not their status; the utmost that could be said was that though the family had introduced many Hindu customs, they in fact were governed by family customs. Of such a family it was manifestly appropriate to remark that "the question is not whether the general law is modified by a family custom forbidding adoption, but whether with respect to inheritance the family is governed by Hindu Law, or by customs which do not allow an adopted son to inherit." But such a comment can have no application to conditions as they exist in this case.

No doubt in *Abraham* v. *Abraham* (4), it is said that a convert upon his conversion may renounce the old law by which he was bound as he has renounced his old religion, or if he thinks fit he may abide by the old law notwithstanding he has renounced his old religion. It is not, however, suggested in the present case that the Lubbais as a community have thought fit to abide by the entirety of their old law; the utmost that is said is that they, or some of them in a particular locality, have followed the Hindu Law, not in all respects, but in relation to property, succession and partition. In their essential characteristics, custom and an election to abide by the law of the old status differ fundamentally as sources of law, still, making every assumption in its favour, in the circumstances of this case and on the record as it stands there is no mode of proving this alleged election except by way of inference from actings and conduct that would establish a custom, so that along whatever line this case may be approached the custom must be established and the burden of proof of this is on the defendants.

Their Lordships have dealt with this aspect of the case at some length as it has evidently influenced the judgment of the High Court. But there is another aspect of it by which (in their Lordships' opinion) their decision must be guided.

It is enacted by the Madras Civil Courts Act, III of 1873, section 16, that all questions regarding inheritance, marriage, or any religious usage or institution shall be decided where the parties are Muhammadans by the Muhammadan Law or by custom having the force of law.

The litigants are Muhammadans to whom this Act applies so that *prima facie* all questions as to succession among them must be decided according to Muhammadan Law. In India, however, custom plays a large part in modifying the ordinary law, and it is now established that there may be a custom at variance even with the rules of Muhammadan Law, governing the succession in a particular community of Muhammadans. But the custom must be proved. The essentials of a custom or usage have been repeatedly defined, but it will suffice to refer to the recent decision of *Abdul Hussein Khan* v. *Bibi Sona Dero* (2) where the essentials of a legal custom or usage and the requisites of proof are fully discussed. The following passage from the judgment in *Ramalakshmi Ammal* v. *Sivanantha Perumal Sethuryar* (5) was cited as a correct and authoritative pronouncement of the law on these points.

"It is of the essence of special usages, modifying the ordinary law of succession that they should be ancient and invariable; and it is further essential that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the Courts can be assured of their existence, and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends."

Though the custom or usage as pleaded is open to objection, still their Lordships will not reject the defendants' contention on that ground, but will deal with the case as though the custom or usage had been pleaded in a form that was free from fault.

There is no suggestion on the record that the rule of exclusion on which the contesting defendants rely has been established by judicial decision in the sense that this can be predicated of the rules of property and succession applicable to Khojas or Cutchi Memons in the Bombay Presidency. Therefore it is necessary to examine the

(4) 9 M. I. A. 195; 1 W. R. P. C. 1; 1 Suth. P. C. J. 501; 2 Sar. P. C. J. 10; 19 E. R. 716.

(5) 14 M. I. A. 570; 17 W. R. 552; 12 B. L. R. 396; 2 Suth. P. C. J. 603; 3 Sar. P. C. J. 108; 20 E. R. 898.

evidence to see whether it supports the rule of succession asserted by the contesting defendants.

This evidence is documentary and oral, and as the former is more important and more trustworthy, their Lordships will first deal with that.

The documents on which the defendants rely as proving the usage, begin in order of time with a decree of the Madras High Court in Original Suit No. 5 of 1877, Exhibit XII, in which Mr. Justice Innes decided in its favour.

There was, however, an appeal from his decree which ended in a compromise, a circumstance which deprives his decision of much of its evidentiary value.

Moreover, in 1885, an Appellate Bench of the Court in *Mirabivi* v. *Vellayanna* (1) decided that the custom of exclusion in the case then before them had not been proved, and this decision has been recently approved by the Judicial Committee in *Abdul Hussein Khan* v. *Bibi Sona Dero* (2).

The next document in order of time is the judgment in Original Suit No. 22 of 1904, dated the 26th of February 1905, Exhibit III, where the custom was affirmed; but the decision in fact was based on that in Original Suit No. 5 of 1877, and has little or no independent value.

Then reliance is placed on the judgment in Original Suit No. 755 of 1906, dated the 26th of September 1910, Exhibit IX. But it is open to the comment that the decision was influenced by that given in Original Suit No. 22 of 1904, as also was the judgment on appeal Exhibit XVI. Thus on an examination of these documents it may fairly be said that the several judgments are substantially based on that pronounced in Original Suit No. 5 of 1877, which is open to the comment that has been made on its value.

The documentary evidence on which the plaintiffs rely starts with the judgment in *Mirabivi* v. *Vellayanna* (1). There the High Court held even in second appeal that there was no evidence to justify the finding of the lower Courts in favour of the custom, and this decision, as already stated, has received the approval of this Board, in *Abdul Hussein Khan* v. *Bibi Sona Dero* (2).

Then there follows a series of documents, some negativing the custom, others applying Muhammadan Law where the custom was not pleaded, and others proceeding on the assumption that it was Muhammadan Law that applied. In all these instances the parties before the Court were Lubbai Muhammadans. The first is a judgment of the 15th July 1890 in Original Suit No. 85 of 1890, Exhibit L, followed by a judgment on appeal in that suit, Exhibit M, in both of which the right of a female to succeed under Muhammadan Law is recognised.

On the 3rd October 1892 judgment was pronounced in Original Suit No. 373 of 1891, Exhibit C, where the rights of females were treated as governed by Muhammadan Law.

On the 23rd January 1893 a petition for a succession certificate, Exhibit F, was presented, and female members of the family were made counter-petitioners as though the rights of the parties were governed by Muhammadan Law.

On the 2nd August 1897 the High Court passed a decree, Exhibit G, confirming the decree of the lower Appellate Court, with the result that the sisters' right to shares, according to Muhammadan Law, was established, though the custom had been pleaded.

On the 30th September 1901 it was decided by the judgment in Original Suit No. 753 of 1900, Exhibit B, affirmed on appeal by the judgment of the District Judge, Exhibit B1, that a female in a Lubbai Muhammadan family was entitled to a share. In this case a custom was alleged that a woman is given by her family, at or about the time of her marriage, her share, or the equivalent of her share, in the estate of her own family. The custom was negatived, though the District Judge seems to have thought that the appellants would have been entitled to more favourable consideration had they pleaded that they had retained the Hindu Law of inheritance and succession instead of setting up a special custom at variance with the Muhammadan Law.

On the 5th of June 1903 a plaint in Original Suit No. 337 of 1903, Exhibit O, was presented in which it was taken for granted that the rights of a female were governed by Muhammadan Law.

On the 30th March, 1903, there was a judgment in Original Suit No. 238 of 1902, Exhibit R, which assumed a right to a share in a female, though it held that in the circumstances of the case the female's right was barred under Muhammadan Law.

The judgment dated the 13th January 1904 in Original Suit No. 36 of 1901, Exhibit H, and that dated the 4th December 1895, in Original Suit No. 34 of 1894, Exhibit N, proceed on the same assumption.

On the 18th October 1906 and the 2nd January 1907 petitions for succession certificates, Exhibits K and P., were presented by daughters, and on the 2nd September 1910 by a judgment in Original Suit No. 33 of 1908, Exhibit Q, the right of a widow and daughters to shares according to Muhammadan Law was affirmed.

It will thus be seen that over this series of years the rights of female members of the Lubbai Muhammadan community, under Muhammadan Law have been repeatedly asserted and recognised, and that on three occasions the rule of exclusion, when pleaded, has been expressly negatived.

When this documentary evidence is contrasted with that adduced in support of the alleged rule of exclusion, it cannot be said that the custom or usage is supported by clear and unambiguous evidence. On the contrary, so far as the weight of documentary evidence goes, the preponderance is on the side of the plaintiffs.

Turning then to the oral evidence their Lordships cannot find in it sufficient proof to support the defendants' plea.

The witnesses were all examined before the Subordinate Judge who made in his judgment a careful and critical examination of their evidence with the result that he was unable to find the custom or usage proved, and their Lordships can see no sufficient reason for questioning his appreciation of the evidence. He evidently did not consider that the witnesses called by the contesting defendants held a position in the community entitling them to greater credit than those called by the plaintiffs, and this appears to their Lordships to be a just estimate of their worth.

There is a witness who holds an office that should have enabled him to speak with some measure of authority and that is P. W. No. 5 a Khazi of Pallapati, and the same may be said of P. W. No. 7 a Moulvi, but the Subordinate Judge evidently was not impressed by either of them. For what it may be worth, however, both assert that a Lubbai's estate is divided according to Muhammadan Law.

Looking then at the whole of the evidence, documentary and oral, their Lordships consider it falls far short of the standard of proof requisite to establish a custom or usage excluding females from succession

It merits notice too that the custom as pleaded is not limited to the exclusion of females, but asserts as a part or at any rate an accompaniment of it that it is the custom to make a gift to female members at the time of or immediately after marriage in lieu of their shares; and it is alleged that consistently with that usage the defendant's father gave jewels, cash and other moveables, worth about Rs. 4,000 to the mother of the second plaintiff immediately after marriage.

This is negatived by the Subordinate Judge and from this conclusion the High Court expresses no dissent.

The result then is that their Lordships will humbly advise His Majesty that the decree of the High Court should be set aside and the decree of the Subordinate Judge restored, with the variation that a day be fixed by the Court of the first instance for the appointment of a Commissioner in lieu of the 7th February, 1914, and that the contesting defendants do pay to the plaintiffs their costs in the High Court.

Six years have elapsed since the date of the decree under appeal, and as no satisfactory explanation is given of this long delay there will be no order as to the costs of this appeal.

S. D. *Appeal allowed.*

Solicitors for the Appellant.—Messrs. *Barrow, Rogers* and *Nevill.*

CHUNGA PRASAD v. PHULWA.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 164 OF 1921.

April 7, 1922.

Present:—Mr. Hallifax, A. J. C.

CHUNGA PRASAD AND OTHERS —PLAINTIFFS—APPELLANTS

versus

PHULWA—DEFENDANT—RESPONDENT.

Imperfect partition—C. P. Tenancy Act (XI of 1898), ss. 46, 47—Transfers of holding less than Rs 100 in value—Registration—Transfer, whether vitiated by fraud—Remedy to set aside transfer.

When two co-proprietors of a village divide up the *sir* land between them, to hold portions of it separately, they make an imperfect partition of that village, each has a separate *patti* comprising the *sir* land he holds in severalty, and the whole of the rest of the village forms what is called a *shamilat patti*. [p. 122, col. 2]

Dhondba v. *Vishwanath*, 15 C. P. L. R. 143, approved.

The mention in section 47 of Act XI of 1898 (C. P. Tenancy Act of the provisions of section 43 includes the provisions of both sub-sections 3) and (5) of that section and does not refer to those of sub-section (3) only and that section 47 applies to transfers in which the consideration is above Rs 100, as well as to those of less value provided no question of fraud arises, which will vitiate any transaction of itself. [p. 122, col. 2]

Ganeshdas v. *Shankar*, 13 Ind. Cas. 909; 8 N. L. R. 22, relied upon.

The proper remedy of a landlord to set aside a transfer of an occupancy land by a tenant, not vitiated by fraud, is by an application by him under section 47 of the Tenancy Act and not by a civil suit. [p. 122, col. 2; 123, col. 1.]

Appeal against a decree of the Additional District Judge, Raipur, in Civil Appeal No. 189 of 1920, decided on the 11th January 1921.

FACTS of this case appear from the following judgment of the lower Appellate Court:—

The defendant-appellant is a co-sharer of Mouza Chhachhanpare. Anandi Chamru and others were also co-sharers of the village. Thus there were several co-sharers and they held *sir* land in severalty. Anandi Chamru and others mortgaged their share to one Shyam Sunder excluding cultivating rights in the *sir* which they held separately and which consisted of 37 fields and comprised an area of 15.07 acres. Shyamsunder obtained a decree on his mortgage and made it absolute in 1918 and then sold the foreclosed share to the plaintiffs in this case. In 1920 Anandi and others who became ex-proprietary tenants of their *sir* land transferred the same to the defendant by a registered deed for Rs. 921. The deed was registered by the Registering Officer as the document was styled as a deed of surrender and the defendant was described as the *malguzar* of the village and the executants were described as his tenants. The plaintiffs brought a suit to eject the defendant from that land on the ground that they were the proprietors of Anandi and others in respect of this land and the defendant was a trespasser.

The suit was instituted in the Court of the Munsif and the defendant raised an objection that the Munsif had no jurisdiction to entertain the suit. The Munsif decided that he had jurisdiction to entertain the suit. On the merits the defendant admitted the mortgage in favour of Shyam Sunder and his decree but pleaded that he was not aware of the sale to plaintiffs by Shyam Sunder and that neither Shyam Sunder nor the plaintiffs obtained any rights in the *sir* land in question and that they could not maintain a suit for ejectment. The mortgagors are not parties to this suit.

The lower Court decided that the sale to defendant was fraudulent, that the mortgagors were the ex-proprietary tenants of Shyam Sunder and the plaintiff and that defendant obtained no title to retain possession of the land and so it decreed the claim.

The defendant has preferred an appeal against the decree of the lower Court and the main point urged is that a Civil Court has no jurisdiction to entertain the suit. The defendant being a fractional co sharer and not a Lambardar, the transaction amounts to a sale and not a surrender. The sale being of immoveable property worth more than Rs. 100 the same cannot be effected without registration. In this case the document too is registered so but for the provisions of section 46 of the C. P. Tenancy Act the transaction is perfectly valid. The case of *Chamru Sao Bania* v. *Tulsidin Singh* (1) has no application as the present document is a registered one. So *prima facie* it would appear that a Civil Court has no jurisdiction to entertain the suit and the plaintiff's remedy is by an application to a Revenue Officer under section 47 of the

(1) 17 C. P. L. R. 49.

C. P. Tenancy Act. The jurisdiction is determined by the allegations in the plaint and the defendant is described as a trespasser. But even this would not go to the rescue of the plaintiffs as they admitted in the very plaint that defendant obtained title by a registered document.

The case has, however, to be looked at from another stand point *i.e.*, as a suit between two co-sharers. Plaintiffs are co-sharers of the village and the defendant is also a co-sharer and this fact takes the case out of the purview of section 47 of the C. P. Tenancy Act. If defendant were not a co-sharer, the Civil Court would have no jurisdiction to entertain this suit. As they are co-sharers, the suit is to be decided on the principles laid down in *Ramdayal* v. *Gulabia Bai* (2).

It is true that as the *sir* lands are held in severalty the plaintiffs become the proprietors of the ex-proprietary tenants. This only means that the latter are liable to pay rent for their land to the plaintiffs. But all the same this rent is to be taken into account at the time of adjusting the village profits among the several co-sharers. The plaintiffs cannot ignore their position as fractional co-sharers and the defendant's position as a co-sharer in dealing with this land. The plaintiffs obtained only proprietary interest in the land and they still have it and cannot claim to recover exclusive possession of that land from the defendant. They may treat the defendant as a tenant of the land or may treat him as a proprietor and claim joint possession on payment of a proportionate share of the purchase money but they cannot treat him as a trespasser.

The suit is an ill-conceived one, plaintiff having no right to exclusive possession of the land as against the defendant. I would, therefore, allow this appeal, set aside the decree of the lower Court and dismiss the plaintiff's suit as untenable. The respondent to bear appellant's costs of both the Courts.

Mr. *J. C. Ghosh*, for the Appellant.

Mr. *S. C. Dutta Chowdhury*, for the Respondent.

JUDGMENT.—The state of things in regard to the proprietorship of the land in dispute here is clearly explained in *Dhonba* v. *Vishwanath* (3). When two co-proprietors of a village divide up the *sir* land between them, to hold portions of it separately, they make an imperfect partition of that village; each has a separate *patti* comprising the *sir* land he holds in severalty, and the whole of the rest of the village forms what is called a *shamilat patti*. Before the transfer of their present share to the plaintiffs their transferees held the whole proprietary right in a certain portion of the *sir* land. This whole right they transferred to the plaintiffs, who, therefore, became sole landlords of that land, holding it as a separate *patti*. The fact that at the same time they acquired the transferor's joint interest in the *shamilat patti* and that that *shamilat patti* was very much bigger than any separate *patti*, makes no difference whatever, beyond leading to a confusion of ideas.

The position then is this. The plaintiffs are sole landlords of the occupancy holding in question. The occupancy tenants of that land transferred it for Rs. 921 to the defendants who are strangers and not co-sharers in the proprietary interest of that land. This document was by mistake admitted to registration, the mistake arising from the fact that the transferees are co-proprietors of other land in the same village. I agree entirely with the ruling of Stanyon, A. J. C., in *Ganeshdas* v. *Shankar* (4) that the mention in section 47 of Act XI of 1898 of the provisions of section 46 includes the provisions of both sub sections (3) and (5) of that section and does not refer to those of sub-section (3) only, and that section 47 applies to transfers in which the consideration is over Rs. 100 as well as to those of a less value, provided no question of fraud arises, which, of course, will vitiate any transaction of itself. Here, however, the registration was obtained by mistake and not by fraud. The learned Judge of the lower Appellate Court was himself under the impression that the defendants were joint landlords of this land, and it is scarcely to be wondered at that the defendants made the same mistake.

The proper remedy of the plaintiffs was, therefore, by application to a Revenue Officer and the jurisdiction of the Civil Court is ousted. The decree of the lower Appellate

(2) 4 N. L. R. 120.

(3) 15 C. P. L. R. 143.

(4) 13 Ind. Cas. 909; 8 N. L. R. 22.

Court dismissing the suit was, therefore, right, though it is based on error. The plaintiffs' application to a Revenue Officer will still be well within time if he can show cause for the application to it of section 14 of the Limitation Act. The appeal is dismissed, but, in the special circumstances of the case, I order that each party shall pay its own costs.

G. R. D. & J. P.

Appeal dismissed.

LAHORE HIGH COURT.

CIVIL MISCELLANEOUS PETITION No. 402 OF 1920.

November 19, 1920.

Present :—Mr. Justice Shadi Lal, Chief Justice and Mr. Justice Leslie-Jones.

HARI PARSHAD, ADOPTED SON OF BALDEV SAHAI—DEFENDANT—RESPONDENT—PETITIONER

versus

Musammat SOOGNI DEVI WIDOW OF BHAGWAN DAS—PLAINTIFF—APPELLANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 89, O. XXIII, r. 3—Award without intervention of Court during pendency of litigation, whether can be recorded as adjustment—"By any other law for the time being in force," meaning of.

An award made without the intervention of any Court, and during the pendency of litigation, cannot, unless it is consented to by parties, be recorded as an adjustment under Order XXIII, rule 3 of the Civil Procedure Code, and section 89 of the Code operates to bar the enforcement of it by one of the parties. [p. 124, col. 1.]

Harakhbai v. *Jamnabai*, 19 Ind. Cas. 786; 37 B. 639; 15 Bom. L. R. 340, *Pragdas* v. *Girdhardas*, 26 B. 76; 3 Bom. L. R. 431, dissented from

The words "by any other law for the time being in force" contained in section 89 of the Civil Procedure Code, refer to some law extraneous to the Code of Civil Procedure, and cannot be legitimately held to cover Order XXIII, rule 3. [p. 124, col. 1.]

Petition, under Order XXIII, rule 3, Civil Procedure Code, praying that the arbitrator's award may be accepted and a decree passed accordingly.

Mr. *Sundar Das*, for the Applicant.

Bakhshi *Tek Chand* and Mr. *Mokand Lal Puri*, for the Respondent.

ORDER.—During the pendency of an appeal to this Court from a decree of the Senior Subordinate Judge of Amballa the parties to the suit, without asking for the intervention of any Court, referred their dispute to the decision of an arbitrator who gave an award which was mainly in favour of the defendant respondent, who thereupon asked the Senior Subordinate Judge to record the award under Schedule II or, in the alternative, under Order XXIII, rule 3 of the Civil Procedure Code. The application was rejected and the defendant-respondent now asks this Court to make an order under the said rule.

Counsel for the plaintiff appellant, however, contends that any agreement to refer the subject-matter of a suit to arbitration during its pendency is unlawful without the intervention of a Court and that, even if it is lawful, the Court cannot take cognizance of such an agreement.

Numerous authorities have been cited before us, but it is not necessary to discuss them all. There are no doubt certain rulings which can be cited in support of the application, but some of them were prior to Act V of 1908 and in others the remarks are *obiter*.

Harakhbai v. *Jamnabai* (1) which followed *Pragdas* v. *Girdhardas* (2) is in fact the only ruling in which, after a discussion of the effect of section 89 of Act V of 1908, it has been held that an award made without the intervention of the Court during the pendency of a litigation could be filed under Order XXIII, rule 3, and even in that case it was found necessary to resort to the provisions of Schedule II.

Pragdas v. *Girdhardas* (2) had, however, already been dissented from in *Rukhanbai* v. *Adamji* (3). A ruling which was not referred to in *Harakhbai* v. *Jamnabai* (1) and there is still later judgment of the same High Court, namely, *Shavaksha Dinshaw Davar* v. *Tyab Haji Ayub* (4) in which, though *Harakhbai* v. *Jamnabai* (1) was not referred to, *Pragdas* v. *Girdhardas* (2) was regarded as no longer binding, and it was held that no application can be made to obtain a decree on an

(1) 19 Ind. Cas. 786; 37 B. 639; 15 Bom. L. R. 340.
(2) 26 B. 76; 3 Bom. L. R. 431.
(3) 1 Ind. Cas. 6[illegible]2; 33 B. 6[illegible]; 10 Bom. L. R. 366.
(4) 37 Ind. Cas. 140; 40 B. 386; 18 Bom. L. R. 559.

award except as provided in section 89 of Act V of 1908.

For the purpose of our decision in this case, it is not necessary for us to go the whole length of *Dhan Singh* v. *Kahn Singh* (5), the decision on which Bakhshi Tek Chand relies for his proposition that the agreement to refer was unlawful, though it may be remarked that in *Ghulam Khan* v. *Muhammad Hassan* (6) their Lordships of the Privy Council had not to consider the effect of section 375 of the old Code (now Order XXIII, rule 3) and that the remarks of Maclean, C. J. in *Tincoury Dey* v. *Fakir Chand Dey* (7) were *obiter* as no award had been made in the case.

Granting, therefore, that if such an award is made and it is agreed to by the parties it may be recorded as an adjustment under Order XXIII, rule 3, we are nevertheless of the opinion that if it is not consented to, it cannot be recorded as an adjustment and that any attempt to enforce it by one of the parties is precluded by reason of section 89 of Act V of 1908 which lays down that "Save in so far as is otherwise provided by the Indian Arbitration Act, 1899, or by any other law for the time being in force, all references to arbitration whether by an order in a suit or otherwise, and all proceedings thereunder, shall be governed by the provisions contained in the Second Schedule." The words "by any other law for the time being in force" contained in that section, must, we think, refer to some law extraneous to the Code of Civil Procedure and cannot be legitimately held to cover Order XXIII, rule 3. The grave difficulties which necessarily follow the adoption of the view for which the applicant contends, are very clearly set forth in *Shavaksha Dinsha Dwar* v. *Tyab Haji Ayub* (4) by Macleod, J., whose arguments and reasoning we adopt. It can never have been intended that a person who gets an award without the intervention of the Court should be in a better position than one who has applied to the Court for an Order of Reference under the Second Schedule.

(5) 15 Ind. Cas. 140; 115 P. R. 1912; 191 P. W. R. 1912; 6 P. L. R. 912 Sup.

(6) 29 C. 167 (P. C.); 6 C. W. N. 226; 29 I. A. 51; 12 M. L. J. 77; 4 Bom. L. R. 161; 8 Sar. P. C. J. 151; 26 P. R. 1902 (P. C.).

(7) 30 C. 218; 7 C. W. N. 180.

There is no application before us that the present application should be treated as one under paragraph 20 of the Second Schedule and as we hold that Order XXIII, rule 3 is inapplicable, we dismiss the application with costs.

W. C. A.

Application dismissed.

PRIVY COUNCIL.

APPEALS FROM THE CALCUTTA HIGH COURT.

January 17, 1922.

Present:—Lord Buckmaster, Lord Atkinson, Lord Carson, Mr. Ameer Ali and Sir Lawrence Jenkins.

SANYASI CHARAN MANDAL—DEFENDANT—APPELLANT

versus

KRISHNADHAN BANERJI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu joint trading family—Dayabhaga School—Distinction between ancestral business and one started after ancestor's death—New business started by Karta—Insolvency—Adjudication of adult members—Debt contracted for purposes of new business—Liability of minor's share—Contract Act (IX of 1872), ss. 247, 239—Minor, admission of, as partner—Proof—Plea and issue, absence of—High Court, power of, to set up new case—Partner, minor whether can become.

The distinction between an ancestral business and one started after the death of the ancestor, as a source of partnership relations is this that in the one case these relations result by operation of law from a succession on the death of the ancestor to an established business, with its benefits and obligations; while in the other case they rest ultimately on contractual arrangement between the parties. [p. 127, col. 1.]

In a joint trading family governed by the Dayabhaga School of Hindu Law, the share of a minor is not liable for debts contracted for the purposes of a new business started by the *Karta* or manager of the family. On adjudication in insolvency of the adult members of the family, such minor's share does not vest in the Receiver. If, however, any of the new firm's assets get into the possession of the minor, the Receiver is entitled to realise them for the benefit of the general body of creditors, an individual creditor cannot, in any event, realise those assets for his own benefit and without adding the Receiver as a party. [p. 128, cols. 1 & 2]

In order to bring section 247 of the Contract Act into play, it must be proved that the minor has been admitted to the benefits of the partnership, but where the fact is neither pleaded nor made an issue at the trial, it is not open to the High Court, without inviting specific evidence, specially directed to the point, to hold the admission proved, and thus set up a new case in appeal. [p. 127, col. 2]

A person under the age of majority cannot become a partner by contract, and so, according to the

SANYAI CHARAN MANDAL v. KRISHNADHAN BANERJI.

definition of the term "firm" in section 239 of the Contract Act, he cannot be one of that group of persons called a firm [p. 128, col. 1.]

Mohori Bibee v. *Dharmodas Ghose*, 30 I. A. 114; 30 C. 539; 7 C. W. N. 441; 5 Bom. L. R. 421; 8 Sar. P. C. J. 374 (P. C.), followed.

Consolidated appeals from two decrees of the Calcutta High Court, Mr. Justice N. R. Chatterjea and Mr. Justice Newbould dated the 31st January 1919, reported as 51 Ind. Cas. 587, reversing those of the Subordinate Judge, 24-Parganas and remanding the cases for inquiry and further trial.

FACTS.—The appellant is one of five brothers who had an ancestral trade. After the death of their father, the eldest brother started a new business in addition to the ancestral one. The businesses flourished for sometime but in 1912, there arose financial difficulties. At the instance of a creditor, the four adult brothers of the appellant, who was then a minor, were adjudged insolvents and a Receiver was appointed. Eventually, the Receiver was directed to take possession of four-fifths of the joint family property and the appellant, through his guardian, got his one-fifth share. The respondents who were creditors of the insolvents in their new business did not get their debt paid in full by the Receiver. They brought the present suits to realise the balance from the share of the appellant on the ground that he was a partner in the new business and liable for the debt. They failed to add the Receiver as a party.

The Subordinate Judge held that neither the minor nor his share was liable for this debt and dismissed the suits. On appeal, however, the respondents relied upon the provisions of the Contract Act and claimed that the appellant was liable as he was in receipt of benefit from the new business. The High Court agreed with their contention, allowed their appeals and remanded the suits to the first Court for further inquiry and trial.

The present appeal is preferred by the appellant against the said orders of the High Court.

Mr. *Kenworthy Brown*, for the Appellant.—The appellant disclaims all rights and liabilities in the new Orphangunj business. He expressly denied it in the written statement filed by his guardian and ratified it after he attained majority. The respondents are not suing for the benefit of the general body of creditors but for their individual benefit. If any property of the firm is found to be in the hands of the appellant, it is the Receiver that should sue to recover it. The Receiver was at least to be made a party. Objection as to the absence of the Receiver from the suit was taken at the earliest stages of the suit and an issue also was framed. The High Court was wrong in holding that the respondents were entitled to an enquiry whether the appellant has got any assets of the Orphangunj business in his hands. The provisions of the Contract Act do not help the respondents. A person under the age of majority cannot become a partner by contract. *Mohori Bibee* v. *Dharmodas Ghose* (1). So the appellant could not have been a member of the Orphangunj firm.

Mr. *DeGruyther*, *K. C.*, and Mr. *Raikes*, for the Respondents.—The business was the business of a joint family. The appellant has actually got 1/5th of the family property and we are entitled to follow it in his hands. The business was not a new one but only an extension of the old. It was carried on for the benefit of the joint family. The Courts have gone wrong in their law. Our contention is that it was joint family property liable for the joint family debts but not that of a partnership between the brothers. We could not appeal because the decision was in our favour.

Mr. *K. Brown* replied.—The suits are on pro-notes not signed by the appellant. The respondents now wish to quarrel with the findings of fact as to whether the minor is personally liable.

JUDGMENT.

SIR LAWRENCE JENKINS.—These are consolidated appeals from two decrees of the High Court of Judicature at Fort William in Bengal, passed in separate suits on the 31st January 1919, reversing two decrees of the Subordinate Judge of the 24-Parganas, dated the 28th February 1916.

In each suit a money-decree was sought against the present appellant, who was a minor at its institution. One suit was brought on a hand-note signed by the minor's three adult brothers; the other on a *hathchitta*, signed by his four adult brothers,

(1) 30 I. A. 114; 30 C. 539; 7 C. W. N. 441; 5 Bom L. R. 421; 8 Sar P. C. J. 374 (P. C.).

the youngest of them having then attained majority.

The ground of liability stated in the plaint is that the defendant and his brothers are owners and partners in ancestral businesses, and the money claimed was borrowed by the brothers for the purposes of the businesses.

The minor was defended in each case by his guardian for the suit.

The defendant and his brothers were the five sons of Bhuban Mohan Mandal, a Hindu governed by the Dayabhaga School of Law. He died in November, 1899, and at that time his two younger sons were minors. Nil Ratan, the eldest brother and the *Karta* of the family, was appointed their guardian under Act III of 1890.

Bhuban Mohan had two businesses, one for fuel wood at Munshigunj, and the other for rice and other articles at Kalibazar. Each devolved as an ancestral business on the five sons, and was carried on by Nil Ratan as the *Karta*, assisted by his adult brothers. After the father's death a new business in rice was started by Nil Ratan at Orphangunj, and it is the defendant's case that the money sued for was borrowed exclusively for the purpose of this business, and that the business was not ancestral.

The Subordinate Judge decided in the defendant's favour and dismissed the suits. The High Court on appeal apparently took the same view in the first instance, but as the result of a re-argument, set aside the Subordinate Judge's decrees and directed certain accounts against the defendant, not because his liability was established but for the purpose of determining whether or not he was liable. It is from these decrees of the High Court that the present appeals have been preferred.

A preliminary objection was taken that the appeals did not lie "because the order was not final," but their Lordships did not give effect to it and the appeals have been heard.

The businesses were conducted by Nil Ratan and his adult brothers for many years with success. Ultimately, however, there were financial difficulties, and on the 19th February, 1912, proceedings under the Provincial Insolvency Act, 1907, were commenced by a creditor against all five brothers in the Court of the District Judge at Alipur. It was established to the satisfaction of the Judge that the defendant was a minor and so could not be adjudicated insolvent, and that the minor was a joint owner in the family business inherited from his father. There was, however, an adjudication against the adult brothers, "they being the members of the firm Bhuban Mohan Mandal and Nil Ratan Mandal."

A Receiver was appointed under section 18 (1) of the Act, and the property of the insolvents thereupon vested in him. He was ordered to realise not only the four-fifth shares of the insolvents in the joint property, but also the minor's share in the joint properties acquired after the father's death. As a result of his insolvency, Nil Ratan was removed from the guardianship of the minor, and Mati Lal Roy was appointed in his place.

On the 19th August 1912, with the sanction of the Judge, Mati Lal Roy and the Receiver agreed to appoint an arbitrator to effect a partition of the immoveable properties, and on the 8th October 1912 an award was made under which the minor got one fifth in both ancestral and after-acquired properties, Mati Lal Roy having claimed that the after-acquired properties were purchased out of the income of the ancestral properties. On the 14th January 1912 a decree was passed in terms of the award.

In the meanwhile cross appeals had been preferred by Mati Lal Roy and the creditors from the orders of the Judge in insolvency, and on the 17th March 1914 they were heard by the High Court with the result that the order refusing to adjudicate the minor an insolvent was affirmed, but so much of the order as directed the Receiver to realise the minor's share was set aside, and in lieu thereof it was ordered that the Receiver should "take possession of four fifths share of the business, and four fifths share of all the properties purchased since the death of Bhuban Mohan Mandal, and also four fifths share of the other properties jointly held by the infant and his brothers."

It is in these circumstances that the present suits were commenced, as the dividend received by the plaintiffs in the insolvency fell short of the amount due.

SANYASI CHARAN MANDAL v. KRISHNADHAN BANERJI.

It is established by concurrent findings by the lower Courts, first, that the money now in suit was borrowed exclusively for the purposes of the Orphanguni business, and secondly, that this business was neither ancestral nor an extension of the ancestral business. These findings must now be deemed conclusive, and this strikes at the very root of the case made by the plaintiffs in the first Court.

The distinction between an ancestral business and one started like the present after the death of the ancestor, as a source of partnership relations is patent. In the one case these relations result by operation of law from a succession on the death of an ancestor to an established business, with its benefits and its obligations. In the other they rest ultimately on contractual arrangement between the parties. The inability of a *karta* to impose on a minor co-parcener the risks and liabilities of a new business started by himself, is fully discussed by both Courts, and their Lordships agreeing with the conclusion at which they have arrived on this point, do not deem it necessary to enter on a further discussion of this aspect of the case.

What has to be seen in the peculiar circumstances of this dispute is not merely whether the minor has some under any liability in respect of the debts of the Orphanguni business, but whether that liability can be enforced by the plaintiffs in the suits as constituted.

It is important at this point to bear in mind (*a*) that at the institution of the suits the defendant was a minor; (*b*) that in the written statement filed in each suit on his behalf by his guardian for the suit, it was denied that he was a co-sharer in the business, or had any responsibility with regard to it; (*c*) that when at a later stage of the litigation the minor attained majority, he adopted these written statements; and (*d*) that at that time the business of the firm had ceased.

The ancestral character of the Orphanguni business being negatived, the plaintiffs have attempted to formulate other grounds of liability. Before the Subordinate Judge the claim seems to have been rested on general principles rather than on the specific provisions of the Contract Act. Thus in the grounds of appeal it is contended that the defendant and his four brothers having all along lived as members of an undivided Hindu family, and properties having been acquired with the joint funds and the defendant having got some of those properties in his share on partition with the Reciever, the learned Subordinate Judge ought to have passed a decree against the defendant at any rate so far as the assets of the firms allotted to his share are concerned.

The answer to the case thus made is given by the Subordinate Judge towards the close of his careful and well reasoned judgment, and their Lordships are in complete agreement with what is there said. In the High Court, however, reliance was evidently placed on the Contract Act, for its provisions are mentioned and discussed. It becomes necessary, therefore, to examine the Act so far as it bears on the question now in contest.

Section 247 provides that a person who is under the age of majority according to the law to which he is subject may be admitted to the benefits of partnership but cannot be made personally liable for any obligation of the firm; but the share of such minor in the property of the firm is liable for the obligations of the firm.

To bring this section into play it must be proved that the minor has been admitted to the benefits of the partnership. This is a fact to be established by evidence, and though it was neither pleaded nor made an issue at the trial, the High Court, without inviting evidence specifically directed to this point, held the admission proved, and thus set up a new case in appeal. The defendant has just ground of complaint as to this, and the procedure is not one to be commended; still in the view their Lordships take they will deal with the case on the basis of the High Court's finding without expressing an opinion as to its correctness. Under the section liability is limited to the share of the minor in the property of the firm.

In section 239 there is a definition of the word "firm." It is there said that the persons who have entered into partnership with one another are called collectively a "firm." In the earlier part of the section it is enacted that "partnership" is the relation which subsists between persons who have agreed to combine their property, labour or

skill in some business and to share the profits thereof between them.

A person under the age of majority cannot become a partner by contract [*Mohori Bibee* v. *Dharmodas Ghose* (1)] and so, according to the definition, he cannot be one of that group of persons called a firm. It would seem, therefore, that the share of which section 247 speaks is no more than a right to participate in the property of the firm after its obligations have been satisfied.

Though there may be this right, in fact it is not claimed by the defendant. On the contrary, the written statements deny his membership of the partnership; this denial was made on his behalf during his minority, and it was adopted by him when he attained his majority. This attitude he still maintains, and it can only be regarded as a relinquishment of all claim to a share in the property of the firm. It is still the property of the firm, and is liable as such to the obligations of the firm.

But all the property of the firm vested in the Receiver on the making of the order of adjudication (Provincial Insolvency Act, section 16), and if any part of it has got improperly into the possession of the minor, the right to recover it is in the Receiver. This is not disputed by the defendant; and it is only by its coming into the hands of the Receiver that its rateable distribution among the general body of creditors can be secured. Nor does it make any difference that the business was conducted by the male adult members of a Hindu family governed by the Dayabhaga; the rights and liabilities of a minor member of such a family would be measured by similar principles for the purpose now under consideration.

The learned Judges in the High Court seem to have thought that the judgment on appeal in the insolvency proceedings put a bar in the way of a recovery by the Receiver, and so justified the plaintiffs' suits; but this proceeds on a misconception of what was actually decided.

It is quite true that in that judgment it was said that "the essence of the matter is that the share of the infant has not vested in him and he is consequently not entitled to deal with it. . . . But whatever remedies may be available hereafter to the Receiver or to the creditor, it is clear that the properties of the infant cannot be dealt with by either of them in these proceedings." This was a correct statement of the legal position; but it in no way justifies the conclusion in the judgment now under appeal that in consequence of it "the defendant cannot now contend that it is only the Receiver (and not any individual creditor) who can deal with his share of the partnership properties." No property belonging to the minor could vest by the adjudication in the Receiver, but what would vest in him would be the right (if it existed) to recover from the minor property in his possession belonging to the firm.

It was then urged that any suit now instituted by the Receiver would be barred by limitation; but when Counsel for the plaintiffs was asked whether to obviate this, he was prepared to add the Receiver as a party, so that any assets realised could come into his hands for rateable distribution he declined the offer, and frankly admitted that it would be of no use to his clients unless they could recover for their own exclusive benefit.

The absence of the Receiver from the suits is not an objection taken for the first time at this stage of the litigation. It was pleaded as a defect in the written statement and an issue was framed on the point.

The plaintiffs do not now contend that the defendant has become personally liable, and so it is unnecessary to discuss the terms of section 248.

In their Lordships' opinion, therefore, these suits constituted as they are, are misconceived. In the circumstances the Receiver is a necessary party to any proceeding for the purpose of realising assets liable for the firm's debts, and the proceeds of any realisation would be applicable not towards the exclusive discharge of any individual debt as the plaintiffs desire, but for rateable distribution among the whole body of the firm's creditors.

Their Lordships will, therefore, humbly advise His Majesty that the appeals be allowed, and that in each suit the decrees of the High Court dated the 31st January 1919, be discharged, and the decrees of the Subordinate Judge, dated the 28th February 1916, be restored, and that the respondents to each appeal do pay to the appellant the

costs of the appeals in the High Court. They will also pay the costs of these appeals.

S. D. & K. V. L. N. & W. C. A.

Appeals allowed.

Solicitor for the Appellant.—Mr. *E. Dalgado.*

Solicitor for the Respondents.—Mr. *Douglas Grant.*

BOMBAY HIGH COURT.
FIRST CIVIL APPEAL NO. 190 OF 1920.
November 16, 1921.
Present :—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

KRISHNAGIRI TRIKAMGIRI—PLAINTIFF—APPELLANT

versus

SHRIDHAR KAVLEKAR—DEFENDANT—RESPONDENT.

Math—*Succession—Designation of successor by* Guru *—Ceremony of initiation, necessity of.*

Where a person is very clearly designated by the *guru* of a *math* as his successor, the absence of the formal ceremony of initiation of that person during the lifetime of the *guru*, is no bar to that person's succession to the office.

First appeal from the decision of the First-Class Subordinate Judge at Belgaum, in Suit No. 135 of 1917.

Mr. *V. V. Bhadkamkar*, for the Appellant.

Messrs. *G. S. Rao* and *A. G. Desai*, for Respondent No. 1.

JUDGMENT.

MACLEOD, C. J.—This is an appeal by the plaintiff whose suit has been dismissed on the ground that first defendant was a designated heir of the last Guru Ramgiri, and, therefore, was entitled to succeed. The plaintiff claimed as a *gurubandhu*. But I do not think there was any necessity to enter into the question whether as a matter of fact he was connected with the line of *gurus* to this Math, as the first defendant was clearly designated by Ramgiri as his successor. An application was made to the Kolhapur Darbar for permission to adopt the first defendant as a *chela*. That permission was granted. But before the initiation ceremony was carried out Ramgiri sent the first defendant to Malvan to learn business matters, so that he might be competent when he succeeded to manage the Math properties. When Ramgiri found his end approaching he sent for the first defendant, but unfortunately from one cause or another the first defendant arrived too late, and, therefore, although one may very safely infer that Ramgiri intended to initiate the first defendant, he was unable to do so owing to his dying before the first defendant arrived. The question then is whether in these circumstances the first defendant is not the person to succeed to the Math rather than the plaintiff, even assuming he was able to prove that he was distantly connected as a *gurubandhu*. I should say on general principles that the designation of the heir would be quite sufficient to enable the first defendant to succeed, the absence of the formal ceremony during the lifetime of Ramgiri not being really material to his success in the suit. I think, therefore, that the Judge was right in holding that the designated heir could succeed to the Math and the appeal should be dismissed with costs.

SHAH, J.—I agree. I only desire to add that there is nothing to show that the person in the position of defendant No. 1, clearly designated as heir by Ramgiri, would not be able to succeed simply because the initiation ceremony was not performed during the lifetime of Ramgiri. Though the proposition has been advanced that the initiation ceremony is essential for the purpose of constituting discipleship which would entitle him to succeed to the property, no authority has been cited in support of that proposition, and I do not think that it could be said as a matter of law that where the designation has been so clear, as in the present case, the absence of formal initiation during the lifetime of the last holder, Ramgiri, should present insuperable difficulty in the way of the designated disciple succeeding as heir.

W. C. A.

Appeal dismissed.

FATTEH SINGH v. BABU RAM.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 3352 OF 1916.

January 14, 1921.

Present:—Mr. Justice Scott-Smith and Mr. Justice Leslie Jones.

FATTEH SINGH—DEFENDANT—APPELLANT

versus

BABU RAM AND OTHERS—PLAINTIFFS—RESPONDENTS.

Court-fee—Appeal insufficiently stamped—Mistake—Court, when will not extend time to pay proper fee.

When by mistake a memorandum of appeal is insufficiently stamped, and the mistake is one which could not have been made if due care and attention had been exercised, the Court will not extend the time so as to allow the appellant to pay the proper Court-fee, and thus deprive the respondent of the valuable right which has accrued to him.

Second appeal from a decree of the District Judge, Jullundur, dated the 4th September 1916, varying that of the Honorary Subordinate Judge, Jullundur, dated the 16th February 1915.

Pandit *Sco Narain*, R. B., for the Appellant.

Messrs *Dalip Singh* and *Ram Lal*, for the Respondents.

JUDGMENT.—This is an appeal against a decree for redemption on payment of a sum of Rs. 1,255. It is met with a preliminary objection that the appeal which was filed on the 30th December 1916 is improperly stamped. The amount of the Court-fee paid is Rs. 10 only and according to the petition of appeal this sum was fixed under Schedule II, Article 17 (6) of the Court Fees Act. There is no doubt, however, that Court fee should have been paid *ad valorem* on the amount of the principal under section 7 (9) of the said Act and we see no reason for extending the time so as to allow the appellant to pay the proper Court-fee. A valuable right has accrued to the respondents and there is no reason why they should now be deprived of it. The mistake was one which could not have been made if due care and attention had been exercised.

The appeal fails and is dismissed with costs.

W. C. A.

Appeal dismissed.

SUGANCHAND SAVAICHAND v. MOTILAL DURGAPRASAD.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION SUIT No. 3635 OF 1920.

July 16, 1921.

Present:—Mr. Justice Pratt.

SUGANCHAND SAVAICHAND AND OTHERS—PLAINTIFFS

versus

MOTILAL DURGAPRASAD AND OTHERS—DEFENDANTS.

Landlord and tenant—Tenant sub-letting in contravention of agreement—Tenancy, termination of, by notice—Sub-tenant, status of—Bombay Rent (War Restrictions) Act (II of 1918), s. 9—"Tenant," whether includes "sub-tenant."

Where a tenant, contrary to the terms of his lease, sub-lets the premises, and the landlord by notice terminates the tenancy, the sub-lessee is a tenant on sufferance thereafter, and is liable to ejectment at the instance of the landlord. [p 131, col. 1]

The term "tenant" in section 9 of the Bombay Rent (War Restrictions) Act does not include a sub-tenant [p 131, col. 1.]

Mr. *Kamdar*, for the Plaintiffs.

Messrs. *Coltman*, *Taleyarkhan* and *Khergamvala*, for the Defendants.

JUDGMENT.—Plaintiffs are the owners of a building at Vithalwady and let the first floor to Ramjilal Ramswarup on the 15th November 1917 at a rental of Rs. 40 per mensem.

Plaintiffs say that Ramjilal Ramswarup's rent was in arrears and he had sub-let the premises contrary to the terms of his lease. Therefore, they gave notice terminating the tenancy on the 10th November 1920.

In the meantime, however, on the 26th October 1920, Ramjilal Ramswarup was adjudicated insolvent and left Bombay. On 28th October 1920, the Official Assignee's auctioneers wrote that they had taken away Ramjilal Ramswarup's moveables and vacated the premises. The plaintiffs went there that day. Plaintiff No. 3 says he found defendants in possession of two rooms and that he locked the other two.

On 29th October 1920, the Official Assignee sent a notice of his intention to disclaim the leasehold, and on 7th December 1920 the Official Assignee disclaimed tenancy as from that date. Squabbles about possession between the plaintiffs and defendants went on, which led to proceedings in the Police Court. Plaintiffs filed this suit on 17th December 1920.

SUGANCHAND SAVAICHAND v. MOTILAL DURGAPRASAD.

There is now no question as to Ramjilal Ramswarup's occupation. He has vacated the premises and his tenancy has terminated. The suit is against the defendants who claim to be sub tenants of Ramjilal Ramswarup.

Now, the effect of the insolvency was not to terminate the tenancy but to vest the leasehold in the Official Assignee. The locking up of the rooms by the plaintiffs on the 28th October was not a re-entry by the landlord, for the lease gives no power of re-entry. Plaintiffs were then only taking action for the protection of their property. The disclaimer of the 7th December, although it operated to relieve the Official Assignee of personal liability to pay rent as from the date of adjudication, did not operate on the leasehold interest until the date of disclaimer, *i. e.*, the 7th December. But before that date the tenancy had been determined by notice, Exhibit 2, on the 10th November 1920. This notice is proved and is admitted by the defendants in their letter of the 29th October (?), Exhibit 10.

If the tenancy had been terminated by the disclaimer, the sub tenants' rights could have been saved by section 62 of the Presidency Towns Insolvency Act, or by section 116 of the Transfer of Property Act. But as it is the tenancy was terminated by notice on the 10th November 1920, and, therefore, the defendants were tenants on sufferance after that date.

Mr. Coltman contends that even though the defendants are sub-tenants, they are entitled to the protection of the Bombay Rent Act, first, because the word 'tenant' in section 9 includes a sub-tenant; and, secondly, because under section 9 (3) the fact that the landlord's interest has terminated is not in itself deemed to be a sufficient cause for dispossession. The term 'tenant' is defined in section 2 (*d*) as "any person by whom or on whose account rent is payable for any premises, and includes every person from time to time deriving title under a tenant."

Granting that the sub-tenant derives title from the tenant, still he is not within the definition unless rent is payable by him or on his account to the landlord. But this is not the case, for there is no privity of contract between him and the landlord. Even if he pays the tenant's rent under the head lease, he does so as the agent of the tenant and not on his own account. The term 'tenant' in section 9 does not include a sub tenant, unless, of course, the suit is filed by the tenant on the under lease, in which case the tenant is the landlord *qua* the sub-tenant and the sub-tenant is his tenant.

As to the other branch of the argument, the termination of the landlord's interest refers to cases of assignment of the lessor's interest and perhaps even to the death of a Hindu widow lessor. In either case the assignee or the remainderman succeeds to the estate and in the case of the assignee becomes landlord by derivative title. But granting that the tenant derives title from the landlord, he is not for that reason within the definition unless he is entitled to receive rent under the head-lease. He is not entitled to receive rent from the sub-tenant because there is no privity of contract between the head-lessor and the sub-tenant. He is, therefore, not the sub tenant's landlord *qua* the head-lease. The extinction of a tenant's title, therefore, does not bring the case within section 9 (3); and in truth the defendants are not sued as tenants or by a landlord.

The defendants as sub-tenants hold on a precarious title and when the tenancy under the headlease terminates, their right to possession terminates too. Unlike trespassers they come in by right but like trespassers they hold over without right, and in this suit they are in the same position as trespassers. It is, therefore, not necessary to find on the issue as to reasonable and *bona fide* requirement, or indeed on the issue as to the number of rooms which were sub-let to them.

The plaintiffs have given false evidence when they pretend ignorance of the sub-tenancy. For, I believe they received Ramjilal Ramswarup's rent from the defendants from February to August and even made repairs on defendants' requisition last rains. On the other hand, defendants have behaved no better for they set up at one time a false case of an agreement of direct tenancy from the plaintiffs, which has been subsequently abandoned.

Therefore, following the ordinary rule, I think this is a case in which costs should follow the event.

TOHLU MAL v. BUTA.

Decree, therefore, that the defendants do give vacant and peaceful possession of the premises in suit to the plaintiffs and pay compensation at the rate of Rs. 35 per month from 11th November 1920 till date of delivery of possession. Defendants to pay plaintiffs' costs of this suit.

W. C. J.

Suit decreed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2978 OF 1916.

January 6, 1921.

Present:—Mr. Justice Broadway and Mr. Justice Abdul Raoof.

TOHLU MAL—DEFENDANT—APPELLANT

versus

BUTA—PLAINTIFF AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. VI, r. 17—Plaint, amendment of—Case ripe for judgment—Mortgagee—Interest, high rate of—Provision, whether penal.

A plaintiff ought not to be allowed to amend his plaint at a late stage of the suit, as, where the case is ripe for judgment, where the amendment has the effect of completely altering the nature of the suit. [p. 183, col. 2.]

Where there is no allegation of undue influence or fraud to make the provisions of section 16 of the Contract Act applicable the mere fact that the rate of interest provided for in a mortgage-bond is high is not sufficient to make the provision as to interest penal. [p. 184, col. 1.]

Second appeal from a decree of the District Judge, Ludhiana, dated the 8th July 1916, varying that of the Senior Subordinate Judge, Ludhiana, dated the 27th August 1915.

Bakhshi *Tek Chand*, for the Appellant.

Mr. *Abdul Ghani*, for the Respondents.

JUDGMENT.—This was a suit for the redemption of a mortgage dated the 8th August 1898. The following facts will disclose the nature of the claim and the issues arising between the parties. The property mortgaged consisted of two shops situated in Ludhiana, *Mohalla* Iqbal Ganj. Nur Muhammad, the defendant No. 2, and *Musammat* Nur Bibi, the defendant No. 3, were the owners of these two shops. During their minority *Musammat* Zebo, their mother and guardian, mortgaged with possession the two shops on their behalf to Tohlu Mal for Rs. 400 The detail of the consideration constituting the total figure of Rs. 400 is given in the mortgage deed. One of the items was Rs. 125, which was left by the mortgagee for payment to a previous mortgagee, Chint Ram. Tohlu Mal was authorised to pay this amount to the previous mortgagee and by redeeming the previous mortgage to take possession of the shops. The following conditions were entered in the mortgage deed in favour of Tohlu Mal:—

(*a*) The mortgagee was to remain in possession.

(*b*) The mortgage money was to carry interest at the rate of Rs. 1-4-0 per cent.

(*c*) The rent of the shops in the case of realisation was to be deducted from the interest;

(*d*) Power was given to the mortgagee to claim and realise the principal and interest from the mortgaged property and other property of the mortgagors and from their persons.

(*e*) The mortgagors were to keep the shops in proper state of repairs, and in default power was given to the mortgagees to make repairs (*shikast wa rekht dokanat marhuna b zimma ham muzhiran hai agar ham muzhiran murammat na karaven to murtahin khud murammat kara lewe*);

(*f*) The expenses incurred by the mortgagees in effecting repairs were made recoverable from the mortgagors with interest at the rate of Rs. 1-4-0 per cent.

(*g*) The clause as regards title was given in the following words:—

(*Agar koi kisi kism ka jhagra ho to us ke harja wa kharcha ke zimmawar ham muzhiran hain, murtahin ka koi taaluq nahin hai*), namely, in case of any dispute we, the mortgagors, will be responsible for the costs and damages. The mortgagees will have nothing to do with them.

The minors, Nur Muhammad and *Musammat* Nur Bibi on attaining majority sold by a sale deed dated the 14th April 1914 the equity of redemption in these shops to Buta, the plaintiff in this case, for Rs. 850 leaving Rs. 400 with the vendor to pay off the mortgage in favour of Tohlu Mal. A clause was inserted in the sale-deed to the effect that if Tohlu Mal was found entitled to any thing in addition to Rs. 400 the vendor would be liable to pay that also.

TOHLU MAL v. BUTA.

The present suit was brought by Buta on the 28th April 1914, Tohlu Mal was made the principal defendant while Nur Muhammad and *Musammat* Nur Bibi were joined as *pro forma* defendants. The plaintiff claimed redemption on payment of Rs. 400 only alleging that the rent of the shops had been appropriated by the mortgagee towards the interest. Tohlu Mal admitted the right of the plaintiff to redeem as the vendee of the equity of redemption, but he claimed that in addition to the Rs. 400 offered he was entitled to Rs. 945 on account of interest from the 8th August 1898 up to the 8th May 1914 at the rate of Rs. 1-4-0 per cent. per mensem, Rs. 115-15 6 on account of expenses incurred in reconstructing certain portions of the shops which had fallen down, Rs. 170 6 0 on account of interest on the amount of expenses for seven years and 10 months at the rate of Rs. 1-4-0 per cent. per mensem, Rs. 44 on account of expenses for repairs during eleven years at the rate of Rs 4 per annum and Rs. 75 on account of costs of a suit which he had to bring against Chint Ram, the prior mortgagee, to recover possession of the shops by redemption. He admitted receipt of Rs. 428-11-6 in the shape of rent of the shops which he offered to deduct from the amount claimed by him. The suit was also resisted by Nur Muhammad and *Musammat* Nur Bibi principally on the allegation that the mortgage was executed by their mother without lawful authority and that no consideration had been received. Replication was filed by the plaintiff objecting to the additional items claimed by Tohlu Mal, the mortgagee, while the defendant, Tohlu Mal, also filed additional pleas meeting the objections raised on behalf of defendants Nos. 2 and 3. The parties also made oral statements in Court. Issues were framed and evidence was tendered. Arguments were heard by Wali Shah on the 1st of August 1915. The case was ready for judgment when on the 5th August 1915 the plaintiff presented an application stating that he had filed the plaint in ignorance of real facts and asked the Court to allow him to amend his plaint. Curiously enough this prayer was granted by the Court at this late stage. In the amended plaint the plaintiff alleged that the mortgage-deed was unlawful and was executed without consideration and necessity, and that he was entitled to get possession of the shops from Tohlu Mal without paying anything to him. The effect of the amendment was that the nature of the suit was altogether changed. The Court of first instance, however, tried the new issue arising on the amended plaint and after going into the question of consideration and necessity came to the conclusion that the plaintiff was entitled to get possession of the two shops without paying anything on account of the mortgage.

Tohlu Mal naturally being dissatisfied with the decision of the Trial Court appealed to the lower Appellate Court. The latter Court has set aside the order allowing the amendment of the plaint and has tried the case on the original plaint with the result that it has decreed the claim of the plaintiff for redemption on payment of Rs. 400 only.

Both Buta, the plaintiff, and Tohlu Mal, the defendant, are dissatisfied with the appellate decree. Tohlu Mal has filed a second appeal in this Court complaining that the additional items claimed by him have been wrongly disallowed by the Appellate Court. Buta, plaintiff, has filed cross objections under Order XLI, rule 22, reiterating the objections as to the legality of the mortgage and his non-liability to pay anything for the redemption of the shops. We must dispose of the cross-objections first. It is admitted that it can be urged only on the amended plaint. We entirely agree with the view taken by the lower Appellate Court with regard to the amended plaint. We are clearly of opinion that by the amendment the nature of the *suit* was altogether altered, and such amendment ought not to have been allowed at such a late stage. We accordingly see no force in the cross-objections and disallow them with costs.

As regards the appeal of Tohlu Mal, after considering the terms of the mortgage-deed we are compelled to disagree with the learned Judge of the Court below with respect to the following items, which we think ought to have been allowed to Tohlu Mal. (1) Rs. 945 interest on the mortgage-money. The mortgagors had clearly agreed to pay interest on the principal amount and both the principal and interest were made a charge on the mortgaged property. Any amount of rent, if realised, was to be deducted from the interest. According to the correct interpretation of the terms of the mortgage-

deed the appellant is clearly entitled to the above item. The lower Appellate Court has held the condition as to the payment of interest to be penal. The mere fact that a high rate of interest was provided for cannot make the provision as to interest penal. There is no allegation of undue influence or fraud to make the provisions of section 16 of the Contract Act applicable. This question is settled beyond any doubt by these cases reported as *Aziz Khan* v. *Duni Chand* (1) and *Balla Mal* v. *Ahad Shah* (2). The appellant is also entitled to the expenses incurred in re-constructing the portions of the shops, which had fallen down. Both according to general principles and the terms of the mortgage deed the appellant was entitled to re-construct and repair the shops in order to keep his security intact. If any authority is needed we may refer to *Bhag* v. *Ghasita Mal* (3) and section 72 of the Transfer of Property Act, IV of 1882. The appellant has claimed Rs. 145-15-6 under the head of expenses incurred in re-constructing the portions of the shops. We find from the record that one Banna Lal was appointed a Commissioner to appraise the cost of re-building. From his report it appears that two walls were re-built and the shops were re-roofed by placing on the walls new rafters and beams. The Commissioner estimated the expenses to be Rs. 100. We, therefore, allow this amount on account of the expenses incurred in re-construction. The appellant is, therefore, entitled to Rs. 400 *plus* Rs. 945, *plus* Rs. 100, total Rs. 1,445. Deducting from it Rs. 428 11-6, the amount of rent received by him the balance comes to Rs. 1,016-4-6. The appellant has also claimed interest on the amount of expenses incurred, but we do not think that he is entitled to any interest in this respect. The item of Rs. 44 claimed on account of annual repairs has not been established on evidence. This item has rightly been disallowed by the Court below. As regards the costs of the redemption suit against Chint Ram we also agree with the Court below in holding that he is not entitled to them under the terms of the mortgage deed. We do not allow interest *pendente lite*, because the appellant is admittedly in possession of the shops.

Mr Abdul Ghani, Advocate for the respondent, contended that the appellant had received more than Rs. 428 11-6 as rent, but he was unable to point out any material on the record in support of his argument. His client did not adduce any evidence to prove that the mortgagee had realised on account of rent anything more than he had admitted. We are, therefore, unable to accept this contention We are asked to refer an issue on the point to the lower Appellate Court, but we do not think that the adoption of such a course would serve any useful purpose. There is no evidence on the record and we do not see our way to allow the plaintiff to produce additional evidence.

In view of the above remarks we allow the appeal and modify the decree of the lower Appellate Court by raising the amount from Rs. 400 to Rs. 1,016 4 6 with interest at Rs. 6 per cent. We accordingly give the plaintiff a decree for redemption on payment of Rs. 1,016-4-6 with interest at 6 per cent. on the decretal amount and costs of the suit, on or before the 6th April 1921. If such payment is not made on or before the date fixed, the plaintiff shall be debarred from all rights to redeem the property.

W. C. A. & R. W.

Appeal allowed;
Decree modified.

BOMBAY HIGH COURT.
FULL BENCH.
LETTERS PATENT APPEAL No 91 OF 1920.
November 16, 1921.
Present:—Sir Norman Macleod, Kt., Chief Justice, Mr. Justice Shah and Mr. Justice Fawcett.
DODDAWA PURSHYA—DEFENDANTS—APPELLANTS
versus
YELLAWA MALLAPPA BENI—RESPONDENT
Limitation Act (IX of 1908), Sch. I, Art. 118—Suit

(1) 48 Ind. Cas. 933; 101 P. R. 1918; 23 C. W. N. 130; 165 P. W. R. 1918 (P. C.).
(2) 48 Ind Cas. 1; 124 P. R. 1918; 35 M. L. J. 614; 16 A. L. J. 905; 23 C. W. N. 234; 25 M. L T. 55; 180 P. W. R. 1918 29 C. L. J. 165; 1 U. P. L R. (P. C.) 25; 21 Bom. L. R. 558 (P. C.).
(3) 55 P. R. 1890.

DODDAWA PURSHYA v. YELLAWA MALLAPPA BEMI.

for possession on displacement of alleged adoption—Article, whether applicable.

Per *Macleod, C.J.* and *Fawcett, J.* (*Shah, J.*, dissenting)—Suits for possession of immoveable property where the plaintiff cannot succeed except by displacing an adoption, are not governed by Article 118 of Schedule I to the Limitation Act. [p. 140, col. 1; p. 142, col 1· p. 143, col 1.]

In view of the decision of the Privy Council in *Thakur Tirbhuwan Bahadur Singh* v *Raja Rameshar Bakhsh Singh* (1) the decision in *Shrinivas* v. *Hanmant*, (2) is no longer good law. [p. 140, col. 1; p. 142, col. 1.]

Letters Patent Appeal from the decision of Macleod, C. J., in Second Appeal No. 445 of 1920, summarily dismissing the appeal from the decision of the Assistant Judge, Belgaum, in Appeal No. 30 of 1919, confirming a decree passed by the Subordinate Judge at Bail Hongal, in Civil Suit No. 295 of 1907.

FACTS appear from the following Order of Reference made by Mr. Justice Pratt and Mr. Justice Fawcett, on the 5th August 1921.

PRATT, J.—The plaintiff is one of three co-widows of Mallappa who died in 1916.

She filed this suit in 1917 to recover possession by partition of one third share of her husband's estate.

The other two co-widows, Yellawa (defendant No. 2) and Tayawa (defendant No. 3), contended that Parshya, a son of Tayawa by a former husband, had been adopted by Mallappa in 1905. Parshya was dead, and his widow was the first defendant claiming to be sole heir through her husband.

Both the lower Courts have found that Mallappa married Parshya's mother in 1903 prior to the deed of adoption which is dated 6th December 1905 If there had been an adoption it would have been invalid, *Panchappa* v. *Sangnbasawa* (1). But both the lower Courts have also found it a fact that no adoption ever took place and that the deed was a sham transaction secretly executed in order to please Tayawa.

The First Court found that the suit was not barred by limitation, as the plaintiff had no knowledge of the adoption and the lower Appellate Court seems to have concurred in that view.

In this appeal it is contended that plaintiff is affected with the knowledge that Mallappa had of the apparent adoption.

Under Article 118 the period of limitation is six years from the time when the alleged adoption becomes known to the plaintiff.

Under section 2 of the Indian Limitation Act the word 'plaintiff' includes any person from or through whom a plaintiff derives his right to sue.

There can be no question but that plaintiff claims as heir of her husband and that her right to sue is derived from him. In the case of *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram* (2), the holder of an hereditary office was held to derive his right of suit from or through his father. Similarly, an adopted son was held to derive his liability to be sued, within the meaning of the definition of defendant, from his adoptive mother: *Padaiirav* v. *Ramrav* (3). So also as to judgment-debtor and auction-purchaser: *Ali Saheb* v. *Koji Ahmed* (4).

It follows, therefore, that if Article 118 applies, the suit is time barred and plaintiff is deprived of her inheritance by reason of a deed of which she had no knowledge and which was never intended to be acted upon.

I think this conclusion is in itself sufficient to raise a serious doubt as to the correctness of the Full Bench ruling in *Shrinivas* v. *Hanmant* (5), applying Article 118 to suits for possession where the plaintiff cannot succeed without displacing an adoption.

This rule was first laid down by the Privy Council in *Jagadamba Chodhrani* v.

(1) 24 B. 89; 1 Bom. L R. 543; 12 Ind. Dec. (N s.) 596.

(1) 33 I. A. 156; 8 Bom. L. R. 722; 10 C. W. N. 1065; 16 M. L. J. 440; 3 A L. J. 695; 4 C. L. J. 405; 1 M. L. T. 265; 9 O. C. 377; 28 A. 727 P. C.).

(2) 24 B 260; 1 Bom. L. R. 799; 12 Ind. Dec. (N. s.) 709 (F. B.)

(2) 23 M. 271; 2 Bom. L. R. 597; 4 C. W. N. 329; 27 I. A. 69; 10 M. L. J. 29; 7 Sar. P. C. J. 671; 8 Ind. Dec. (N. s.) 591 (P. C).

(3) 13 B. 160; 13 Ind. Jur. 232; 7 Ind. Dec. (N. s.) 107.

(4) 16 B. 197; 8 Ind Dec. (N. s.) 609.

(5) 24 B. 260; 1 Bom. L. R. 799; 12 Ind. Dec. (N. s.) 709 (F. B.).

DODDAWA PURSHYA v. YELLAWA MALLAPPA BENI.

Dakhina Mohun Roy (6), under Article 129 of the Indian Limitation Act of 1871. That Article was as follows :—

Description of suit.	Period of limitation.	Time when period begins to run.
129. To establish or set aside an adoption.	12 years.	The date of the adoption, or (at the option of the plaintiff) the date of the death of the adoptive father.

It was not very clear what was meant by the phrase "set aside an adoption" and the Article was absurd, for, a Hindu widow had only to live twelve years after making of an adoption and the claim of the reversioner was barred unless he had taken the precaution of filing declaratory suit in her lifetime.

However, in *Jagadamba's case* (6) the Privy Council held that this Article applied indiscriminately to suits for a declaration and to suits for possession.

In 1877 the Specific Relief Act was passed and section 42 gave the Courts power to make declaratory decrees. Illustration (*f*) is as follows :—

"A Hindu widow in possession of property adopts a son to her deceased husband. The person presumptively entitled to possession of the property on her death without a son may, in a suit against the adopted son, obtain a declaration that the adoption was invalid."

The Limitation Act of 1877 was passed in the same year and for Article 129 of the Act of 1871 were substituted two Articles as follows :—

Description of suit.	Period of limitation.	Time when period begins to run.
118. To obtain a declaration that an alleged adoption is invalid, or never, in fact, took place.	Six years.	When the alleged adoption becomes known to the plaintiff.
119. To obtain a declaration that an adoption is valid.	Six years.	When the rights of the adopted son, as such, are interfered with.

(6) 13 I. A. 84; 13 C. 308; 10 Ind. Jur. 307; 4 Sar. P. C. J. 715; 6 Ind. Dec. (N. S.) 705 (P. C.).

I think the effect of the legislation was to restrict the operation of Article 118 and 119 to purely declaratory suits such as those described in Illustration (*f*). The period was reduced to six years in deference to a passage in the judgment of *Jagadamba's case* (6) suggesting that a moderate time should be allowed for litigation of the delicate and intricate questions involved in adoption. But suits for possession even where adoptions were involved do not fall under these Articles but must be governed by the twelve years rule under Article 141. Alienations by Hindu widows give rise to questions as delicate and as intricate as adoptions. Nevertheless a suit for possession by a reversioner is governed by Article 141 even though a reversioner has filed no declaratory suit in the lifetime of the widow under Article 125 corresponding to Illustration (*e*) to section 42 of the Specific Relief Act.

After the passing of the Limitation Act, 1877 the case of *Mohesh Narain* v. *Taruck Nath* (7), was decided by the Privy Council in 1892. The facts were simple. Shib Narain died in 1850. His widow made an invalid adoption in 1850 and died in 1884. The suit was brought in 1885 by a validly adopted son for possession of the estate. It was held following *Jagadamba's case* (6) that the suit was barred twelve years after 1851, *i.e.*, in 1863. Then as to the contention that the suit having been brought in 1885 limitation should be decided with reference to the Act of 1877, Lord Shand held that the right of suit barred under the Act of 1871 was not revived by the Act of 1877; and that even if the latter Act were applicable it was more than doubtful whether the plaintiff would derive any advantage.

The same points arose again in the case of *Thakur Tribhuwan Bahadur Singh* v. *Raja Rameshwar Bakhsh Singh* (8), decided by the Privy Council in 1906. The Taluka which was the subject-matter of the suit had become the property of a lady, the Thakurain Daryao Kunwar who made the apparent adoption of the defendant in 1858 and died

(7) 20 C. 487; 20 I. A. 30; 6 Sar. P. C. J. 261; 17 Ind. Jur. 164; 10 Ind. Dec. (N. S.) 330 (P. C.).

(8) 33 I. A. 156; 8 Bom. L. R. 722; 10 C. W. N 1065; 16 M. L. J. 440; 3 A. L. J. 695; 4 C. L. J. 405 1 M. L. T. 265; 9 O. C. 377; 28 A. 727 (P. C.).

in 1893. The heir was the lady's brother's grandson and he filed a suit in 1899. Lord Macnaghten said (page 163) :—

"Mr. Cohen, who argued the case with great ability, relied entirely on the Act of 1871. He contended that the Limitation Act of 1877 did not apply because the appellant relied on title acquired before the passing of the Act of 1877, and his rights were, therefore, saved by section 2 of that Act. He admitted that if the Act of 1877 applied, his client was out of Court.

"Their Lordships are unable to accede to Mr. Cohen's argument. Giving full effect to the *Jagadamba's case* (6) and the other cases which followed it, they do not think that the immunity, such as it is, gained by the lapse of twelve years after the date of an apparent adoption amounts to acquisition of title within the meaning of section 2 of the Act of 1877."

The *obiter dictum* in *Mohesh Narain's case* (7) that the Act of 1877 did not alter the period of limitation was treated as an *obiter dictum* and ignored.

Then as to section 2 of the Limitation Act of 1877, that section is as follows :—

"All references to the Indian Limitation Act, 1877, shall be read as if made to this Act; and nothing herein or in that Act contained shall be deemed to affect any title acquired, or to revive any right to sue barred, under that Act or under any enactment thereby repealed."

It refers (1) to plaintiffs' right of suit, and (2) to title acquired by the defendant.

Lord Shand had said that as plaintiff had not filed a suit, which must have been a suit for declaration, his suit for possession was barred under the Act of 1871 and not revived by the Act of 1877.

Lord Macnaghten did not refer to the plaintiff's right of suit but said that defendant could not acquire title by omission to file a suit for a declaratory decree. But the necessary implication is that the right to sue for a declaration is distinct from the right to sue for possession, and this is directly contradictory to the *ratio decidendi* of Lord Shand in *Mohesh Narain's case* (7).

I think the only conclusion from this judgment is that the Privy Council do not mean to follow *Jagadamba's case* (6) and that they do not regard suits for possession as suits for declaration where an adoption is disputed as subject to the same period of limitation. Indeed their Lordships seem to have made an express declaration to that effect in the case of *Muhammad Umar Khan* v. *Muhammad Niaz ud din Khan* (9), in the following passage :—

"Although their Lordships consider that the question of an adoption was an immaterial issue, they think it is advisable to say that the omission to bring within the period prescribed by Article 118 of the Second Schedule of the Indian Limitation Act, 1877, a suit to obtain a declaration that an alleged adoption was invalid, or never, in fact, took place, is no bar to a suit like this for possession of property."

Now *Shrinivas* v. *Hanmant* (5) was based largely on *Jagadamba's case* (6), the *obiter dictum* of Lord Shand in *Mohesh Narain's case* (7) and the other *obiter dictum* of the same Judge in *Lachman Lal* v. *Kanhaya Lal* (10).

I think *Shrinivas* v. *Hanmant* (5) has been overruled by *Thakur Tirbhuwan Bahadur Singh's case* (8).

But the Division Bench of this Court ruled in *Shrinivas Sarjerao* v. *Balvant Venkatesh* (11) that *Shrinivas* v. *Hanmant* (5) was not overruled.

In *Shrinivas Sarjerao* v. *Balvant Venkatesh* (11) Chandavarkar, J. distinguishes *Thakur Tirbhuwan Bahadur Singh's case* (8) on two grounds.

(1) The plaintiff was a minor until 1896 and brought his suit within three years of attaining majority and no knowledge could be imputed to him during his minority.

(2) The Thakurain was owner in her own right and there was no title in the adopted son till her death in 1893.

With all respect I venture to think that the first reason overlooks the fact that plaintiff claimed through his father and grandfather and must, therefore, be affected with their knowledge. And the second reason practically admits that the Act of 1877 has

(9) 13 Ind. Cas. 344; 39 I. A. 19 at p. 25; 14 Bom. L. R. 183 at p. 187; 6 P. W. R. 1912; (1912) M. W. N. 77; 11 M. L. T. 76; 9 A. L. J. 137; 15 C. L. J. 172; 12 P. L. R. 1912; 22 M. L. J. 240; 16 C. W. N. 458; 39 C. 418; 126 P. R. 1912 (P. C.).

(10) 22 I. A. 51; 22 C. 609; 6 Sar. P. C. J. 559; 11 Ind. Dec. (N. S.) 405 (P. C.).

(11) 20 Ind. Cas. 162; 37 B. 513; 15 Bom. L. R. 533.

superseded *Jagadamba's case* (6). It made no difference that the Thakurain was full owner, for the next heir could still have sued for a declaration. If the Act of 1871 had been law in 1896 plaintiff could not have sued in that year to dispute an adoption of 1858. But he succeeds under the Act of 1877 because the suit he could have filed in the lifetime of the widow could only have been declaratory and the defendant had acquired no title by lapse of time. Granted—but what about plaintiff's right to sue? His right to challenge the adoption was barred already according to *Jagadamba's case* (6) and not revived according to *Mohesh Narain's case* (7)? The Privy Council do not deal with this because they consider that Article 129 of the Act of 1871 is limited to declaratory suits only.

It is true that in *Malkarjun* v. *Narhari* (12) decided by the Privy Council in 1900, *Jagadamba's case* (6) was quoted with approval with reference to the applicability of Article 12 (*a*), to suits for possession. This Article uses the same phrase "setting aside" with reference to sales that Article 129 of the Limitation Act, 1871, did with reference to adoptions. This identity of expression made a reference to *Jagadamda's case* (6) inevitable. But there is a distinction, for, in the first place, Courts are reluctant to disturb judicial sales and, in the second place, a sale without jurisdiction is null and void and does not affect limitation—*Khiaramal* v. *Daim* (13) while the same principle cannot be applied to an adoption.

I venture respectfully to express dissent from Chandavarkar, J. that an *obiter dictum* of the Privy Council is binding on this Court [*Shrinivas Sarjerao* v. *Balvant Venkatesh* (11) *supra* at page 531*]. An *obiter dictum* is but an *obiter dictum* and has no authority however exalted the tribunal that utters it. There are *obiter dicta* on the one side in *Mohesh Narain's case* (7) and in *Lachman Lal's case* (10) and in *Malkarjun* v. *Narhari* (12) and on the other side in *Muhammad Umar Khan's case* (9). But *Thakur Tirbhuwan Bahadur Singh's case* (8) involves a decision that the right to sue for a declaration that an adoption is invalid is a different right from the right to sue for possession of property affected by the adoption.

I would, therefore, refer to a Full Bench the question whether in view of the Privy Council decision in *Thakur Tirbhuwan Bahadur Singh's case* (8), the decision in *Shrinivas* v. *Hanmant* (5) is still good law and whether suits for possession where the plaintiff cannot succeed except by displacing an alleged adoption are governed by Article 118 of the Indian Limitation Act.

FAWCETT, J.—I agree with the proposed Reference to Full Bench. I think there are good grounds for such a reference, even though in *Bharma* v. *Balaram Sakharam* (14) a Division Bench took the same view as that taken in *Shrinivas Sarjerao* v. *Balvant Venkatesh* (11).

I was at first inclined to think that a distinction might be made between Malappa's right to sue to obtain a declaration that the alleged adoption was invalid and the right of the plaintiff, his widow. If Malappa sued, he did so because the setting up of the adoption was an infringement of Mallapa's rights, as a sole owner: see *Chinnosami Mudaliar* v. *Ambalavana Mudaliar* (15). The plaintiff as his wife with contingent rights in property had, so to speak, an independent right to sue to set aside the adoption even during Mallappa's lifetime. This is on the principle that any person having a right in property, whether present or contingent, is entitled to come to a Court of equity to complain of any attempt which may be made by a person having no authority to do so, to deal with the property in a mode which may ultimately harm him in the matter of his title: see *Beharee Lall* v *Monho Lall* (16). This is recognized in Illustrations (*d*) to (*f*) of section 42 of Specific Relief Act. Even before the Act was passed Westropp, C.J laid down that the Legislature had recognised the right of a person to bring a suit to set aside an adoption as a substantive proceeding independent of any claim to property: see *Kalova* v. *Padapa* (17). But in so far as the plaintiff derives

(12) 27 I. A. 216; 2 Bom. L. R. 927; 5 C. W. N. 10; 25 B. 337; 10 M. L. J. 368; 7 Sar P. C. J. 739 (P. C.).

(13) 32 C. 296 at p. 315; 9 C W. N. 20 ; 2 A. L. J. 71; 7 Bom L. R. ; 1 C. L. J. 584; 32 I. A. 23; 8 Sar. P C. J. 734 (P. C. .

* Page 37 B.—[*Ed.*]

(14) 47 Ind. Cas. 639; 43 B. 63; 20 Bom. L. R. 836.

(15) 29 M. 48 at p. 49.

(16) 21 W. R. 30

(17) 1 B. 248; 1 Ind. Dec. (N. S.) 165.

her right to sue from the fact of her having married Malappa, it is difficult to say that the plaintiff in this case did not derive her right to sue from Mallappa within the meaning of clause (b) of section 2 of the Indian Limitation Act. This view is strengthened by the decision in *Bhagwanta* v. *Sukhi* (18) that, where there are several reversioners entitled successively under Hindu Law to an estate held by a Hindu widow, no one of them derives his right to sue from the other, even though that other happens to be his father, but he derives his title from the last full owner. No doubt the definition in section 2 only applies "unless there is anything repugnant in the subject or the context." But I do not think there is anything in Article 118 which brings the case under this exception. Accordingly it seems to me that the appellants are right in their contention that the plaintiff is affected by the knowledge of Malappa, and a case like this shows the absurdity that can arise from the view taken in *Shrinivas* v. *Hanmant* (5).

Mr. *Coyajee* (with him Mr. *Nilkanth Atmaram*), for the Appellants.

Mr. *G. N Thakor* for Mr. *H. B. Gumaste* and Mr. *J. G. Rele*, for the Respondent.

JUDGMENT OF THE FULL BENCH.

MACLEOD, C. J. - One Mallappa Tammappa died in 1916 leaving three widows and no children. The plaintiff, one of the widows, sued her co-widows for partition. They were made defendants Nos. 2 and 3. The first defendant was the son of defendant No. 3 by her first husband. The defendants' answer was that Mallappa had adopted the first defendant in 1905 before he married defendant No. 3. The widows, therefore, were not the heirs of Mallapppa. Defendant No. 1 had died after suit leaving a widow. The suit being brought more than six years after the adoption was barred by limitation. The issues in the Trial Court were:

(1) Is it proved that the deceased first defendant was adopted by Mallappa?

(2) Is it proved that this adoption was before the re-marriage of defendant No. 3 to Mallappa?

(3) If not, is the adoption valid?

(4) Is the suit in time under Article 118 of the Limitation Act?

The Trial Judge decided—

(1) that though Mallappa executed an adoption-deed, no adoption took place;

(2) that defendant No. 3 was married to Mallappa in 190 3;

(3) that the adoption, if it had taken place in 190 , was invalid;

(4) that, as no adoption was proved and the passing of the adoption deed was kept secret, the plaintiff had no knowledge of any claim by the adopted son more than six years before suit.

Accordingly a decree for partition was passed.

In first appeal the learned Judge agreed with the Trial Judge that no adoption had taken place. He thought that the issue of limitation was unnecessary, and, if it was, he was prepared to agree with the Trial Judge. A second appeal was dismissed under Order XLI, rule 11, but an appeal under the Letters Patent having been admitted, it came on for argument before Pratt and Fawcett, JJ.

Those learned Judges were of opinion that as under section 2 of the Indian Limitation Act the word 'plaintiff' included any person from or through whom a plaintiff derived his right to sue, and the plaintiff claimed as heir of her husband, she was affected with the knowledge of the alleged adoption.

It would follow that if Article 118 of the Indian Limitation Act applied, the suit was barred, because Mallappa had executed an adoption-deed which he never intended to be acted upon and of which plaintiff had no knowledge.

That such a conclusion would be possible would follow from the Full Bench decision of this Court in *Shrinivas* v. *Hanmant* (5) and the learned Judges were of opinion that so startling a result necessarily raised in their minds the doubt whether that decision was correct.

It would be all the more startling considering the peculiar facts of this case, for it has been found that Mallappa pacified the demands of defendant No. 3 that provision should be made for her son by her first husband by secretly executing a deed purporting to evidence an adoption, which had never taken place, and which he must have known would be invalid if it had been made.

(18) 22 A. 33; A. W. N. (1899) 159; 9 Ind. Dec. (N. S.) 1054.

DODDAWA PURSHYA v. YELLAWA MALLAPPA BENI.

The decision in *Shrinivas* v. *Hanmant* (5) was to this effect, that where a plaintiff in a suit for possession of property is met by the claim of a defendant setting up a title as an adopted son, the plaintiff's suit is barred unless it is brought within six years of the date when the alleged adoption became known to the plaintiff.

The question referred to us is whether in view of the decision of the Privy Council in *Thakur Tirbhuwan Bahadur Singh* v. *Raja Rameshar Bakhsh Singh* (8) the decision in *Shrinivas* v. *Hanmant* (5) is still good law, and whether suits for possession where the plaintiff cannot succeed except by displacing an alleged adoption are governed by Article 118 of the Indian Limitation Act.

It is necessary, therefore, to consider the facts of *Thakur Tirbhuwan Bahadur Singh's case* (8) since *Shrinivas* v. *Hanmant* (5) was not mentioned in the judgment, and it can only be said to have been overruled, if at all, by implication. Thakur Basant Singh was the last male owner of the Taluqa of Samarpaha. He died in November 1857 leaving his widow as his next heir. Thereafter a Sanad was granted to the widow and she became Taluqdar in her own right. She died intestate in 1893. The estate was claimed by Thakur Sher Bahadur as her son adopted after her husband's death. The plaintiff who attained majority in 1896 filed the suit in 1899 claiming to succeed as the grandson of the widow's eldest brother. Both the lower Courts held in favour of the plaintiff. On appeal to the Privy Council it was argued that in any event there was an apparent adoption sufficient to satisfy the provisions of the Limitation Act of 1871 as interpreted by the Privy Council in *Jagadamba Chaodhrani* v. *Dakhina Mohun* (6). It was admitted that if the Act of 1877 applied, the appellant-defendant had no case but it was argued that as the appellant relied on title acquired before the Act of 1877 was passed, his rights were saved by section 2 of the Act of 1877.

That section is as follows:—

"All references to the Indian Limitation Act, 1871, shall be read as if made to this Act; and nothing herein or in that Act contained shall be deemed to affect any title acquired, or to revive any right to sue barred, under that Act or under any enactment thereby repealed."

Their Lordships said at page 163* :—

"Their Lordships are unable to accede to Mr. Cohen's argument. Giving full effect to the *Jagadamba's case* (6) and the other cases which followed it, they do not think that the immunity, such as it is, gained by the lapse of twelve years after the date of an apparent adoption amounts to acquisition of title within the meaning of section 2 of the Act of 1877."

To appreciate the full meaning of the decisive passage of the judgment it will be necessary to follow the history of the case in the lower Courts and the arguments of Counsel before the Privy Council.

In the Trial Court it was argued that the suit was barred by Article 118, Schedule II, of the Limitation Act of 1877 as the adoption of the defendant became known to the plaintiff and his ancestors more than six years before the institution of the suit. After referring to *Jagadamba's case* (6) and *Mohesh Narain* v. *Taruck Nath* (7) the learned Judge said (page 158*): "The above decisions were given with reference to Article 129 of the old Act of 1871...It is contended on behalf of the defendant that the principle enunciated in the above rulings is applicable to cases governed by the existing law." Then after referring to *Parvathi Ammal* v. *Saminatha Gurukal* (19) and *Shrinivas* v. *Hanmant* (5) which adopted that view, and the numerous decisions to the contrary, he continued (page 159*): "There seems to be a consensus of opinion in most of the High Courts that Article 118 of the present Act does not apply to suits for possession and I do not think we are justified in departing from it without the distinct authority of the Privy Council." The Court of the Judicial Commissioner of Oudh concurred in this view. Before the Privy Council Mr. Cohen argued for the appellant that Act IX of 1871 applied, and, as no suit had been filed within the time fixed by Article 129 of the Schedule to that Act, the validity of the adoption could not be questioned in the plaintiff's suit. The principle laid down in *Jagadamba's case* (6) that when a suit to set aside an adoption was barred,

(19) 20 M. 40; 6 M. L. J. 272; 7 Ind. Dec. (N. S.) 29.

* Pages of 33 I. A.—[*Ed.*]

so also was any suit which in order to succeed must first get rid of the adoption applied equally to Article 118 of the Schedule II to the Act of 1877. Mr. De Gruyther for the respondent argued that the suit was governed by Article 143 of Schedule II of Act XV of 1877. Article 118 differed in its terms from Article 129 of the earlier Act and did not apply to a suit for possession. There had been no acquisition of title by the appellant in virtue of an apparent adoption within the meaning of section 2 of the Act of 1877. Nor could it be laid down under Act XV of 1877 that a plaintiff must sue for a declaratory decree before suing for possession, and that his suit for possession was barred if a declaratory action was barred.

It will be seen, therefore, that the appellant, though he mainly relied on the contention that he had acquired a title under the Act of 1871, and that title was preserved by section 2 of the Act of 1877, also contended that the principle laid down in cases under Article 129 of the Act of 1871 applied to cases under Article 118 of the Act of 1877 and that the suit was barred on that ground, *Shrinivas* v. *Hanmant* (5) being relied upon in Mr. Cohen's reply. No doubt the suggestion that the immunity gained by the appellant by the lapse of six years, without a declaratory suit being filed, amounted to acquisition of title was too fanciful to demand any attention. It would seem, therefore, obvious to me that their Lordships having before them all the arguments which have been raised before us in this reference on behalf of the appellant deliberately adopted the contrary view as contended for by the respondents.

And as if that had not been made sufficiently clear in the judgment, their Lordships in *Muhammad Umar Khan* v. *Muhammad Niaz ud din Khan* (9) referred to *Thakur Tirbhuwan Bahadur Singh's case* (8) as laying down that the omission to bring within the period prescribed by Article 118 of the Second Schedule of the Indian Limitation Act of 1877 a suit to obtain a declaration that an alleged adoption was invalid or never in fact took place was no bar to a suit for possession of property. A Division Bench of this Court in *Shrinivas Sarjerao* v. *Balwant Venkatesh* (11) came to the conclusion that the decision in *Shrinivas* v. *Hanmant* (5) had not been overruled by the Privy Council. The referring judgment of Pratt, J., analyses the reason given for that conclusion and points out the fallacies which underlie them. As a matter of fact when the Court was of opinion that the adoption of the defendant was valid the question of limitation became academical. I shall not discuss in detail the reasons given by the learned Judges, for I agree with what has been said by Pratt, J. I have already pointed out that their Lordships of the Privy Council, having all the arguments before them which have been from time to time raised in this Court, came to a conclusion absolutely inconsistent with those reasons, and I see no object in referring to various passages in the judgments in other cases as showing that their Lordships could not have meant what they said in *Thakur Tirbhuwan Bahadur Singh's case* (8). What their Lordships did mean is clearly enunciated in *Muhammad Umar Khan's case* (9). Whatever the nature of the adoption in that case and whatever its effect might be on the status of the person adopted, it was an adoption within the meaning of the word in Article 118 of Act XV of 1877, and if it was set up as a defence to a suit for possession, the omission to bring a declaratory suit within six years was no bar to the suit for possession. I think the question can also be considered from another point of view. The Limitation Act is an Act for the limitation of suits, prescribing the period within which suits asking for various reliefs can be brought. In a suit for possession on title, the only answer by the defendants which can be successful is a better title than that proved by the plaintiff, and such a title may be obtained by adverse possession. An adoption may be the origin of such a title being acquired, but the defendant may succeed in his title by adverse possession and not by virtue of his adoption. But if his title depends on adoption apart from the question of adverse possession, he may succeed by proving his adoption and the question of the limitation of plaintiff's suit does not arise, provided it is brought within the period prescribed for the particular suit he has brought. For the plaintiff is in the position of a defendant when he is resisting

a claim by adoption and there is no bar of limitation to a defence The mere fact that an adoption allegd to have taken place is not challenged does not set time running in favour of the adopted son, so that he may acquire a title unless he is in possession. Then if he is sued he can either say 'I have been in possession for twelve years' or 'I am an adopted son and I have a better title than the plaintiff.' It is then open to the plaintiff to say 'your adoption as a matter of fact never took place or, if it did, it is invalid.'

Lastly, I may refer to the following decisions of the High Courts of Calcutta, Madras and Allahabad, *Ram Chandra Mu er ee* v. *Ranjit Singh* (20), *Natthu Singh* v. *Gul b Singh* (21), *Velaga Mangamma* v. *Bandlamudi Veerayya* (22), which are opposed to the view taken by this Court in *Shrinivas* v. *Hanmant* (5). The judgment in *Velaga Mangamma* v. *Bandlamudi Veerayya* (22) shows that the learned Judges were clearly of opinion that the Privy Council in *Thakur Tirbhuwan Bahadur Singh's case* (8) overruled the view that a suit for possession where the validity of an adoption has to be determined is governed by Article 118 of the Act of 1877.

I would, therefore, answer both parts of the question referred to us in the negative.

SHAH, J.—The question referred to the Full Bench is whether in view of the Privy Council decision in *Thakur Tirbhuwan Bahadur Singh's case* (8) the decision in *Shrinivas* v *Hanmant* (5) is still good law and whether suits for possession where the plaintiff cannot succeed except by displacing an alleged adoption are governed by Article 118 of the Limitation Act.

My answer is that *Shrinivas* v. *Hanmant* (5) is not overruled by *Thakur Tirbhuwan Bahadur Singh's case* (8) that it is still good law in this Presidency, and that Article 118 would apply to suits for possession where there is a title by adoption to be displaced to the extent indicated in *Shrinivas* v. *Hanmant* (5).

We are not concerned in this reference with the questions whether on the finding of the lower Appellate Court the rule in *Shrinivas* v. *Hanmant* (5) is applicable to the present case and whether on those facts the suit would be barred under Article 118. I express no opinion thereon as they are points for the Division Bench to decide.

I desire to state briefly my reasons for the answer to the question referred to us.

In the first place in *Thakur Tirbhuwan Bahadur Singh* v. *Raja Ramesh r Bakhsh Singh* (8) their Lordships do not in terms purport to overrule *Jagadamba Chaudhrani* v. *Dakhina Mohan Roy* (6), and the other cases which followed it, among which the case of *Shrinivas* v. *Hanmant* (5) must be included. That case was decided on the ground taken by the Counsel for the appellant whether the alleged adoption was or was not an apparent adoption to which the ruling in *Jagadamba's case* (6) would apply if the Act of 1871 were then in force. Their Lordships hold in that case that giving full effect to *Jagadamba's case* (6) and the other cases which followed it they do not think that the immunity, such as it is, gained by the lapse of twelve years after the date of an apparent adoption, amounts to acquisition of title within the meaning of section 2 of the Act of 1877. That is the point which they decided and I am slow to accept the view that if their Lordships meant to overrule *Shrinivas* v. *Hanmant* (5), they would have left it to implication as to which there is so much doubt and difficulty. In other words unless the implication is clear, I think that it would not be right to treat the decision in *Shrinivas* v. *Hanmant* (5) as overruled.

I do not think that the implication is by any means clear. The suggested implication is based upon the consideration that it was conceded in the argument by the Counsel for the appellant in that case that the Act of 1877 did not apply, and admitted that he was out of Court if the Act of 1877 applied. The difficulty of inferring from this circumstance that their Lordships meant to overrule *Shrinivas* v. *Hanmant* (5) is clear from the judgment in *Shrinivas Sarjerao* v. *Balvant Venkatesh* (11), followed in *Bharma* v. *Balaram Sakharam* (14). I do not for the moment say anything as to the correctness of the view accepted in these two decisions as regards the effect of the decision of the Privy Council in *Thakur Tirbhuwan Bahadur Singh's case* (8)

(20) 27 C. 242; 4 C. W. N. 405; 14 Ind. Dec. (N. S.) 160.
(21) 17 A. 167; A. W. N. (1895) 36; 8 Ind. Dec. (N. S.) 443.
(22) 30 M. 303; 2 M. L. T. 178; 17 M. L. J. 182.

But the implication, such as it is, is by no means so clear as to give rise to no doubt or difficulty. Where that is the case I do not think that it is right to treat a Full Bench decision or any decision as overruled by implication.

Secondly, on the merits I feel by no means clear that their Lordships meant to overrule *Shrinivas* v. *Hanmant* (5). The adoption in that case was not the ordinary adoption which, according to the Hindu Law, gives title but it was really a nomination of an heir and an adoption only in the popular sense. It is possible that that circumstance may have influenced the Counsel for the appellant in taking up the position with reference to the Act of 1877 that he did. Then the facts in that case were so special that I think it is entirely unsafe to hold that because it was admitted in that case that if the Act of 1877 applied, the defendant was out of Court, their Lordships meant to overrule *Shrinivas* v. *Hanmant* (5). It is possible to attribute that admission to other grounds and after giving the point my best attention, I am unable to hold that in view of *Thakur Tirbhuwan Bahadur Singh's case* (8), *Shrinivas* v. *Hanmant* (5) should be treated as overruled.

I do not think that the observations in *Muhammad Umar Khan* v. *Muhammad Niaz-ud-din Khan* (9), which have been relied upon, have any such effect. Those observations were made in a case in which the parties were Muhammadans and their Lordships distinctly point out that under the general Muhammadan Law an adoption cannot be made; an adoption if made in fact by a Muhammadan could carry with it no right of inheritance The preceding observations relating to Article 118 are applicable to a suit for possession like the one which their Lordships had to deal with in that case in which an alleged adoption carried with it no right of inheritance; at least the observations are capable of being read in that sense, and were read in that sense in *Shrinivas Sarjerao* v. *Balvant Venkatesh* (11). It is significant that in *Thakur Tirbhuwan Bahadur Singh's case* (8) their Lordships had to deal with an adoption in the popular sense and not one which would carry with it any title to property, and the reference to that case in *Muhammad Umar Khan's case* (9) when looked at in the light of the context is capable of being read in that sense.

Thus, on the whole, it is clear to my mind that *Shrinivas* v. *Hanmant* (5) cannot be treated as overruled and must be accepted as good law.

As regards the second part of the question I admit that it is desirable that there should be uniformity in the decisions on a point of this character as far as possible in different High Courts and it is clear that the other High Courts have not accepted the view taken in *Shrinivas* v. *Hanmant* (5). That, however, is a general consideration of importance but necessarily of limited application. I do not think that it would be right to disturb a rule of limitation affecting titles to property, deliberately laid down so far back as 1899, and consistently followed during all these years in this Presidency on such a general ground. It seems to me that the main purpose of this reference is to settle the question as to whether *Shrinivas* v. *Hanmant* (5) is overruled by the decision in *Thakur Tirbhuwan Bahadur Singh's case* (8) and not to invite a re-consideration of the decision of the Full Bench in that case. It seems to me that the final word on this point must come either from the Legislature or from the Privy Council. We are informed that the question as to the correctness of *Shrinivas* v. *Hanmant* (5) arises in an appeal from this Court to the Privy Council, which has been admitted, and in which the point is likely to be decided. The present state of the decisions is embarrassing to those whose rights are affected by the application of the rule in *Shrinivas* v. *Hanmant* (5).

I do not consider it necessary to re examine the whole subject with a view to consider whether *Shrinivas* v. *Hanmant* (5) has been rightly decided. Under the circumstances I think that the rule in that case should be applied so far as it may be applicable to the facts of any particular case.

FAWCETT, J.—I agree with the learned Chief Justice that both parts of the question referred to the Full Bench should be answered in the negative. I concur generally in his reasons and will abstain from adding to the great quantity of literature on the point, in which the arguments *pro* and *con* are fully stated. In brief, I believe that the Privy Council *did* intend in *Thakur Tirbhuwan Bahadur Singh's case* (8) to decide the point

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that had been fully argued before them, whether the principle of *Jagadamba's case* (6) was applicable to cases governed by the Limitation Act of 1877, Article 118. I think, therefore, that we should fall into line with all the other High Courts in India, and cease to give effect to the view taken in *Shrinivas* v. *Hanmant* (5).

W. C. A. & N. H.

Answers accordingly.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2979 OF 1916.

January 2, 1921.

Present:—Mr. Justice Chevis and Mr. Justice Abdul Raoof.

Musammat PARMESHRI DEVI—DEFENDANT—APPELLANT

versus

AUTAR SINGH—PLAINTIFF—RESPONDENT.

Sale, completion of—Unregistered sale-deed, whether an agreement to sell—Specific performance—Evidence Act (I of 1872), s. 91.

A sale is completed by the execution of the deed of sale. [p. 145, col. 2.]

The mere non-registration of a sale-deed does not make it anything less than a sale-deed. [p. 145, col. 2.]

A contract of sale, even if unregistered, is not an agreement to sell and cannot form the basis of a suit for specific performance. [p. 146, col. 1.]

An unregistered document, which amounts to a sale-deed, must be excluded from evidence for want of registration, and also by reason of section 91, Evidence Act, no other evidence of the sale can be admitted. [p. 145, col. 1; p. 146, col. 1.]

Second appeal from a decree of the District Judge, Rawalpindi, dated the 15th May 1916, confirming that of the Senior Subordinate Judge, Rawalpindi, dated the 31st March 1915.

Mr. *M. S. Bhagat*, for the Appellant.

Sardar *Sewa Ram Singh*, for the Respondent.

JUDGMENT.—The plaintiff and the defendant in this case are brothers. The plaintiff sues for specific performance of an agreement to sell a house for Rs. 1,100. The plaint begins by reciting that the house was sold by defendant to plaintiff for Rs. 1,100 on the 30th of August 1914, that it was agreed that half of the sale price should be paid in advance and the remaining half within a year, that Rs. 100 were paid by plaintiff and were placed in deposit with Ganesha Singh and as the remaining Rs. 450 payable in advance was to be paid on the following day, a *ruqa* was obtained from the defendant and also entrusted to Ganesha Singh, and it was also agreed that a formal deed of sale would be executed and registered. The plaint goes on to say that as the defendant refused to take the remaining money and to execute a regular sale-deed, the plaintiff prays for specific performance of the contract and for possession of the house. The defendant denies having agreed to sell the house and pleads that the execution of the *ruqa* was obtained when he was in a state of intoxication. The lower Courts have held that the defendant executed the *ruqa* and that though unregistered it is admissible in evidence. Accordingly they have decreed the claim relying on the *ruqa* and on the oral evidence which has been produced in the case. The *ruqa* in question runs as follows:

Bais tahrir anke jo ke ek manzil makan meh ek kothri bairuni wa ek kothri andruni wa sahan jo mushtarka haveli Baba Awtar Singh baradar haqiqi ka hai woh makan bamqabla mublig gayara so rupiya se baiqrar i zabani badast Baba Awtar Singh baradar haqiqi khud bai kar diya hai. Zar-i-saman naqd imroza panch so pachas wasul kar liya hai aur panch so pachas rupiya bahi khata men raqam tahrir kar liye hain. Goya ainda kisi kisim ka dawa dakhil makan mazkur ke sath mera nahin rahi hai. (For translation see judgment of the First Court).

On behalf of the defendant-appellant it is urged that this document cannot be admitted in evidence for want of registration. In our opinion this plea is perfectly correct. Even if it does not fall under section 17 (1) (*b*) of the Registration Act, it certainly falls under section 17 (1) (*c*) being a non-testamentary instrument acknowledging the receipt of consideration on account of extinction of a title of the value of Rs. 100 and upwards in immoveable property. The *ruqa* clearly acknowledges receipt of Rs. 550

in cash and winds up by saying "I have no claim left in the house." Therefore, whether the Rs. 560 were paid or not, the document clearly falls under section 17 (1) (c). But it is necessary for us to go further and to consider whether the *ruqa* in itself amounts to a deed of sale. If it does, then it is a case of the terms of a contract having been reduced to the form of a document, and not only the *ruqa* itself must be excluded from evidence for want of registration, but also by reason of section 91 of the Evidence Act no other evidence of the sale can be admitted. Now, the *ruqa* begins by stating that the writer has orally sold the house to his brother for Rs. 1,100. The oral evidence is, no doubt, to the effect that the sale was first agreed on verbally, that the *ruqa* was then written and that the agreement between the parties was that a formal sale-deed would be subsequently executed and registered. The *ruqa* was written on a Sunday, so it was impossible to register a regular sale deed on that day. The *ruqa* was only obtained from the defendant in order to prevent him from backing out of his bargain. The terms of a sale are almost invariably arrived at in the course of verbal negotiations. In some cases nothing is written at all and the sale remains simply a verbal one; in other cases, however, a sale deed is written, which may or may not require registration according to the value of the immoveable property dealt with. If the immoveable property exceeds Rs. 100 in value and the deed is not registered, then in the event of the factum of the sale being denied by the vendor the vendee is debarred from proving the sale either by the deed or by any other evidence. In some cases, however, when the terms have been fixed, the owner executes an agreement promising to sell and in that case the would-be purchaser is in a good position to sue for specific performance. Such a document merely promising to sell does not require registration. Now, the present document is certainly not a promise to sell; it does not in terms make any promise to sell and it does not, as such documents frequently do, make any reference to a sale deed to be executed at some future date. It simply recites the fact that the sale has already been made and that Rs. 550 cash have already been received and that an entry has been made in a *bahi* regarding the remaining Rs. 550. Such a document following immediately after the terms of the sale have been verbally agreed upon, in our opinion, constitutes a sale deed, and had plaintiff sued on that document for possession as vendee, we do not see any obstacle to his getting a decree except the want of registration. Now, if the document in question be a sale-deed, the mere want of registration will not make it anything less than a sale-deed. As has already been stated the oral evidence tendered goes to show that the object of getting the *ruqa* executed was to prevent the defendant from backing out of his agreement in case he afterwards refused to execute and register a formal deed of sale. So the plaintiff got the defendant to execute a document which was, in our opinion, the terms of a contract reduced to writing. No doubt the plaintiff did not realise that in the event of the defendant refusing to register a regular sale-deed the plaintiff would be placed in a difficult position being unable to produce in evidence an unregistered document and being debarred by section 91 of the Evidence Act from producing oral evidence in proof of the sale. But the fact remains that the document was written and, in our opinion it is nothing less than a sale deed. On behalf of the plaintiff-respondent it is urged that there is no completed sale because the document was entrusted to a third person and was not handed over to the plaintiff, but it is the execution of the deed which completes the sale, and Counsel has been unable to quote any authority to the effect that title does not change until the sale deed has been not only executed but actually handed over to the vendee. It is also urged that the *ruqa* is a mere memorandum. Looking, however, to the terms of the deed we cannot regard it as a mere memorandum. The terms are clear and say expressly that the house has been sold and that the vendor's title has ceased. The *ruqa* is not only executed by the defendant but is also witnessed by no less than seven persons. It is further urged that the *ruqa* cannot be regarded as a sale deed because it does not contain all the terms of the sale and does not give the boundaries or other particulars of the property sold. Now, when a house is sold it may

perhaps be necessary in case of doubt to admit oral evidence in order to show which particular house has been sold, but in this case neither side has alleged that there was any doubt as to which house was the subject of the *ruqa*, and we cannot see that the mere omission to give the boundaries or any other particulars as to the house in question makes the document other than a deed of sale. As to the terms of the sale no doubt the *ruqa* states incorrectly that Rs. 550 have already been paid in cash; but an incorrect statement on this point does not alter the nature of the document. The only other term which appears to be wanting in the *ruqa* is that it is not stated within what period the remainder of the money is to be paid. This, however, is a matter merely affecting the payment of the consideration, but in the case of a sale there is no ground for saying that title does not pass until the full consideration is paid.

We hold, then, as regards the contract between the parties that it was not merely an agreement to sell but an actual contract of sale and that the plaintiff cannot, therefore, sue for specific performance of an agreement to sell. Further the plaintiff cannot be allowed to turn round and plead that he should be allowed to take possession as vendee under a completed sale, because the sale is denied and the plaintiff is debarred from proving it, the deed itself being inadmissible for want of registration and other evidence being barred by the provisions of section 91 of the Evidence Act. We, therefore, accept the appeal and reversing the decision of the lower Courts we dismiss the suit, but as it appears to us that the defendant has behaved very badly we leave the parties to bear their own costs in all Courts.

N. H. & W. C. A.

Appeal accepted.

MADRAS HIGH COURT.

CIVIL APPEAL No. 284 OF 1920.

November 16, 1921.

Present :—Mr. Justice Spencer and Mr. Justice Kumaraswami Sastri.

GATTINENI PEDA GOPAYYA AND OTHERS—APPELLANTS

versus

DEPUTY COLLECTOR OF TENALI—RESPONDENT.

Land Acquisition Act (I of 1894), ss. 18, 25, 24 (1)—Hindu widow—Claim for compensation at certain rate—Reversioners, whether can claim at higher rate—Land, valuation of—"Applicant," meaning of.

Although under section 25 of the Land Acquisition Act claimants and their legal representatives are estopped from getting more from the Judge than what they claimed before the Collector, the reversioners of a Hindu widow, not being the legal representatives of the widow, are not bound by her acts on any principle of estoppel and can claim compensation at a higher rate. [p. 147, col. 1.]

The purpose for which land has been acquired is an element for consideration in estimating its value, though under section 24 (1) the Court is precluded from considering the increase of its value likely to arise from the use to which it will be put. [p. 147, col. 1.]

The word "applicant" in section 25 is used to describe the person who puts in a written application under section 18 for having his objection to the Collector's award referred for determination by a Civil Court. He is not necessarily identical with the person who makes a claim after notice under section 9. [p. 147, col. 1.]

Appeal against the award of the District Court, Guntur, dated the 10th January 1920, in Original Petition No. 35 of 1918.

Mr. *V. Visvanatha Sastri*, for the Appellants.

Mr. *C. Madhavan Nair*, Government Pleader for Referring Officer, for the Respondent.

JUDGMENT.—The Acquiring Officer awarded compensation at the rate of Rs. 1,200 an acre. The widow Durgamma to whom the northern part of Survey No. 575 belonged at the time claimed at the rate of Rs. 1,400 an acre. After she had surrendered the estate to her husband's reversioners they claimed Rs. $2\frac{1}{2}$ a square yard, but the District Judge held that he was precluded by section 25 (1) of Act I of 1894 from awarding a higher amount than that claimed by the widow. In appeal the reversioners ask to be compensated at the rate of Rs. $2\frac{1}{2}$ a square yard.

Upon the question of law, we are of opinion that section 25 was designed with the purpose

of holding claimants to their own bargains and of preventing demands being increased at every stage from the Collector to the High Court. The word 'applicant' in this section is used to describe the person who puts in a written application under section 18 for having his objection to the Collector's award referred for determination by a Civil Court. He is not necessarily identical with the person who makes a claim after notice under section 9. All that section 18 requires is that he should be a person interested who has not accepted the award, and a "person interested" is defined in section 3 as including every person claiming an interest in compensation to be made on account of the acquisition. Under section 25 claimants are estopped from getting more from the Judge than what they claimed before the Collector, and on the same principle their legal representatives would, no doubt, be bound. But although a widow represents her deceased husband's estate for certain purposes and has limited powers of disposal over it, the reversioners are not her legal representatives nor are they bound by her acts on any principle of estoppel. The Judge, therefore, should not have considered his award as limited to the amount claimed before the Acquiring Officer.

On the question of fact which is what is the market rate which the plots acquired would fetch at a fair computation, we are of opinion that 8 annas a square yard which is the rate awarded by the District Judge is too low. This land though hitherto used for wet cultivation is surrounded on all sides by lands which have been built upon and it will be suitable for building sites as soon as the level has been raised. In fact the purpose for which it has been acquired is the extension of the village site and this is an element for consideration in estimating its value, though under section 24 (1) the Court is precluded from taking into consideration the increase of its value likely to arise from the use to which it will be put.

Now, from among the multitude of transactions of which the documents filed in this and the connected case afford evidence, if we exclude evidence of transactions that are not sufficiently recent to be a guide to prices prevailing at the present time, since there is ample proof that prices have arisen enormously in the last 30 years; if we exclude also evidence of sales of portions of the regular village site which adjoin other properties of the purchasers; if we exclude transfers of lands with houses, wells or crops standing on them when the value of the superstructures or crops is unknown or uncertain; also Inam lands, with roads or lanes on them, lands in bad localities such as those which adjoin cemeteries or *madigas'* quarters or are far distant from other habitations, and plots of small dimensions which are of little use for determining the value of big blocks, and then take an average of the prices at which lands in the neighbourhood of the land acquired have been selling within the last ten years, we find that the average price, judged from the evidence of documents that are not open to any serious objection, such as Exhibits EE, KK, BB, S, T, F and II works out approximately to one rupee a square yard.

From this has to be deducted the cost of raising the level by $1\frac{1}{2}$ yards. The second witness for Government estimated this cost at 7 or 8 annas a yard, but this appears to be rather high as the claimant's second witness puts it at 2 annas a yard and their first witness at 6 annas a yard or 2 annas for every half yard that is raised. In paragraph 16 of his judgment the District Judge states that it will cost from 4 to 6 annas a square yard to raise the level but in the schedule both he and the Acquiring Officer allow Rs. 3 a cent for raising the level by $\frac{3}{4}$ yard and this works out to 2 annas a square yard for raising the level by $1\frac{1}{2}$ yards. Adopting a mean rate of 4 annas a square yard for raising the level of the land acquired by $1\frac{1}{2}$ yards to make it fit for building purposes and subtracting this amount from the average value, we arrive at a valuation of 12 annas a square yard and the amount of the District Judge's award will be increased accordingly for all the lands concerned in this appeal with interest and proportionate costs.

M. C. P.
N. K. *Appeal allowed in part.*

DATA RAM v. BADLU.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 683 OF 1921.

January 6, 1922.

Present:—Mr. Justice Martineau.

DATA RAM—DEFENDANT—APPELLANT

versus

BADLU AND ANOTHER—PLAINTIFFS AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Members holding land in specified shares—Specific shares entered in Revenue Records—Separation.

Where one member of a Hindu family, in a suit to contest an alienation by another member of his share in the family property, admits in the plaint that the property was held by the members of the family in certain specific shares, such admission, coupled with an entry in the Revenue Records that the property was held in equal shares by the members of the family, is evidence of a separation having taken place between such members, and is inconsistent with the position that the property was held by the members of the family as co-parceners, for until partition takes place the shares of the several co-parceners in a joint Hindu family cannot be defined.

Second appeal from a decree of the District Judge, Delhi, dated the 10th January 1921, varying that of the Munsif, First Class, Delhi, dated the 31st May 1920.

Lala *Balwant Rai*, for the Appellant.

Lala *Rama Nand*, for the Plaintiffs-Respondents.

JUDGMENT.—The land in suit belonged to the plaintiffs and their brother Khiali. In 1908 Khiali mortgaged it, during the plaintiffs' minority, to the defendant Data Ram with possession for Rs. 350 and in the following year sold his one third share to him. The plaintiffs sue for possession, contesting the validity of the alienations.

The First Court passed a decree for possession subject to the payment of Rs. 40. On the defendant's appeal the District Judge held the mortgage to be valid to the extent of Rs. 235, but also held that the plaintiffs followed Hindu Law, that the family was joint, and that Khiali was not competent to effect the sale, which was not for family purposes. He altered the decree to one for possession of the land on payment of Rs. 235, and at the same time declared the sale to be invalid.

The defendant has preferred a second appeal, contending that Khiali was competent to alienate his share of the land inasmuch as (1) the land is entered in the Revenue Records as held by Khiali and the plaintiffs in equal shares, and (2) it is admitted in the plaint that the land is so held by them.

It has been held in *Gajendar Singh* v. *Sardar Singh* (1) and *Nageshar Bakhsh Singh* v. *Ganesha* (2) that a definition of shares in revenue papers is not, standing alone, sufficient evidence of a separation between the members of a Hindu family. But in the present case there is, in addition to the entry in the Revenue Records, the clear admission of the plaintiffs in their plaint that they and their brother owned the land in equal shares, and that admission, which the lower Appellate Court has overlooked, is inconsistent with the position that they held the land as co-parceners, for until partition takes place the shares of the several co parceners in a joint Hindu family cannot be defined. It is urged on behalf of the respondents that the defendant did not plead that there had been a partition, but it was not necessary for him to raise the plea when the plaintiffs by specifying the shares in which they and Khiali owned the land, had tacitly admitted that a severance of the joint status had taken place.

The appellants' contention is, therefore, correct. As Khiali's share in the land was defined he was competent to alienate it without any restriction on the part of his brothers. The sale in 1909 was valid, and the plaintiffs are entitled only to possession of their two-thirds share in the land which was mortgaged in 1908 on payment of the amount which has been found to be a valid charge.

I accept the appeal and alter the decree to one for possession of ⅔rd of the land in suit on payment of Rs. 235 to the appellant. The plaintiffs-respondents will pay the appellants' costs in this Court, but the parties will bear their own costs in the Courts below.

W. C. A. & S. D.

Appeal accepted.

(1) 18 A. 176; A. W. N. (1893) 23; 8 Ind. Dec. (N. S.) 824.

(2) 56 Ind. Cas. 806; 42 A. 368; 7 O. L. J. 48; 2 U. P. L. R. (P. C.) 37; 38 M. L. J. 521; 23 O. C. 1; 18 A. L. J. 532; 22 Bom. L. R. 596; 28 M. L. T. 5; 47 I. A. 57; 3 L. W. 622 (P. C.).

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1087 OF 1919.

February 8, 1922.

Present :—Mr. Justice Greaves and Mr. Justice Panton.

M. ABDUL AZIZ AND ANOTHER—DEFENDANTS Nos. 5 AND 9—APPELLANTS

versus

AMIR ALI AND OTHERS—DEFENDANTS—RESPONDENTS.

Possession, suit for—Plaintiff to establish title—Defendant's failure to prove title cannot affect position—Rent-sale—Omission to make heirs of recorded tenant parties, effect of.

In a suit for recovery of possession of a land on declaration of title it is for the plaintiff to establish his title to the land and if he fails to do so the failure of the defendant to establish his title cannot affect the position. [p. 150, col. 2.]

The interest of the heirs of a recorded tenant in respect of a holding cannot be affected by a sale of the holding in execution of a decree for arrears of rent unless they were made parties to the execution proceedings in which the sale took place. [p. 151, col. 1]

Appeal against a decree of the Subordinate Judge, Chittagong, dated the 20th February 1919, modifying that of the Munsif, Fatikchari, dated the 10th of January 1918.

FACTS appear from the judgment.

Babu *Paresh Nath Sen*, for the Appellant.—The substantial question relates to the appeal preferred by defendant No. 5. The land in dispute was described both in the plaint as well as in the Settlement *Khatian* as a non-occupancy holding. So there was no justification for the lower Appellate Court's conclusion that it was an occupancy holding. And if it was a non-occupancy holding it could not be sold in execution of a rent-decree. Refers to sections 65 and 66 of the Bengal Tenancy Act. My next contention is that defendant No. 6 through whom the plaintiff claims got only the right, title and interest of the judgment-debtor at the execution sale. The interest of the heirs of the recorded tenant who were not made parties to the execution proceedings, cannot be affected by the sale. Refers to *Ashok Bhuiyan* v. *Karim Bepari* (1), *Jagattara Dassya* v. *Daulati Bewa* (2) and *Faizannessa* v. *Gaganeswari* (3). Lastly, the lower Appellate Court should have held that defendant No. 5 had a protected interest.

Babu *Biraj Mohan Majumdar* (with him Babu *Priya Nath Dutt* for Babu *Narendra Kumar Das*), for the Respondents.—It is not impossible that a non-occupancy holding should become an occupancy holding by lapse of time, even non-occupancy holdings can be sold for arrears of rent. See *Chandra Bindu Kundu* v. *Sheikh Ala Bux* (4). The question of protected interest is a finding of fact which cannot be challenged in second appeal.

Babu *Paresh Nath Sen* replied.

JUDGMENT.—This is an appeal by defendants Nos. 5 and 9 against a decision of the Subordinate Judge of Chittagong modifying a decision of the Munsif. The plaintiff sued alleging that the land mentioned in the plaint was a non occupancy holding belonging to defendant No. 6 which he purchased at a sale in execution of a decree for arrears of rent, the purchase being dated the 7th of April 1915. The Munsif decreed the suit and allowed *khas* possession. There was an appeal preferred against the Munsif's decision by defendants Nos. 5, 9, 19, 20 and 21. The learned Subordinate Judge held that defendants Nos. 9 19, 20 and 21 had protected interests but that defendant No. 5 had no protected interest. So far as defendant No. 9 is concerned the only question that arises is with regard to the form of the decree. What the learned Subordinate Judge in the lower Appellate Court held was that, so far as defendant No. 9 was concerned, no decree for *khas* possession was to be made in respect of the plots which this defendant claimed in the written statement. Now, the plots which he claimed in his written statement are seven in number 146, 156, 1437, 1422/1468, 11884/4451, 149 and 1487 and the only one of these *dags* which is mentioned in the decree, so far as defendant No. 9 is concerned, is *dag* No. 1487, the other *dags* being omitted. It seems to us that this must, having regard to the deci-

(1) 9 C. W. N. 843.
(2) 2 Ind. Cas. 695; 13 C. W. N. 1110; 37 C. 75.
(3) 63 Ind. Cas. 706; 26 C. W. N. 138.
(4) 58 Ind. Cas. 353; 24 C. W. N. 818 at p. 819; 31 C. L. J. 510; 48 C. 184.

sion of the learned Subordinate Judge have been a mistake.

A cross-objection has been preferred as against defendant No. 9 but this has not been pressed before us. Accordingly, so far as defendant No. 9 is concerned the appeal must succeed and the decree will be so far as he is concerned that the plaintiff will not be entitled to *khas* possession of any of the plots mentioned in his written statement, the numbers of which we have already given.

The plaintiff also preferred a cross-objection against defendants Nos. 19, 20 and 21. This cross-objection clearly cannot lie as against these persons and must be dismissed without costs as defendants Nos. 19 and 20 do not appear and the minor heirs of defendant No. 21, represented by the Deputy Registrar of this Court, are the only persons before us.

We now come to the real substance of the appeal, namely, the appeal of defendant No. 5. On his behalf three points have been urged before us. First, it is said that the Subordinate Judge is wrong in holding that the land which, both in the Settlement *Khatian* and in the plaint, was described as "non-occupancy" had become an occupancy holding and that, assuming he was wrong in so holding, there could be no sale of a non-occupancy holding in execution of a rent-decree. The second point urged is that the defendant No. 6, through whom the plaintiff claims, did not by virtue of his purchase get the entire holding, it being urged that as the heirs of Sadak Ali who was one of the recorded tenants in 1906 were not brought on the record after Sadak Ali's death their interest was not bound by the decree. The third point urged is that the defendant No. 5 had a protected interest.

So far as the third point is concerned this has not been pressed before us in view of the finding of fact contained in the judgment of the Subordinate Judge.

So far as the 1st point is concerned it is said that the Subordinate Judge has based his finding merely upon an assumption. What he says is this—the Survey operation in Chittagong commenced in the year 1892 or 1893; that inasmuch as in the finally published Record of Rights the *raiyats* are recorded as non-occupany *raiyats* they must by the year 1906, when the lands were sold to defendant No. 6, have acquired occupancy rights. Certainly the mere fact that you find in the finally published Record of Rights in 1898 a name recorded does not necessarily mean that the same persons as were recorded in in 1898 were on the land in 1892 or 1893 or 1894, which is the critical year. But as the Munsif has pointed out the sale in 1906 was acted upon as vesting a valid title in defendant No. 6 (through whom the plaintiff claims) and the tenants raised no objection at the time of the sale in 1906. We think, therefore, that taking into consideration all these matters it was possible to arrive at the conclusion that those who were non-occupancy *raiyats* had by lapse of time obtained occupancy rights and that the learned Subordinate Judge was right in holding as he did, that the *raiyats* had occupancy rights in the land. This being so the question as to whether a non-occupancy holding can be brought to sale in execution of a rent-decree does not arise for our decision in the present case.

So far as the second point is concerned, it does not seem to us that this has been satisfactorily disposed of by the judgment of the lower Appellate Court. The learned Vakil for the appellant, defendant No. 5, quite rightly says that it is not sufficient for the learned Subordinate Judge to say that defendant No. 5 has not established his title. It was for the plaintiff in proceedings of this nature to establish his title to the land and if he has failed to do so the failure of defendant No. 5 to establish his title cannot affect the position. Now, it is clear that Sadak Ali was a recorded tenant in 1906 and also prior to that year. It is clear that he died before the auction-purchase of defendant No. 6. It is also clear that his heirs were not made parties in the execution proceedings as they ought to have been and this being so it seems to us that Sadak Ali's heirs were not bound by the sale in 1906 and *a fortiori* they were not bound by the sale to the plaintiff in 1915. The learned Subordinate Judge says that the Suit No. 584 of 1912 was not a litigation between the parties, therefore, the decision of that suit is not binding upon the parties to the present litigation. Now, that is quite true, but the certified copy of the judgment which

was produced shows that the facts were as we have stated. This being so, the interest of Sadak Ali's heirs was not affected by the sale in 1905 or by the subsequent purchase in 1915 by the plaintiff. Defendant No. 5 claims to be the purchaser from heirs of Sadak Ali, accordingly he is entitled to such rights as Sadak Ali's heirs possessed at the date of the sale to defendant No. 5.

In the result so far as defendant No. 5 is concerned this appeal must succeed, and we reverse that portion of the judgment of the Subordinate Judge and of the Munsif which affects his interest and the case is sent back to the Court of first instance in order that the Munsif may hold an enquiry to ascertain what portion of the land in suit belonged to the heirs of Sadak Ali and the plaintiff's suit must fail against defendant No. 5 in respect of the land so found on the enquiry.

It is stated to us that the *dags* whose numbers appear in the judgment and which we have held belong to defendant No. 9 are held by him and defendant No. 8 his brother jointly. Nothing contained in the judgment must be deemed to throw any doubt on the interest of defendant No. 8 in those *dags*.

The appellants will be entitled to their costs in all Courts from the plaintiff-respondent. The suit as against defendant No. 5 must stand dismissed.

B. N.

Appeal allowed.

BOMBAY HIGH COURT.
FIRST CIVIL APPEAL No. 346 OF 1920.
December 21, 1921.
Present:—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.
VITHALDAS BHAGWANDAS—PLAINTIFF—APPELLANT
versus
MURTAJA HUSEIN—DEFENDANT—RESPONDENT.

Dekkhan Agriculturists' Relief Act (XVII of 1879), ss. 12, 13—Account—Amount due under bond—Larger amount cannot be awarded as result of account.

A debtor, owing to his seeking the relief afforded by the Dekkhan Agriculturists' Relief Act, should not be made to pay more than he is obliged to pay according to the terms of his bond.

Appeal from the decision of the First Class Subordinate Judge at Bijapur, in Suit No. 69 of 1916.

Mr. *Jinnah* (with him Mr. *H. B. Gunasts*), for the Appellant.

Mr. *S. R. Bakhale*, for Respondent No. 8.

JUDGMENT.—The plaintiff sued to recover Rs. 6,000 on a bond passed by the mortgagor defendants on the 20th December 1892 for Rs. 15,000 whereby the suit property was mortgaged, the mortgage amount being payable by annual instalments of Rs. 500. The suit was to recover twelve instalments due under the bond commencing with 1904. As the mortgagor-defendants were agriculturists, an account was taken under the Dekkhan Agriculturists' Relief Act by the Commissioner who reported that Rs. 6,231-10-0 were due for principal and a larger amount for interest and as the plaintiff would not be able to recover more than the amount of principal as interest, it followed that on the Commissioner's report an amount of Rs. 12,453-4-0 was due to the plaintiff. The Judge has dealt with the Commissioner's report in a somewhat cursory fashion, as he has only considered the various bonds entered into by the defendants from time to time and has come to the conclusion that only three of those bonds for Rs. 2,000, Rs. 400 and Rs. 800 were for cash consideration. How he came to that conclusion is not very clear, because from the Commissioner's report it will be seen that the plaintiff was able to produce his accounts from 1879 showing a very large number of small cash advances at short intervals until 1892, and it would also appear that the bonds taken by the plaintiff from time to time in no way corresponded with the account which he kept of the advances made to the defendants. So that there is no reason whatever for discarding entirely the accounts as drawn up by the Commissioner, and looking only to certain bonds as having been passed for cash consideration. Considering it does not appear that the advances made by the plaintiff correspond with the amount of the various bonds passed by the defendants, we would prefer to rely

on the very careful account taken by the Commissioner; and we think that on the whole it is far more probable that on taking the accounts under the Dekkhan Agriculturists' Relief Act, over Rs. 12,000 were really due by the defendants as a result of the dealings between the parties. But under the bond itself, apart from any question of taking accounts under the Dekkhan Agriculturists' Relief Act, only Rs. 9,500 remain due, and it would be a very curious result if a debtor owing to his seeking the relief afforded by the Dekkhan Agriculturists' Relief Act should have to pay more than he is obliged to pay according to the terms of his bond. I cannot imagine that it was ever intended that the law should produce such an extraordinary result as that. I think the proper order to pass in this suit is that Rs. 9,500 are due by the mortgagor-defendants to the plaintiff. That amount we direct to be paid in two instalments; Rs. 4,750 to be paid on the 21st June 1922, and the second instalment of Rs. 4,750 to be paid on the 21st June 1923. In default the plaintiff should apply under section 15 B of the Dekkhan Agriculturists' Relief Act.

The eighth respondent, who is a party to the suit as defendant No. 9 is a second incumbrancer, and the Judge has rightly directed that the property subsequently mortgaged to him should only be sold when it has been found that the sale-proceeds of the remaining properties encumbered in favour of the plaintiff are insufficient to meet the plaintiff's decree.

The costs of the appeal and of the suit to be added to the mortgage amount.

J. P. *Order accordingly.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2823 OF 1918.

December 2, 1921.

Present:—Mr. Justice Abdul Raoof and Mr. Justice Martineau.

NARAIN DAS—PLAINTIFF—APPELLANT

versus

Musammat JANAT BIBI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Specific Relief Act (I of 1877), s. 42—Mortgage—Suit by mortgagee for declaration that he was in possession, maintainability of—Second appeal—Finding of fact.

A mortgagee who is not in actual possession and who is entered in the Revenue Records as a mortgagee without possession is not competent to maintain a suit for a declaration that he is a mortgagee in possession, nor is such a suit within the contemplation of section 42 of the Specific Relief Act. [p. 153, col. 1.]

The finding of the lower Appellate Court that a mortgagee had never been in "actual possession" of the land, being one of fact, cannot be contested in second appeal. [p. 153, col. 1.]

Second appeal from a decree of the District Judge, Lyallpur, dated the 6th July 1918, affirming that of the Munsif, Second Class, Jhang, dated the 31st January 1918.

Mr. *Nihal Chand Mehra*, for the Appellant.

Syed *Mohsin Shah*, for the Respondents.

JUDGMENT.—The defendant's predecessors in interest mortgaged the land in suit in 1890 to the plaintiff's father. The mortgage deed provided (1) that the mortgagors would pay Rs. 31-8-0 annually to the mortgagee and be liable for the payment of the revenue, (2) that if they failed to pay the Rs. 31 8-0 the mortgagee would be entitled to realize the produce and would then pay the revenue, and (3) that if the mortgagors did not cultivate the land the mortgagee would be entitled to do so.

In 1902 the plaintiff applied for mutation, but as he admitted that he was not in possession of the land the mortgage was entered in the revenue papers as one without possession.

In 1909 the plaintiff sued in the Revenue Court for the lease money for six years, but the suit was dismissed on the ground that he became entitled to possession of the land on default being made in payment of the lease-money in any year.

In 1913 he again applied to have it entered in the Revenue Records that the mortgage was with possession, but that attempt also failed.

He then brought the present suit, alleging that he had himself got possession 10 years before and asking for a declaration that he was a mortgagee in possession.

The Courts below have concurred in dismissing the suit, and the plaintiff has now preferred a second appeal.

The finding of the lower Appellate Court is that the plaintiff has never been in actual possession of the land, and it is objected for

the respondents that this finding, being one of fact, cannot be contested in second appeal. In reply it is urged for the appellant that in saying in the plaint that he was in possession he meant, not that he was in actual cultivating possession, but that he was in possession by receiving produce from the cultivators. This may be so, but it seems probable that the lower Appellate Court also, in finding that the plaintiff had never been in "actual possession" meant merely that he had not been receiving the produce. Consequently the objection that the finding cannot now be contested is correct.

In the second place we are of opinion that the suit is not maintainable. Section 42 of the Specific Relief Act provides only for a declaration being made by the Court as to a person being entitled to any legal character or to any right as to any property. In the present case the plaintiff is not seeking such a declaration. In his plaint he asks for a decree declaring that he is a mortgagee in possession. But he is already recorded as a mortgagee, and in the mutation proceedings the mortgage was not disputed. The plaintiff's only objection is that instead of being entered in the records as a mortgagee in possession he is entered as a mortgagee without possession, and what he wants is a declaration that he is in possession. Such a declaration cannot be made under section 42 of the Specific Relief Act, and it would do the plaintiff no good if it were made, for if, as he alleges, he is in possession of the land he has got all he requires.

We accordingly dismiss the appeal with costs.

Z. K. & W. C. A. & N. K.

Appeal dismissed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 574 OF 1920.

December 21, 1921.

Present:—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

HIRACHAND KHEMCHAND GUJAR AND OTHERS—DEFENDANTS—APPELLANTS

versus

ABA LALA PATIL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 48—Dekkhan Agriculturists' Relief Act (XVII of 1879)—Decree, mortgage—Instalments—Failure to pay any instalments entitling decree-holder to execute whole decree—Decree made absolute—Starting point for 12 years' limitation—Limitation.

On the 11th September 1900 a decree was passed under the provisions of the Dekkhan Agriculturists' Relief Act providing the payment of the decretal amount by ten yearly instalments and also providing that in case of default of the payment of any one instalment the decree-holder was to wait for a year and if the instalment remained still unpaid he was at liberty to recover the whole amount then due. The first instalment fell due in March 1901 and was not paid within a year. Thus the whole decree became payable in March 1902 but the decree-holder applied in December 1903 for a decree absolute and got the order on the 7th January 1904. Some applications were made for execution but the last application was made on the 7th June 1915:

Held, that as the decree was passed under the provisions of the Dekkhan Agriculturists' Relief Act there was no necessity to apply to the Court to have the decree made absolute, that the application to have the decree made absolute could only be treated as a step-in-aid of execution, that the order on the application dated the 7th January 1904 could not be treated as a decree to give a fresh starting point for the period of twelve years allowed by section 48 of the Civil Procedure Code and that, consequently the application of 1915 was barred by limitation. [p. 154, col. 1.]

Second appeal from the decision of the Assistant Judge, Satara, in Appeal No. 254 of 1919, confirming an order passed by the Subordinate Judge at Islampur, in Darkhast No. 125 of 1915.

Mr. *Koyajee*, (with him Mr. *P. B. Shingne*), for the Appellants.

Mr. *Desai*, (with him Mr. *Ratanlal Ranchhodlal* for Mr. *K. N. Koyajee*), for Respondents Nos. 1, 2, 3 and 5.

JUDGMENT.—This is an appeal from the decision of the Assistant Judge of Satara, dismissing an appeal from an order made by the Second Class Subordinate Judge in the matter of a Darkhast taken out by the plaintiffs in execution of a decree which was passed on the 11th September 1900. That was a consent decree whereby it was declared that there

was a balance of Rs. 1,800 due to the defendants; that it should be paid off by ten yearly instalments from the end of Falgun 1831 Shake, which would correspond with March 1901; that in case of failure of payment of an instalment the defendant was to wait for one year; and that if during that time the plaintiff did not pay to the defendants the amount of the instalment, in respect of which there was failure of payment, together with insterest, then the defendants were to recover the whole of the amount through the Court by selling the mortgaged lands. Default was made in paying the first instalment, nor was it paid within a year from the date of the default. Therefore, by the terms of the decree, the defendants were entitled to apply in March 1902 for execution of the decree by selling the mortgaged lands. On the 1st December 1903, they applied to the Court to have the decree made absolute, and, on the 7th January 1904, an order was made by the Subordinate Judge making the decree absolute.

Now, when a decree is passed under the provisions of the Dekkhan Agriculturists' Relief Act, there is no necessity to apply to the Court to have the decree made absolute. The defendants should have applied for execution at once, and the application to have the decree made absolute would at the best be considered as a step-in-aid of execution, so that the order of the Subordinate Judge cannot be treated as a decree which would form a first starting point for the period of twelve years allowed by section 48 of the Civil Procedure Code. The defendants issued a Darkhast on the 7th August 1906, another in 1909, and another in 1912. The present Darkhast was filed on the 7th June 1915. That was clearly more than twelve years after March 1902 when the decree could have been executed by sale of the mortgaged property in consequence of the plaintiffs' default. It is admitted that unless the defendants can succeed in getting the Court to hold that the order of the 7th January 1904 was a decree which has now to be executed, the present Darkhast is out of time. For the reasons already given, I think that the order of the 7th January 1904 was merely an order in execution, and not a fresh decree. The decision, therefore, of the learned Assistant Judge was right and the appeal must be dismissed with costs.

J. P. *Appeal dismissed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2726 OF 1918.

December 22, 1921.

Present:—Mr. Justice Scott-Smith and Mr. Justice Harrison.

Musammat JAWAI—DEFENDANT—APPELLANT

versus

HUSSAIN BAKHSH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Muhammadan Law—Inheritance—Several deaths among heirs—Vested shares—Distribution.

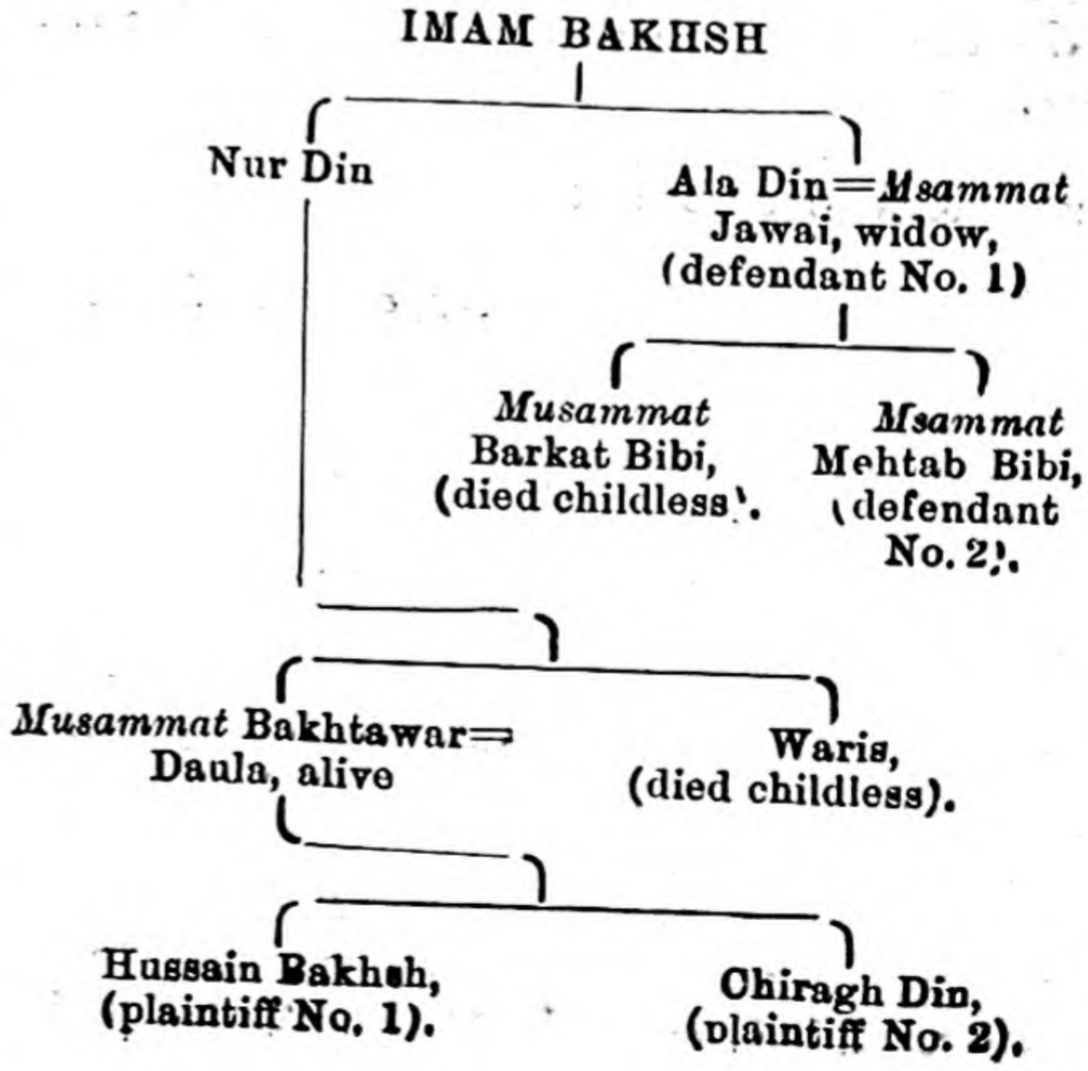
A 'vested inheritance' is the share which vests in an heir at the moment of the ancestor's death. If the heir dies before distribution, the share of the inheritance which has vested in him will pass to his heirs at the time of his death. So that where there have been several deaths among the heirs of a deceased Muhammadan before the final distribution of his estate, the shares of the different heirs must be determined on the basis of each death in working out the final distribution. [p. 155, col. 2.]

Second appeal from the decree of the District Judge, Lahore, dated the 17th June 1918, affirming that of the Subordinate Judge, Second Class, Lahore, dated the 12th April 1918.

Mr. *Ghulam Rasool*, for the Appellant.

Sheikh *Abdul Razaq*, for the Respondents.

JUDGMENT.—This is an appeal by *Musammat* Jawai, defendant, from the decree of the lower Courts giving the plaintiffs 29/48th share in a certain house situated in Lahore. The pedigree table printed at page 13 of the paper-book is as follows:—



JAWAI v. HUSSAIN BAKHSH.

It is common ground that the house in suit was acquired jointly by Nur Din and Ala Din, and that shortly after the acquisition Nur Din died leaving his two children Waris and *Musammat* Bakhtawar living with Ala Din in the house. Ala Din died prior to 1899 leaving a widow *Musammat* Jawai defendant appellant, and the two daughters shown in the pedigree-table. As the learned District Judge points out there is nothing to show that the children of Nur Din did not reside in the house up till 1899 and there is no proof of any assertion of adverse title on the part of Ala Din or his widow before that time. It is admitted that from 1899 to 1905 the plaintiffs' mother lived in the house and that the plaintiffs themselves were born there. It was after *Musammat* Bakhtawar's death in Amritsar in 1906 that *Musammat* Jawai took sole possession and that possession had not ripened into an adverse title at the time the present suit was instituted. The only point upon which stress can be laid is that on the 14th November 1899 *Musammat* Jawai mortgaged one-half of the house to Haider Shah and that on the following day *Musammat* Bakhtawar's husband took that half on lease from Haider Shah. The act of the lessee Daula cannot, however, be taken as meaning that his wife *Musammat* Bakhtawar had no right in the house. He has himself given an explanation, which the First Court accepted, as to why he executed the lease, and it is also quite possible, as the learned District Judge has remarked, that the mortgagee may have insisted on the lease being executed by a male member of the family who was living in the house. We are in full agreement with the lower Courts that no adverse possession has been shown on the part of *Musammat* Jawai prior to *Musammat* Bakhtawar's death.

It has been held that the parties are governed by Muhammadan Law, and the only question which remains for decision is to what share are the plaintiffs entitled under that law? Upon Ala Din's death his widow inherited 1/8th share of his estate and his daughters 1/3rd share each in accordance with Muhammadan Law. This left 5-24th of his share, *i. e.*, 5-48ths of the whole house to go to the residuary; in other words, to Waris the nephew of Ala Din. Upon Nur Din's death Waris inherited 2-3rds of his half share, *i. e.*, 1-3rd of the house, whilst *Musammat* Bakhtawar inherited $\frac{1}{3}$rd of one-half, *i.e.*, 1/6th. Waris's share, therefore, was $\frac{1}{3}$rd *plus* 5-48ths=21-48ths. Waris died leaving a widow who was entiled to $\frac{1}{4}$th of his estate, whilst *Musammat* Bakhtawar inherited the other $\frac{3}{4}$ths, *i. e.*, $\frac{3}{4}$th of 21-48ths. Her share, therefore, became 1/6th *plus* $\frac{3}{4}$ths of 21/48ths. Upon her death her husband took 1-4th and her two children, the plaintiffs, $\frac{3}{4}$ths. The latters' share, therefore, is $\frac{3}{4}$ths of 95/192, or in other words 95/256ths. Mr. Abdul Razaq on behalf of the respondents urges that as no distribution has hitherto taken place, we should only have regard to the persons now existing. But this is clearly wrong. In Mulla's Principles of Muhammadan Law, Fourth Edition, Article 45 runs as follows:—

"A 'vested inheritance' is the share which vests in an heir at the moment of the ancestor's death. If the heir dies before distribution, the share of the inheritance which has vested in him will pass to his heirs at the time of his death."

It is, therefore, clear that the shares have to be determined on the occasion of each death, and according to this rule, we have calculated the plaintiffs' shares to which they are entitled at the present time.

Another point urged by plaintiffs' Counsel was that as Daula, plaintiffs' father, did not claim his share, it should be given to the plaintiffs as *Musammat* Jawai is not entitled to it. Daula, however, has not sued and the plaintiffs are obviously only entitled to their own share and they cannot be given the share of another co-sharer who has not joined with them in bringing the suit.

We, therefore, accept the appeal, and, in modification of the decree of the lower Courts, give the plaintiffs a decree for a 95/256ths share in the house in dispute, and we direct that the defendants should pay half the plaintiffs' costs in the lower Courts, and that parties should bear their own costs in this Court.

Z. K.

Appeal accepted.

DIGAMBAR MAHTON v. DHANRAJ MAHTON.

PATNA HIGH COURT.

FIRST CIVIL APPEAL No. 121 OF 1919.

February 1, 1922.

Present :—Mr. Justice Das and Mr. Justice Adami.

DIGAMBAR MAHTON—DEFENDANT No. 2—APPELLANT

versus

DHANRAJ MAHTON AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Partition suit—Grandson, whether necessary party—Grandson, whether can claim partition.

In a partition suit under the Hindu Law grandsons although proper parties are not necessary parties as their interests are fully represented by their father.

In this case in an appeal against a preliminary decree for partition on the ground that the grandsons were not made parties the High Court, holding that this was not a fatal defect, directed the lower Court to bring them on the record and allot to them separate shares if they wanted.

Obiter.—Under Hindu Law a grandson can claim partition as against his grandfather.

First appeal.

Mr. *Nirsu Narain Sinha*, for the Appellant.

Mr. *Siva Narain Bose*, for the Respondents.

JUDGMENT.

DAS, J.—This appeal is directed against a preliminary decree in an action for partition. The only question which has been argued before us is, that the plaintiff did not cite as parties to the action certain persons who would be entitled to a share on partition.

Now, the plaintiffs are the sons of defendant No. 1, and defendant No. 2 is also a son of defendant No. 1. It is argued before us that the plaintiffs should have brought on the record their sons and the sons of defendant No. 2. The learned Subordinate Judge has taken the view that grandsons are not entitled to claim partition as against the grandfather. I am not prepared to uphold the view of the learned Subordinate Judge in this respect. No doubt a Full Bench of the Bombay High Court in the case of *Apaji Narhar Kulkarni* v. *Ramchandra Ravji Kulkarni* (1) took the view that it is not open to a grandson to maintain an action for partition against a grandfather, but all the other High Courts have dissented from that view, see *Jogul Kishore* v. *Shib Sahai* (2), *Rameshwar Prosad Singh* v. *Lachmi Prosad Singh* (3) and *Subba Ayyar* v. *Ganasa Ayyar* (4). In my opinion, it was open to the grandsons to claim partition as against the defendant No. 1. But the question in the present action is somewhat different, namely, whether these grandsons were necessary parties in an action for partition. In my opinion, the distinction between a proper party and a necessary party is not always recognised. It may be that the grandsons were proper parties in the present action, but I am not prepared to admit that they were necessary parties. They were fully represented in the action by their father and there is no prejudice to their interest by the decree which has been pronounced by the learned Subordinate Judge. But the learned Vakil on behalf of the appellant makes a grievance and I think that the best course to adopt in this matter would be to bring the grandsons on the record as parties to the suit. The learned Vakil for the plaintiffs undertakes to present an application to the Court below for the purpose of bringing the sons of the plaintiffs and the sons of defendant No. 2 on the record as party defendants. The names of these added parties will be mentioned in the decree and the Commissioner will proceed to make the partition in accordance with the decision of the learned Subordinate Judge. If, however, the added defendants wish to have shares allotted to them, they must apply to the Court for that purpose, and in that case the learned Subordinate Judge will give the necessary directions to the Commissioner. Subject to this variation, this appeal will stand dismissed, but without costs.

ADAMI, J.—I agree.

N. H. & J. P.

Order accordingly

(1) 16 B. 29; 8 Ind. Dec. (N. S.) 497 (F. B.).

(2) 5 A. 470; A. W. N. (1883) 102; 3 Ind. Dec. (N. S.) 564 (F. B.).

(3) 31 C. 111; 7 C. W. N. 688.

(4) 18 M. 179; 6 Ind. Dec. (N. S.) 474.

FAZAL ILAHI v. IMPERIAL CHEMICAL CO., DELHI.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2595 OF 1916.
December 14, 1921.

Present :—Mr. Justice Scott-Smith and Mr Justice Abdul Qadir.

FAZAL ILAHI—DEFENDANT—APPELLANT

versus

THE IMPERIAL CHEMICAL COMPANY, DELHI THROUGH H. MUHAMMAD RAFI, PROPRIETOR OF THE COMPANY —PLAINTIFFS—RESPONDENTS.

Contract Act (IX of 1872), s. 230 (1)—Principal and agent—Agent acting for foreign principal—Personal liability of agent—Presumption—Time of essence of contract—Finding of fact—Appeal, second.

Plaintiffs ordered certain goods from defendant which the latter undertook to supply. Plaintiffs knew that the defendant would have to order the goods from Japan, but they looked to the defendant alone for the performance of the contract. The correspondence between the parties contained occasional references to the dealer in Japan but there was nothing to show that the plaintiffs were dealing with the latter. There were certain clauses in the indents, however, which provided that as regards the outturn of goods, the defendant was not to be held responsible. Owing to late shipments plaintiffs had to pay a certain amount as surcharge and they sued the defendant for the recovery of that sum :

Held, (1) that there was nothing to show that the defendant was acting only as an agent or a scribe for the dealer in Japan and that, therefore, he was personally liable on the contracts. [p. 158, col. 2.]

(2) that even if the defendant was acting as an agent for a foreign principal the presumption contained in section 230 (1) of the Contract Act had not been rebutted. [p 158, col 2.]

A finding that time is or is not of the essence of a contract is a finding of fact and cannot be assailed in second appeal. [p. 159, col. 2.]

Second appeal from a decree of the District Juge, Delhi, dated the 14th June 1908, affirming that of the Subordinate Judge, Second Class at Delhi, dated the 10th December 1917.

Lala *Sardha Ram* and Mr. *Muhammad Rafi*, for the Appellant.

Lala *Moti Sagar*, R. S., and Lala *Mool Chand*, R. S., for the Respondent.

JUDGMENT.—This second appeal arises out of a suit for Rs. 2,412-3 10 brought by the plaintiffs, a firm called the Imperial Company, Delhi, against the defendant, Mr. S. M. Fazal Ilahi, who works as a commission agent at Delhi. The plaintiffs had placed orders with the defendant for some acids to be imported from Japan and claimed to recover from him the amount which they had to pay on account of surcharges owing to shipments having been made late. The defendant denied his liability, mainly on the ground that the contract was with a merchant in Japan, named H. Yamamoto, and that the defendant was merely an agent. The Court of first instance held that the defendant was liable, and disallowing certain items it passed a decree for Rs. 2,167-14 7 in favour of the plaintiffs. The defendant appealed to the District Judge but the decree of the Trial Court was upheld and the appeal was dismissed with costs. The defendant has now preferred a second appeal against the decision of the lower Appellate Court and his case has been argued before us at great length by Lala Sardha Ram and we have heard Mr. Mool Chand on behalf of the plaintiffs-respondents

Before considering the arguments addressed to us on both sides it will be helpful if a brief summary of the facts of the case is given.

The first order given by the plaintiffs for the goods in question was Exhibit D.5, No. 972, dated the 15th October 1915. This was an order from the plaintiffs to the defendant and was written on a printed indent form of the defendant giving the conditions on which he did business. The order was for "900 cases, Jars nitric acid." The defendant kept this indent, signed by the plaintiffs, with himself and ordered the goods from Japan by cable. He received a letter, Exhibit P-1, from Japan containing the acceptance of his order by H. Yamamoto and stating the time of shipment to be "within before end of April 1916." This letter was addressed to him and was passed on by him to the plaintiffs and is produced by the latter. The second order by the plaintiffs was, Exhibit D 12, dated the 10th November 1915, similarly written on an indent form of the defendant and was for 600 cases of nitric acid and was "to be completed within six months from the date of first shipment." The acceptance of this was by a letter, dated the 5th January 1916 from Yamamoto to Fazal Ilahi, Exhibit P-2,

Mr. Sardha Ram argues that D-5 and D-12 are offers which the plaintiffs really made to Yamamoto through the defendant-appellant, who did not accept them himself but communicated the same to the dealer in Japan and on receiving his acceptances, P-1 and P-2, forwarded the same to the plaintiffs. He wants us to infer from this that his client merely acted as an agent or a scribe and incurred no personal responsibility. Mr. Mool Chand, on the other hand, points out that the letters, Exhibit P-1 and P-2, from Japan are addressed to the defendant and contain no reference at all to the plaintiffs and show that the plaintiff firm was looking to the defendant for the fulfilment of the contract, while the defendant had a contract with the dealer in Japan. He urges that after duly considering the correspondence between the parties and the terms of their contract the learned District Judge has held that "neither the plaintiffs nor the supplier Mr. Yamamoto were looking upon the defendant as a mere scribe," and that this constitutes a finding of fact which cannot be assailed in second appeal. Mr. Sardha Ram contends that some important documentary evidence has been ignored by the lower Appellate Court and that if those documents had been considered the Court below would have seen that the real contracting parties were the plaintiffs and Yamamoto. He asks to be permitted to refer to a few documents to show that a part of the documentary evidence on the record has remained unconsidered. We have thought it proper, under these circumstances, to allow him to draw our attention to those documents only, which he contends have been ignored. After going through Exhibits D-28, D-34, D 87 and the invoices P-24, P-25, etc. to which our attention was invited, we are of opinion that an inference cannot be drawn from them that the defendant was absolved from responsibility. There are references to Yamamoto in some of the letters written by the plaintiffs, because they knew that the defendant had arranged to get the goods from him, but it appears that in spite of that knowledge the plaintiffs looked to defendant for the fulfilment of their contract. Moreover there is nothing to show that these documents have been ignored by the lower Appellate Court. On the contrary the learned District Judge states clearly that he has been "through all the correspondence of the parties", and we see no reason to doubt the fact that he has read the whole of the correspondence and after considering the effect of it, as a whole, has come to the conclusion that the defendant was responsible under the contract.

Our attention has also been drawn in this connection, to certain clauses in the printed indent forms and it has been argued that according to the terms of the indent the defendant was free from personal liability. We have seen the terms of the indent, but do not think that this argument is correct. Let us first examine D-5. Clause 6 of D-5 runs thus "when goods are ordered from specified manufacturers we agree to take all risks connected with outturn both as to quality, delivery and every other respect." This is what the plaintiffs agreed to when they placed their order with the defendant. As Mr. Mool Chand points out the risks they took under this clause referred to "outturn" only, so that if the outturn was deficient they could not blame the defendant or hold him responsible. This clause cannot be construed into a general exemption from liability in favour of the defendant. There is a similar clause in D-12, though it is differently worded. It says: "It is understood by us that you are in no way reponsible *re*: the outturn of goods etc., and all our claims will be with the suppliers abroad." The obvious reference in this clause is to the matter of outturn with which we are not concerned in the case before us. These clauses, therefore, do not in any way help the defendant.

The decision of the case against the defendant has been based not only on the findings of fact arrived at by the Courts below as to the nature of the contract and the intention of the parties, as judged by the correspondence between them and the terms of the original indents, but also on the application of section 230 (1) of the Contract Act to the transaction in dispute. It has been argued before us that even if the defendant was acting merely as an agent, there was a legal presumption of his personal liability, as the principal for whom he was contracting was residing abroad. The words of section 230 (1) are:—"In the absence of any contract to that affect, an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them. Such a contract

FAZAL ILAHI v. IMPERIAL CHEMICAL CO., DELHI.

shall be presumed to exist in the following cases :—(1) where the contract is made by the agent for the sale or purchase of goods for a merchant resident abroad." Mr. Mool Chand for the plaintiffs-respondents contends that the defendant was admittedly an agent of Yamamoto and was receiving commission from him and as the principal was abroad, the defendant's personal liability must be presumed. Mr. Sardha Ram argues that this is a rebuttable presumption and should be held to have been rebutted. He cites *Tutika Dasavaraju* v. *Parry & Co.* (1) where it is held that this presumption of law is one which can be rebutted and is rebutted when the foreign principal is, in writing, made the contracting party and the contract is made directly in his name. He says that here the acceptance of the original offer having been signed by the principal in Japan, it must be held that the presumption was rebutted. We think, however, that the present case, differs from the Madras case because here there is no contract made directly in the name of Yamamoto and the acceptance he communicated was addressed to the defendant and made no mention of the plaintiff firm. Mr. Sardha Ram next refers to a decision of the Punjab Chief Court, published as *Puran Chand* v. *Tara Singh* (2) where the plaintiffs' indent was not accepted by the defendants, commission agents, but by a merchant residing abroad and the defendant did not undertake any primary liability. On a comparison of the case of 1905 with the present case it appears that the two cases are distinguishable from one another. In the case of 1905 it was the plaintiff's indent that was accepted by the merchant abroad. Here the indent that pertains to acceptance P-1 is not the indent of the plaintiffs. That was admittedly kept with himself by the defendant nor is there anything on the record to show that he referred to it when writing to his suppliers. The indent D 5, dated the 15th October 1915, was for nine hundred cases. The acceptance P. 1, dated the 5th November 1915, referred to a cabled indent, dated the 3rd November 1915, sent by the defendant in which the quantity ordered was "less than 250 cases." It is clear from this that defendant treated the indent D-5 as one addressed to him out of which he was ordering only a part for the time being. Moreover it seems that in the case published as *Puran Chand* v. *Tara Singh* (2) there was no correspondence to throw light on the intention of the parties and, therefore, that case cannot be of much help in determining the present case. Mr. Sardha Ram quoted some other rulings of which only one requires some discussion. It is a recent Division Bench ruling of this Court, Civil Appeal No. 1018 of 919, [published in the L. L. J. page 374, *Bharagava & Co.* v. *B. Kobayashi* (3)] in which a defendant pleaded that a firm in Japan and not he was responsible. This plea was allowed in that case on the ground that it was *admitted* there that the contract was made by the Japanese firm itself. The learned Judges rightly held, therefore, that to that case section 230 of the Contract Act had no application.

After considering carefully the arguments discussed above, we hold that in the case under appeal the contracting parties were the plaintiffs and the defendant and that the latter is liable under the contract.

The next contention raised on behalf of the appellant is that even if it is held that he was liable no liability arises from late shipments as time was not of the essence of the contract. Mr. Sardha Ram quotes certain letters of the plaintiffs which show that they were willing to extend time on more occasions than one and when Yamamoto once wrote that the contract might be cancelled as shipment could not be arranged the plaintiffs asked him not to do so. He says that in Exhibit D-7 and D-16 it was indicated by the defendant that shipment could not be guaranteed, and that the correspondence between the parties showed that the plaintiffs were ready to accept late goods. Mr. Mool Chand's reply to this argument is that the time was fixed by the contracts and the plaintiffs contracted with other parties to supply by a certain time on the strength of the understanding between them and the defendant. He adds that the lower Appellate Court has found that "it is clear from the contract conditions that time was an essential element" and that this finding is a finding of fact which cannot now be assailed.

(1) 27 M. 315.
(2) 138 P. L. R. 1905.
(3) 65 Ind. Cas. 468; 2 L. L. J. 374.

We agree with this contention and take this finding of fact to be final.

We now come to the question whether the amount allowed on account of surcharges has been correctly assessed. Exhibit P-3 gives the details of the sum of Rs. 2,412 3-10 which was originally claimed by the plaintiffs. Out of this sum two items, *i. e.* Rs. 48-14-5 and Rs. 195 6-10 were disallowed by the Trial Court, as it found that the goods relating to them had been shipped in time and, therefore, no surcharge could be claimed by the plaintiffs. Of the remaining six items four are not disputed by the appellant, as they relate to shipments which were admittedly late, but with regard to two items of Rs. 146-14 1 and Rs. 733-8-0, connected with invoices Nos. 7162 and 7299 respectively, it is contended that they should be disallowed as the shipments in these two instances were not late, if 20 days of grace, provided for in the terms of the indent, were allowed. To support this contention reliance is placed on clause 7 of the indent forms D 5 and D 12, which provides that "any deviation from time limit not exceeding 20 days is not to be considered a breach of contract." Mr. Mool Chand points out, however, that all that this provision meant was that delay in shipment not exceeding 20 days would not entitle the plaintiffs to cancel the contract, but that its aid could not be invoked by the defendant to avoid responsibility for surcharges occasioned by such late shipments. We think this interpretation of clause 7 is correct and there is no reason to disallow the items of Rs. 146-14-1 and Rs. 733-8-0. The result is that the plaintiffs are entitled to recover the sum of Rs. 2,167-14 7 for which a decree has been passed in their favour. There is one small item, however, which we think must be deducted from the amount decreed. The appellant claims that he should have been allowed Rs. 70 which he had spent out of pocket, on behalf of and at the instance of his the plaintiffs, in sending telegrams to Japan from time to time. The plaintiffs have all along admitted that they authorised the defendant to incur this expense for them and have expressed their willingness to pay what is proved to have been spent. The Courts below did not allow this item for the reason that the defendant had not produced very satisfactory proof as to this item. We notice, however, that there was the sworn testimony of Abdullah (D. W.) with a copy of his accounts and we think no further proof of this was needed when the liability was admitted by the plaintiffs. The Counsel for the respondents agrees that this item, being a small one, may be allowed to the defendant. Deducting the item of Rs 70 from Rs. 2,167-14 7 which have been found due we get Rs. 2,097-14 7 as the net amount which the defendant is liable to pay.

The decree of the lower Appellate Court is consequently modified to this extent and a decree for Rs. 2,097 14-7 is hereby granted in favour of the plaintiff firm against the defendant, S. M. Fazal Elahi with costs. Appellant will pay plaintiff's respondent's costs in this Court.

Z. K.

Decree modified.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1276 OF 1919.

March 24, 1922.

Present :—Mr. Justice Lindsay and Mr. Justice Stuart.

RAM DAS AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Saiyid MUHAMMAD SAYEED KHAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), s. 19, Sch. I, Art. 132—Mortgage—Property hypothecated—Covenant to pay interest yearly and on default whole amount—Cause of action.

A mortgage-deed was executed in 1901; the mortgagor covenanted to pay interest year by year and the principal within three years of the date of execution; in case of default of payment of the annual interest the mortgagee was empowered to realise the principal and interest from the hypothecated property. No interest was paid at all. A suit on the mortgage was brought in 1916:

Held, that the suit was barred by time in the absence of any acknowledgment within section 19 of the Limitation Act, as the cause of action for the principal and interest arose on the first default in 1902. [p. 161, col. 1.]

Second appeal against a decree of the District Judge, Benares, dated the 18th July 1919.

Messrs. *B. E. O'Conor* and *Iqbal Ahmad*, for the Appellants.

Messrs. *Ishwar Saran*, *K. N. Katju* and *Badri Narain*, for the Respondents.

JUDGMENT.—This is an appeal by the plaintiffs against the dismissal of their suit on a deed dated the 17th of July 1901 on the ground that it was time barred. We have been taken through the terms of the deed in question. We find that the executant, Muhammad Raza, executed the deed for a consideration of Rs. 1,000 and agreed to pay interest at the rate of 24 per cent. per annum. He covenanted to pay the interest year by year and the principal within three years of the date of execution, and in case of default of the payment of the annual interest he empowered the mortgagee without waiting for the expiration of the period fixed for payment of the principal to realise the amount due for the principal and interest from the hypothecated property. He also covenanted that so long as the principal remained unpaid interest at 24 per cent. per annum would accrue and that interest at this rate should be payable from the date of default to the date of the payment.

We can only interpret these portions of the deed to mean that the privilege of deferring payment of the principal to the 17th of July 1904 was conditional on the punctual payment of the annual interest and that the whole amount, principal and interest, became due on the 17th of July 1902 in default of payment of the interest for the first year.

On the facts, no interest was paid at all, so the cause of action arose in our opinion on the 17th of July 1902.

In these circumstances, the suit which was instituted on the 23rd of February 1916 was time barred in the absence of acknowledgment. If authority be needed for this view, we would refer to *Gaya Din* v. *Jhumman Lal* (1). The document before the Bench in that case was very similar to the document now before us. We have now to consider whether there was any acknowledgment which can be pleaded under the provisions of section 19 Act IX of 1908 to extend the period. There is a final finding of fact that no interest was paid. Two acknowledgments were set up, one alleged to have been made by Muhammad Raza on the 10th of November 1906 and the other made by Mul Chand.

With regard to the acknowledgment alleged to have been made by Muhammad Raza, we find, in addition to the fact that it was not an acknowledgment in writing signed by Muhammad Raza personally or by an agent duly authorised in this behalf, that the statement which he made did not amount to an acknowledgment of liability.

The learned Counsel for the appellant has not pressed the acknowledgment alleged to have been made by Mul Chand as being of any advantage to his client. This concludes all the points taken in argument.

We dismiss the appeal with costs including fees on the higher scale.

J. P. *Appeal dismissed.*

(1) 23 Ind. Cas. 910; 37 A. 400; 13 A. L. J. 510 (F. B.).

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1397 OF 1917.

December 7, 1921.

Present:—Mr. Justice Scott Smith and Mr. Justice Harrison.

Musammat BAKHTAWAR AND ANOTHER—DEFENDANTS—APPELLANTS

versus

MOOL CHAND AND OTHERS—PLAINTIFFS—RESPONDENTS.

Mortgage—Conditional sale—Foreclosure—Failure to make demand before notice.

Courts will not presume that all formalities have been observed in foreclosure proceedings.

A mortgagee's omission to make a demand for the mortgage-money before notice is issued in foreclosure proceedings is a fatal flaw in the proceedings and renders them nugatory.

Lachmi v. *Tota*, 16 P. R. 1888, *Kirpa Ram* v. *Bhagwana*, 103 P. R. 1889, followed.

Second appeal from a decree of the District Judge, Ferozepore, dated the 4th April 1917, reversing that of the Additional Subordinate Judge, Second Class, Ferozepore, dated the 24th January 1917.

Mr. *Ghulam Rasul*, for Maulvi *Ghulam Mohi ud Din*, for the Appellants.

Mr. *Sagar Chand* and Lala *Fakir Chand*, for the Respondents.

JUDGMENT.—The plaintiffs in this suit are reversioners of one Sainan Mal and sue for possession of a shop by redemption of a mortgage effected by his widows. This mortgage contained a clause of conditional sale and the mortgagee took proceedings to foreclose and obtained a decree against the widows in their lifetime. The suit was originally dismissed and the appeal was accepted by the learned District Judge on two grounds, that there was no necessity for the execution of a mortgage of this type including the penal clause though there was necessity for the alienation and that the foreclosure proceedings do not bind the reversioners. The mortgagee appeals.

It is unnecessary to discuss the first point as we find that the reversioners are in no way bound by the proceedings. The plaint did not disclose that any demand had been made before the notice was issued, nor did the mortgagee at any later stage even assert that he had made such a demand. *Lachmi* v. *Tota* (1) and *Kirpa Ram* v. *Bhagwana* (2) are clear authority for holding that such an omission is a fatal flaw in the proceedings and that Courts will not presume that all formalities have been duly observed. The foreclosure, therefore, in no way affects or binds the reversioners and they are entitled to redeem the mortgage and to obtain possession of the property by payment of Rs. 200. We dismiss the appeal with costs.

S. D. *Appeal dismissed.*

(1) 16 P. R. 1888.
(2) 106 P. R. 1889.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL No. 41 OF 1921.

December 1, 1921.

Present:—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

THE CENTRAL INDIA SPINNING AND WEAVING CO.—PLAINTIFFS—APPELLANTS

versus

G. I. P. RAILWAY—DEFENDANT—RESPONDENT.

Railway Company—Risk-Note Form H—Contract to carry goods at owner's risk—Loss of goods—Company's liability—Wilful neglect—Proof.

The plaintiff delivered to the defendant Company at Nagpur fifty-seven bales of piece-goods to be conveyed from Nagpur to Amritsar and the defendant Company issued a Railway receipt for the said bales to the plaintiffs. The goods were booked under a Risk-Note in Form H whereby the plaintiffs, in consideration of the consignment being charged for at the special reduced or owner's risk rates, agreed and undertook to hold the Railway Administration and all other Railway Administrations working in connection therewith, and also all other transport agents or carriers employed by them respectively, over whose Railways or by or through whose transport agency or agencies the said goods might be carried in transit, harmless and free from all responsibility for any loss, destruction or deterioration of or damage to all or any of the said consignment from any cause whatever except for a loss of the complete consignment or of one or more complete packages forming part of the same consignment, due either to the wilful neglect of the Railway Administration or to theft by or to the wilful neglect of its servants, transport agents, or carriers employed by them before, during or after transit over the said Railway or other Railway lines working in connection therewith or by any other transport agency or agencies employed by them respectively for carriage of the whole or any part of the said consignment, provided that, the term "wilful neglect" should not be held to include fire, robbery from a running train or any unforeseen event or accident. The waggon was sealed and remained for 30 hours in the Nagpur goods yard. The seal bore the dscription: N. G. P. 8. The goods were carried over the Railway of the defendant Company from Nagpur to Delhi, then over the Railway of the East India Railway Company from Delhi to Umballa, and lastly over the Railway of the North-Western Railway Company from Umballa to Amritsar. The goods arrived at Amritsar and the unloading clerk at Amritsar noticed that the seal on one side bore the inscription N G P. in large characters without any figure, and that 3 out of 57 bales were missing. Consequently only fifty-four out of the fifty-seven bales were delivered to the plaintiffs' consignees. Plaintiff sued the defendant Company for damages for loss of the three bales, the defendant admitted the short delivery but denied that the loss was due either to the wilful neglect of the defendant Company or to theft by or to the wilful default of their servants:

Held, that under the circumstances of the case the legitimate inference was that the waggon was broken open at Nagpur where the goods could be disposed of without exciting any suspicion and by persons who could calculate on being free from disturbance for a considerable time and that even if it occurred after the waggon left Nagpur, either some of the defendants' servants were concerned in the theft or the theft occurred owing to the wilful neglect of the defendants' servants. [p. 166, col. 2]

Held, also, that there being a *prima facie* case against the defendants it was for them to offer

some reasonable explanation in order to escape liability; and that as they failed to offer any explanation they were liable for the damages. [p. 166, col. 2.]

Appeal from the decision of Mr. Justice Kajiji.

Messrs. *Desai* and *Mulla*, for the Appellant.

Sir *Thomas Strangman*, Advocate-General, (with him Mr. *Campbell*), for the Respondents.

JUDGMENT.

MACLEOD, C. J.—This is an appeal from the decision of Kajiji, J. dismissing the plaintiffs' suit with costs.

On the 19th August 1918, the plaintiffs delivered to the defendant Company at Nagpur fifty-seven bales of piece goods to be conveyed from Nagpur to Amritsar and the defendant Company issued a Railway receipt for the said bales to the plaintiffs. The goods were booked under a Risk-Note in Form H whereby the plaintiffs, in consideration of the consignment being charged for at the special reduced or owner's risk rates, agreed and undertook to hold the Railway Administration and all other Railway Administrations working in connection therewith, and also all other transport agents or carriers employed by them respectively over whose Railways or by or through whose transport agency or agencies the said goods might be carried in transit, harmless and free from all responsibility for any loss, destruction or deterioration of or damage to all or any of the said consignment from any cause whatever except for a loss of the complete consignment or of one or more complete packages forming part of the same consignment, due either to the wilful neglect of the Railway Administration or to theft by or to the wilful neglect of its servants, transport agents, or carriers employed by them before, during or after transit over the said Railway or other Railway lines working in connection therewith or by any other transport agency or agencies employed by them respectively for carriage of the whole or any part of the said consignment provided that the term "wilful neglect" should not be held to include fire, robbery from a running train or any unforeseen event or accident.

The said goods were carried over the Railway of the defendant Company from Nagpur to Delhi, then over the Railway of the East India Railway Company from Delhi to Umballa, and lastly over the Railway of the North Western Railway Company from Umballa to Amritsar. The goods arrived at Amritsar on or about the 6th September but only fifty four out of the fifty-seven bales were delivered to the plaintiffs' consignees.

A lengthy correspondence ensued in which the defendant Company at first contended that the loss had not occurred on their Railway and, therefore, they were not liable, disregarding the provisions of section 80 of the Indian Railways Act. Finally, on the 31st July 1919, the defendants wrote that for the reasons already stated in the previous correspondence they were not liable for the claim. The suit was filed on the 5th September claiming the sum of Rs. 1,582 7-0, the value of the three missing bales and interest.

The defendants in their written statement admitted the short delivery but denied that the loss of the three bales was due either to the wilful neglect of the defendant Company or to theft by or to the wilful default of their servants as alleged.

At the hearing the following issues were raised :—

(1) Whether the loss of the three bales was due to the wilful neglect of the defendant Company?

(2) Whether the loss of the said bales was due to theft by or wilful default of the defendant Company's agents or servants?

The third issue was immaterial.

Leave was then granted to amend the plaint so that the following issue might be raised:—Whether the goods were not conveyed over to the East India Railway Company and the North Western Railway Company at Railway risk, and clause 10-A was added to the plaint, claiming that if the goods were lost after they left Delhi the defendants were liable in any event.

The defendant Company replied that they were not liable for the claim made on the assumption that the bales were lost on a line of Railway other than the defendants'. The evidence shows that the plaintiffs' goods were loaded at Nagpur in one waggon the doors of which were sealed with a seal bearing the following description: N. G. P. 8. When the waggon arrived at Amritsar the unloading clerk noticed that the seal on one side bore the inscription N. G. P. in large characters

without any figure and so the Police were sent for. The seals were broken in the presence of Khairuddin of the Government Railway Police and on the waggon being unloaded three bales were found to be missing. Smith who was Station Master at Nagpur in August-September 1918 said that during his time no such seal as N.G.P. (Exhibit J.) was used. Mr. Schofield, Assistant Traffic Superintendent (Claims) N. W. Railway Company deposed that when goods were booked on a foreign line to their line, and the waggon arrived at Umballa the train clerk in conjunction with the guard of the incoming train and the Chowkidar examined the seals of the waggon and reported if they were defective. No such report was made in this case. He made inquiries and was informed that there were no foot boards on the waggon in the suit so that it would not be possible to substitute the seals while the train was running. The witness also stated that the seals bearing different types were discovered after the waggon had been unloaded, *i.e.*, after one of the seals had been removed.

The defendants called no evidence.

Some of their servants were present and were offered for examination by plaintiffs' Counsel but Mr. Mulla said they ought to have been called by the defendants. The learned Judge thought that as a matter of fact if the defendants had called them they would not have thrown any further light on the question how the loss occurred. Clearly the onus lay on the plaintiffs who had signed the Risk Note in Form H to prove either that the defendants were liable under the terms of the note, or to satisfy the Court that the proper inference to be drawn from the facts proved was that the defendants were liable. It is not suggested the theft was from a running train. The learned Judge says Mr. Mulla advanced two theories. The first was that the loss occurred when the goods were still in the goods-yard at Nagpur Station. The goods were booked on the 19th August, the waggon being sealed at 11 15 A. M. As the waggon remained for thirty hours in the Nagpur goods-yard the theft must have been committed by the defendants' servants or it must have occurred owing to their wilful neglect.

The second theory was that if the theft was not committed by the employees of the defendants it was due to the neglect of one of its servants, *i.e.*, the Chowkidar. But it will be seen that this was only part of the first theory. The learned Judge thought that the probabilities were against the theft having been committed in the Nagpur goods-yard. Any servant of the defendants intending to commit the theft and taking the trouble to prepare a seal to re seal the waggon would have taken the precaution to prepare a seal similar to the one used by the defendants, and further it would require great daring for any servant to commit a theft from the goods-yard.

With regard to the question of neglect, Mr. Mulla had not called the Chowkidar who was available for examination. He, therefore, came to the conclusion that he was not satisfied that the loss was due either to theft by or to wilful neglect of a servant of the defendants.

Considerable light on the question how a case of this nature should be dealt with is thrown by the decision of the Court of Appeal in *Smith Limited* v. *G. W. Railway Co.* (1).

Certain traders delivered to the defendant Railway Company a parcel containing six pairs of boots weighing 19 lbs. for carriage from Birmingham to Wilton, near Salisbury, on the terms that the Company should not be liable for loss, etc., except upon proof that the loss, etc., arose from the wilful misconduct of the Company's servants. The parcel was never delivered to the consignee. Eventually an action was brought to recover the value of the parcel. The defendant Company offered no evidence. The County Court Judge decided in favour of the plaintiffs saying (p. 241) :—

"I must look at the whole of the circumstances which may be equally consistent with one or more theories. If any one of these theories is adopted which would relieve the Railway Company from liability under the contract the claim certainly could not succeed, but if there is evidence strongly preponderating in favour of one of those theories which in the absence of reasonable explanation by the Company would fix them with liability, I am entitled to act upon it. There is, in my opinion, evidence here which justifies me in finding, as I do, wilful

(1) (1921) 2 K. B. 237; 90 L. J. K. B 644; 125 L. T. 44; 26 Com. Cas 84; 65 S. J. 172; 37 T. L. R. 117.

misconduct on the part of the defendants."

The Divisional Court reversed this judgment.

The plaintiffs appealed. Bankes, L. J., said (p. 243):—

"I pass now to consider the point which was taken in the County Court,...whether the evidence laid by the appellants was such as to justify an inference that the parcel was lost owing to the wilful misconduct of the Railway Company's servants. If there was evidence upon which the learned County Court Judge could properly draw that inference this Court cannot interfere with his decision. The learned Judge, in my opinion, directed himself quite correctly when...he said: 'If there is evidence strongly preponderating in favour of one of such theories which, in the absence of reasonable explanation by the Company, would fix the defendants with liability, I am entitled to act upon it.' That legitimate inference from established fact is evidence for the purpose of applying the above direction to the present case is, I think, clear beyond doubt...Although the learned Judge...was undoubtedly entitled to draw inferences from the facts proved before him, the inferences must be such as could legitimately be drawn from the facts. If the facts are such that no reasonable man could draw a particular inference from them or if the particular inference is such as to be equally consistent with non liability and with liability, then the party who relies on the inference to discharge the onus of proof of establishing liability fails."

After discussing the evidence the learned Lord Justice came to the conclusion that there were no materials in the case upon which a charge of bad faith could be sustained. In the absence of any evidence of bad faith the evidence adduced for the appellants was not in his opinion capable of the inference that the parcel must have been lost owing to the wilful misconduct of the defendants' servants. The evidence left the question entirely open as to the cause of the loss. Scrutton, L J., said (pp. 249, 250):—

"It is to be noted that the appeal being from a County Court Judge, who is the sole judge of fact, the question is not whether the Court on such evidence as there was would have come to the same conclusion, but whether there is any evidence which could reasonably, if accepted, be the basis of such a conclusion...In my opinion it is impossible to lay down any general rule as to the facts from which one can infer in the absence of explanation of loss, 'loss by wilful misconduct of the Company's servants.' It must depend on the nature of the subject-matter and of the stage of the transit reached in each particular case. For instance, if the Company were carrying an elephant and would say nothing as to why it was not delivered, as an elephant can hardly disappear without a Company's servant knowing of it, one would easily find that it was lost either by wilful misconduct of the Company's servants, or by their wilfully not at once informing some superior that it had disappeared when it could easily be traced and recovered. On the other hand if a small parcel disappeared from a place to which both the Company's servants and outsiders had free access, in a time of a great pressure of business, it would be impossible to draw any inference as to what had really happened...In an action by the same goods owner against the Midland Railwey Company [*Smith Limited* v. *Midland Railway Co.* (2)] this Court felt able to find wilful misconduct of the Company's servants from the fact that part of the contents of a parcel had disappeared, the parcel having been opened, re packed with rubbish, and done up again. In such a case such an operation must have taken sometime, and have been carried out on the Company's train by a person who could calculate on being free from disturbance for the considerable time taken in unpacking and re packing, facts which pointed strongly to theft by a servant of the Company."

On consideration of the evidence the learned Lord Justice came to the conclusion that there were too many suppositions and assumptions in the case for the goods owner, and that there was no ground on which it could reasonably be found as a fact that the goods were lost by wilful misconduct of the Company's servants. Atkins, L. J, dissented. He considered there was *prima facie* evidence of conversion or detention and the defendants' long continued failure to give any explanation as to what had happened to the goods coupled with the inadequate

(2) (1919) 88 L. J. K. B. 868; 121 L. T. 27.

explanation of the delay afforded some evidence upon which the Judge could find that there was a *prima facie* case that the conversion or detention was not innocent but wilful.

We are not restricted to finding whether there was any evidence which could reasonably if accepted be the basis of the conclusion of the learned Judge in the Court below. It is competent to us to find that on the facts proved the inference drawn was not the right one.

Now, it is admitted that the bales were packed in a waggon at Nagpur which was sealed. Thereafter the waggon would be on the Railway line to which ordinarily the public would not have access unless they were travelling as passengers in passenger trains. Whoever committed the theft must certainly have taken sometime over it and must have come prepared with the materials for re-sealing the waggon. Even after the bales were removed and the waggon re sealed, the task of secretly removing three bales each weighing 245 lbs. was not an easy one, and several persons must have taken part in the theft. Therefore, the whole operation must have been carried out on the train by persons who could calculate on being free from disturbance for a considerable time, and that points strongly to the theft being committed either by or with the connivance of the Company's servants as pointed out by Scrutton, L. J., in considering the case of *Smith Limited* v. *Midland Railway Company* (2). I do not follow the argument of the learned Judge in differentiating that case, because the parcel lost was a small one. The operation of unpacking and re-packing a small parcel could not take so long or require so much preparation as the removal of these bales. In my opinion the facts proved strongly preponderate in favour of the theory which, in the absence of reasonable explanation by the defendants, would fix them with liability. Even assuming that there was a gang of train thieves operating somewhere between Nagpur and Amritsar, who had made preparations for breaking open waggons and re sealing them with seals, resembling the original ones, it would make no difference, though if this were the case one would have expected that there would be evidence of similar thefts. In my opinion a legitimate inference is, that the waggon was broken open at Nagpur where the goods could be disposed of without exciting any suspicion, and, even if it occurred after the waggon left Nagpur, that either some of the defendants' servants were concerned in the theft or the theft occurred owing to the wilful neglect of the defendants' servants. They would be equally liable if the theft took place in this manner on the other lines even if the plaintiffs' contention that the goods on those lines were not carried at owner's risk were held good. That point, however, need not be decided. I do not think that the fact that the difference between the seals was not discovered until the waggon reached Amritsar points inevitably to the conclusion that the theft must have taken place between Umballa and Amritsar. The inspection of the seals on the journey was probably superficial, and as long as the seal did not appear to have been tampered with, the fact that the seal on the opposite side of the waggon did not correspond would probably not be noticed, unless the two seals were inspected one immediately after the other. It would have been better if the original seal N. G. P., as it was found on arrival at Amritsar had been produced before the Court.

There being a *prima facie* case against the defendants it was for them to offer some resonable explanation in order to escape liability. They have offered no explanation The learned Judge says :—

"It is inconceivable that the Railway Company, however careful and prudent, could have taken such care as to make it impossible for any thief to commit a theft."

Put so widely this proposition may be accepted. But it is certainly conceivable that the Railway Company could have taken such care as to make it impossible for such a theft as occurred in this case to take place, and if they suggested that they could not have taken such care they should have led some evidence to support the suggestion. Their attitude throughout has been dilatory and unbusinesslike.

As Scrutton, L. J., pointed out in *Smith Limited* v. *G. W. Railway Co* (1), it is regrettable if Railway Companies take up

the positoin of actively resisting all claims for information and assistance from those whose goods are stolen, instead of giving their consignors and consignees all possible information as to the disappearance of the goods. And I may refer to the words of Atkin, L. J., (p. 259) :—

"If a bailee says, I have received your chattel; I have not delivered it in the terms of the bailment; and I will give you no information as to what I know about it, or what steps I have taken to find out about it, he suffers no hardship if unkind inferences are drawn against him. This judgment is far from throwing the onus upon him which rests upon the plaintiff, and it only requires the performance of very ordinary business obligations in the way of explanation to secure the very large measure of relief stipulated for in the contract of carriage."

No doubt Bankes, L. J., acquitted the defendant Company of bad faith, and I should not go so far as to impute bad faith to the present defendants, but I think they failed to recognise how strong the case was against them, and the necessity there was for some action on their part to rebut it.

In my opinion the appeal should be allowed, and there should be judgment for the plaintiffs for Rs. 1,582-7-0 with interest at six per cent. from the 1st February 1919 till judgment with costs throughout and interest on judgment at six per cent.

SHAH, J.—I concur.

J. P. *Appeal allowed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 20 OF 1918.

May 20, 1919.

Present :—Justice Sir Syed Shamsul Huda, Kt.

MEHER ALI KHAN—DEFENDANT No. 2—APPELLANT

versus

Srimati AROATANNESSA BIBI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Part performance, applicability of, equitable doctrine of– Doctrine applicable whether right to claim specific performance was or was not subsisting.

In a suit for joint possession of land on declaration of title the defendant admitted that the land had fallen exclusively to the share of the plaintiff's father but alleged that the latter had exchanged that land with the defendant and received from her another piece of land that had fallen to her share. The lower Appellate Court found the story of exchange to be true but held that without a registered document the exchange was void :

Held, that notwithstanding the absence of a registered document, on the equitable doctrine of part performance, the plaintiff as heir of her father could not question the validity of the exchange. [p. 68, col. 1.]

That the doctrine was applicable without reference to the question whether the right to claim specific performance was or was not subsisting. [p 168, col. 2.]

Appeal against a decree of the Subordinate Judge, Third Court, Hooghly, dated the 14th September 1917, modifying that of the Munsif, First Court at Uluberia, dated the 2nd May 1916.

Babu *Nogendra Nath Ghose*, for the Appellant.

Babu *Monmotha Nath Roy*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for joint possession on declaration of title. Plaintiff alleged that the land described in schedule *ka* of the plaint belonged to her grandfather and that upon his death by a partition among his heirs her father Gholam Hossain got the whole of plot *kha*. She accordingly as the daughter of Gholam Hossain claimed her legal share of this plot according to the Muhammadan Law of inheritance. It has not been disputed that if plot *kha* belonged exclusively to Gholam Hossain, plaintiff is entitled to the share claimed by her. Defendant No. 2 who contested the suit on the plea that he had purchased the land in suit from defendant No. 3, admitted that this plot had fallen exclusively to the share of Gholam Hossain upon partition but alleged that Gholam Hossain subsequently exchanged this plot with defendant No. 3 and received from her in exchange another piece of land that had fallen to her share. The learned Munsif found that the land on partition had fallen to the share of Gholam Hossain, that the stroy of exchange alleged by the defendant had not been established, that even if the exchange really took place it was ineffectual without a registered deed and lastly that the fact

of purchase by defendant No. 2 from defendant No. 3 had not been satisfactorily proved. Upon these findings the learned Munsif decreed the plaintiff's suit. On appeal by defendant No. 2 the decree was upheld. The lower Appellate Court, however, found the story of exchange to be true but agreed with the Munsif that without a registered document the exchange was void. He expressed no clear opinion on the question whether the defendant No. 2 had succeeded in proving his purchase from defendant No. 3. The defendant No. 2 has preferred this appeal and on his behalf it is argued that notwithstanding the absence of a registered document on the equitable doctrine of part performance plaintiff as the heir of Gholam Hossain cannot question the validity of the exchange. It seems to me that on the authority of *Walsh* v. *Lonsdale* (1) and the decisions of this Court in which the principle laid down in that case was followed, this contention must prevail. It is, however, urged on behalf of the respondent that the findings are not sufficient to justify the application of the doctrine. Reliance is placed on the decision of Mr. Justice Farwell in *Manchester Brewery Co.* v. *Coombs* (2) that the doctrine is applicable only in those cases where specific performance can be obtained between the same parties in the same Court and at the same time as the subsequent legal question falls to be determined. On this point there are no findings and I was at first inclined to send the case back but after looking to the more recent authorities and having heard further arguments on the point I am of opinion that such a course is not necessary. It is true that in some of the earlier cases decided by this Court, this limitation on the applicability of the doctrine was distinctly recognised. See *Bibi Jawahir Kumari* v. *Chatterput Singh* (3) *Secretary of State for India* v. *Forbes* (4) and *Singheeram Poddar* v. *Bhagbat Chander Nundi* (5). However, in the case of *Puchha Lal* v. *Kunj Behari Lal* (6) where, as in the present case, the findings were not sufficient to show whether a suit for specific performance could be maintained. Jenkins, C. J., observed as follows:—"It is quite true that the question whether the defendants, first party, were entitled to bring a suit for specific performance in vindication of their rights was not debated before the lower Appellate Court, but there is no matter brought to our notice which can throw any serious doubt upon the defendants' right to complete their right by such a suit"

The same remark applies to this case.

In a very recent case to which I was a party a different view was taken but in that case the later decisions bearing on the point to which I am about to refer were not placed before the Court.

In *Mahomed Musa* v. *Aghore Kumar* (7) their Lordships of the Judicial Committee laid down the principle without any such limitation. Their Lordships observed quoting the *dictum* of Sir Strange in *Potter* v. *Potter* (8) that a contract if confessed or carried in part into execution will be binding on the parties and carried into further execution in equity. In *Khagendra Nath Chatterjee* v. *Sonatan Guha* (9) Sanderson, C.J., (Roe, J. P) and Mr. Justice N. R. Chaterjea applied the doctrine without any reference to the question whether the right to claim specific performance was or was not subsisting.

It was argued on behalf of the respondent that although their Lordships of the Judicial Committee did not expressly refer to this question the case of *Potter* v. *Potter* (8) on which they rely recognises this limitation of the doctrine. This is no doubt correct as will appear from the following passage in the judgment of the Master of the Rolls.

"It will be the same, where vendor comes for specific performance and the agreement is admitted. No doubt, but on such admission

(1) (1882) 21 Ch. D. 9; 53 L. J. Ch 2; 46 L. T. 853; 31 W. R 109.
(2) (1901) 2 Ch. 608; 70 L. J. Ch. 814; 82 L. T. 347; 16 T. L. R. 299
(3) 2 C. L. J. 313.
(4) 17 Ind Cas. 180; 16 C. L. J. 217.
(5) 6 Ind. Cas. 632; 11 C. L. J. 543,
(6) 20 Ind. Cas 803; 18 C. W. N. 445; 19 C. L. J. 213.
(7) 28 Ind Cas. 930; 42 C. 801; 17 Bom. L. R. 420; 21 C. L. J. 231; 28 M. L. J. 548; 19 C. W. N. 250; 13 A L. J. 229; 17 M. L T 143; 2 L. W. 258; (1915) M. W. N. 621; 42 I. A. 1 (P. C.).
(8) (1750) 1 Ves Sen 437 at p. 441; 27 E R. 1128.
(9) 31 Ind. Cas. 987; 20 C. W. N. 149.

it will be considered as an agreement from the time of transaction; so that on a bill by either party, the Court must have decreed execution, the estate as testator's from June 1744, and the money the vendor's".

But at the same time the fact cannot be overlooked that their Lordships of the Judicial Committee were dealing with an agreement entered into 30 or 40 years before the suit and if the question of limitation for enforcing a claim for specific performance was considered material their Lordships would have referred to it. There is the further fact in this case that the defendant No. 2 is in possession of the land in suit. If the plaintiff's claim is to be decreed by reason of the transaction not being clothed in those legal forms to which finality attaches after the bargain has been acted upon, she could only do so in equity by making restitution in respect of the property which Gholam Hotsain obtained from defendant No. 3. Such restitution is now impossible by the reason of the fact that the property has been sold to a third party. I, therefore, think that on these grounds the plaintiff is not entitled to a decree.

It is next argued on behalf of the respondent that the plaintiff had denied in the plaint that the defendant No. 2 was a *bona fide* purchaser from defendant No. 3 and although the First Court decided this issue against the plaintiff, she was entitled to a decision of the Appellate Court on the point. It seems to me that there is no substance in the argument. The lower Appellate Court expressly find that defendant No. 2 was in possession and not defendant No. 3 and clearly meant to find that the defendant No. 2 was a *bona fide* purchaser. Besides even as *benamidar* of defendant No. 3 he is entitled to take any defense that the defendant No. 3 might have taken and it is immaterial whether the title vests in the one or the other. *Gur Narayan* v. *Sheo Lal Singh* (10).

Upon this view of the case I decree the appeal and dismiss the plaintiff's suit. But in view of the fact that if this question had been raised before the lower Appellate Court an appeal to this Court might not have been necessary, the defendant-appellant though successful must pay the costs of the respondents in this appeal. He is, however, entitled to the costs of the Courts below from the plaintiff.

B. N.

Appeal allowed.

(10) 49 Ind. Cas. 1; 17 A. L. J. 66; 36 M. L. J. 68; 9 L. W. 830; 1 U. P. L. R. (P. C.) 1; 46 C. 566; 23 C. W. N. 521; 12 Bur. L. T. 122; 46 I. A. 1 (P. C.).

BOMBAY HIGH COURT.

LETTERS PATENT APPEAL NO. 18 OF 1921.

December 2, 1921.

Present:—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

SITABAI ZUKAPPA MHETRE—PLAINTIFF—APPELLANT

versus

KESHAVRAO PARVATRAO KATE—DEFENDANT—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 182—Step-in-aid of execution—Instalment decree—Several instalments due—Application for recovery of one instalment, whether saves time.

Where a decree directs instalments to be paid on particular dates an application which asks for the assistance of the Court for the recovery of one of several instalments due at the date of the application is a step-in-aid so as to start a new period of limitation with regard to all the instalments then due. [p. 170, col. 2.]

Letters Patent Appeal from the decision of Mr. Justice Pratt, in Appeal No. 32 of 1921, against an order passed by the First Class, Subordinate Judge at Poona, in Darkhast No. 33 of 1919.

Mr. *Coyajee* (with him *J. R. Gharpure*), for the Appellants.

Mr. *V. D. Limaye*, for the Respondent.

JUDGMENT.—The plaintiffs in this suit got a decree on the 24th July 1908 for Rs. 6,603 with interest on Rs. 6,500 at twelve annas per cent. per mensem. The decree was made payable by instalments of Rs. 1,000 each. The first instalment was to be paid at the end of Ashad Shake 1831 corresponding with July 1909. Apparently nothing further was done by the plaintiffs although

no instalments had been paid under the decree until the 7th of April 1914 when an order was made making the decree final for the sum become due. It is strange that that order was made as it was absolutely unnecessary. But it has been made, and, therefore, it must be considered that that order kept the decree alive.

In December 1915 the first Darkhast was filed. At that time all the instalments payable under the decree had become due. But we have not been told to what instalments the Darkhast related. The Judge says that that Darkhast fell through on account of the plaintiffs' laches. But it is admitted that the two instalments for 1909, 1910, with interest had been paid. The next Darkhast was filed in November 1918 to recover the instalments which fell due in 1911, 1912 and 1914. The Judge said that thatDarkhast was evidently time-barred, and it would be so unless the Darkhast of 1915 could be considered as a step-in-aid of execution with regard to the instalments which were sought to be recovered in the Darkhast of 1918. However that may be, execution proceeded under the Darkhast of 1918 and recoveries were made. It appears from the Darkhast that the instalments for 1914, 1915, were first entered in it but were afterwards struck out, so that the Court did not pass any order with regard to those instalments by which the plaintiffs' right to recover them was reserved.

The present Darkhast was filed in 1919 to recover the instalment for 1914, 19 5. These instalments were clearly barred at the date of the Darkhast, unless the previous Darkhast of 1918 could be considered as a step-in-aid in respect of all the instalments then due, and a point arises for which we can find no direct authority.

We have been referred to the decision in *Nepal Chandra Sadookhan* v. *Amrita Lall Sadookhan* (1) where the decree directed not only that possession should be given by the execution-debtor but also that he should pay costs. The plaintiff first sought execution with regard to the costs, reserving his right to execute the decree for possession, and three years later when he sought execution of the decree for possession he was met with the contention that he ought to have done so when he executed the decree for costs. But this contention was disallowed on the ground that an application for partial execution of a decree would be a step in aid with regard to the whole decree. No doubt there is a considerable difference between a decree which directs several things to be done by the defendant without specifying any particular date or dates for their performance, and a decree which directs instalments to be paid on particular dates; but we see no reason why a Darkhast, which asks for the assistance of the Court for the recovery of one of several instalments due at the date of the Darkhast, should not be considered as a step in aid so as to start a new period of limitation with regard to all the instalments then due. In our opinion the appeal should be allowed and the Darkhast should proceed with costs throughout.

J. P.

Appeal allowed.

(1) 26 C. 918; 13 Ind. Dec. (N. S.) 1169.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 96 OF 1920.

July 8, 1921.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Buckland.

JOGENDRA NATH SAHA CHAUDHURY AND OTHERS—DEFENDANTS—APPELLANTS

versus

Maharaja JAGADINDRA NATH ROY BAHADUR—PLAINTIFF AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 18, 21—Jurisdiction, territorial, doubt as to—Decree, setting aside of—Bengal Tenancy Act (VIII of 1885), s. 103-B (3)—Record of Rights—Presumption as to correctness—Burden of proof—Adverse possession—Land subject to destructive action of river—Diluvion and re-formation—Conditions to be fulfilled Landlord and tenant—Adverse possession, nature of.

In view of the provisions of sections 18 and 21 of the Civil Procedure Code, the decree of a Trial Court cannot be set aside on the mere ground that there is a doubt whether the Court had territorial jurisdiction over the subject-matter of the suit unless there has been a failure of justice [p. 172, col 2.]

Under the provisions of section 03-B (3 of the Bengal Tenancy Act the entries in a finally published Record of Rights must be presumed to be correct

until proved by evidence to be incorrect, and the burden of proof lies *prima facie* on the person seeking to establish their incorrectness But the question on whom the initial onus lies loses its importance and becomes immaterial when each of the contesting parties adduces evidence in support of his case. [p. 172, col 2: p. 173, col. 1]

The question of the acquisition by adverse possession of title to property which is subject to the destructive action of a river should be investigated on the basis of when diluvion commenced, and when re-formation took place, and the person setting up such a title must prove, either that he had by adverse possession acquired such title since the date of re-formation and before the commencement of litigation, or that he had acquired such title to the extinction of the title of the true owner before the date of the diluvion. [p 174, col ; p 175, col. 1]

In a case between landlord and tenant, to render the possession of the latter adverse to the former, such possession must be actual, visible, exclusive, hostile and continued during the time necessary to create a bar under the Statute of Limitation, because the tenant's possession of land can commence to be adverse only when the title adverse to the landlord is asserted, or the landlord becomes aware of the encroachment [p. 175, cols 1 & 2.]

Appeal against a decree of the Officiating Subordinate Judge, First Court, Pabna and Bogra, dated the 29th February 1920.

FACTS appear from the judgment.

Dr. *Dwarka Nath Mitter* (with him Babu *Manindra Nath Banerjee*), for the Appellants. My first contention is that the subject-matter of the litigation being outside the local limits of the jurisdiction of the Subordinate Judge of Pabna, the Trial Court had no power to decide the suit. Secondly, the Court below ought to have found that the land in dispute is comprised in the *patni taluk* held by me under the plaintiff. It is so entered in the finally published Record of Rights prepared under Chapter X of the Bengal Tenancy Act. It is for the plaintiff to establish by positive evidence that the entry in the Record of Rights is incorrect. See section 103B (3) of the Bengal Tenancy Act. Lastly, my submission is that under no circumstances can my title by adverse possession be defeated by the plaintiff. Since re-formation and previous to the diluvion the land is, and was in, my possession. My title by adverse possession is, therefore, complete and indefeasible.

Babu *Dwarkanath Chakravarty* (with him Babus *Ramakanta Bhattacharjee*, *Jotindranath Lahiri*, *Krishna Kamal Maitra* and *Heramba Lal Sanyal*), for the Respondents —The first contention as to jurisdiction is unsubstantial. On the evidence, if everything is taken in favour of the defendants, it is at most a case of doubtful territorial jurisdiction. It has not even been suggested how the defendants are prejudiced by this assumption of jurisdiction. See sections 18 and 21 of the Civil Procedure Code. Refers to *Midnapur Zemindary Co.* v *Kumar Naresh Narain Roy* (1). As regards the identity of the disputed land with the Mauza Khairaddi Kondi, the evidence is conclusive in our favour. The question of onus hardly arises in the present appeal because the Trial Court came to its conclusions on the point after a careful consideration of the evidence adduced by both the parties. Refers to *Kundan Lal* v *Begam un-nisa* (2) and *Seturatnam Aiyar* v. *Venkatachala Gounden* (3). On the question of adverse possession my submission is that the defendants having failed to establish that their alleged title by adverse possession was complete before the diluvion began and was completed after the re-formation, the title to the land remained in the real owner and the defendants acquired nothing by their possession. Refers to *Secretary of State for India* v. *Krishnamoni Gupta* (4). Moreover, the other essentials of adverse possession, namely, continuity, publicity and extent etc., were also absent in the present case. Refers to *Radhamoni Debi* v. *Collector of Khulna* (5), *Jogendra Nath Roy* v. *Baladeo Das* (6) and *Amrita Sundari* v. *Shera ud-din Ahmed* (7).

Dr. *Dwarka Nath Mitter* replied.

JUDGMENT.

MOOKERJEE, J.—The subject-matter of the litigation which has culminated in this appeal is a large tract of land known as Mauza Edalair Kandi otherwise called

(1) 65 Ind. Cas. 833; 33 C. L. J. 497 at p. 499.
(2) 47 Ind. Cas. 337; 22 C. W. N. 937; 8 L. W. 233 (P. C.).
(3) 56 Ind. Cas. 117; 47 I. A. 76; 43 M. 567; 1920) M. W. N. 6; 27 M. L. T. 04; 11 L. W. 399; 38 M. L. J. 476; 22 Bom. L. R. 578; 18 A. L. J. 707; 25 C. W. N. 485 P. C.).
(4) 29 C. 518; 29 I. A. 104; 6 C. W. N. 617; 4 Bom. L. R. 537; 8 Sar. P. C. J. 269 (P. C.).
(5) 27 C. 943; 27 I. A. 186; 4 C. W. N. 597; 2 Bom. L. R. 592; 7 Sar. P. C. J. 714; 14 Ind. Dec. (N. S.) 617 (P. C.).
(6) 12 C. W. N. 127; 35 C. 96; 6 C. L. J. 735.
(7) 29 Ind. Cas. 156; 19 C. W. N. 565.

Khairaddi Kandi. The plaintiff-respondent, the Maharaja of Natore, claims the disputed property as comprised in his Zamindari which formerly bore Touzi No. 429 of the Collectorate of Rajshahi and now bears Touzi No. 2166 of the Collectorate of Pabna. In 1910, in the course of Cadastral Survey proceedings under the tenth Chapter of the Bengal Tenancy Act, a dispute arose between the plaintiff and the defendants, who claimed that they were in possession of the land now in suit as comprised in a *patni taluk* known as Goalnagar Maldah held by them under the Maharaja of Natore. The objection taken by the defendants under section 103-A of the Bengal Tenancy Act was allowed by the Assistant Settlement Officer on the 5th September 1911. The Record of Rights drawn up on this basis was finally published on the 1st August 1914. On the 14th April 1919, the Maharaja of Natore instituted the present suit for establishment of his title, for declaration that the disputed village was not comprised in the *patni taluk* held under him by the defendants, for recovery of possession with mesne profits, and for incidental reliefs. The defendants resisted the claim on the ground that the Revenue Authorities had correctly held that the disputed village was comprised in their *patni*, and that if it were found to lie beyond the ambit of the *patni*, the defendants had acquired a good title by adverse possession for the statutory period. The defendants further urged that the Subordinate Judge of Pabna had no jurisdiction to entertain the suit as the land was situated within the District of Faridpur. The Subordinate Judge overruled the contentions of the defendants and decreed the claim with costs. On the present appeal, the decision of the Subordinate Judge has been assailed on three grounds, namely, first, that the Trial Court had no jurisdiction to entertain the suit; secondly, that the land is comprised in the *patni taluk* held by the defendants and thirdly, that if the land be found to have been situated beyond the limits of the *patni taluk*, the defendants have acquired an indefeasible title by adverse possession for the statutory period.

The first ground is plainly unsubstantial. Section 13 (1) of the Bengal Civil Courts Act, 1887, lays down that the Local Government may, by notification in the official Gazette, fix and alter the local limits of the jurisdiction of any Civil Court under the Act. The jurisdiction list dated the 3rd June 1903 shows that the District of Pabna, where the Subordinate Judge exercises jurisdiction, comprises all the *mouzahs* (inclusive of the *mouza* in suit) demarcated and surveyed in the Survey of 1850-55. Consequently, no weight can be attached to the contention of the defendants that the river Padma is the boundary between the districts, and that the river has so shifted in recent years as to transfer the disputed land from the jurisdiction of the Pabna Court to the jurisdiction of the Faridpur Court. But even if it were conceded that the shifting river should be accepted as the boundary for the purpose of determining the jurisdiction of a Court under the Bengal Civil Courts Act, 1887, the objection taken by the defendants is futile. Their contention is that the old main stream of the river to the south has become a shallow small stream and an old shallow stream to the north has become the new main stream. The evidence adduced in support of this allegation is not satisfactory, and certainly not conclusive. As no map was prepared for this purpose, it is impossible for us to say which is the main channel and which is the subsidiary channel of the river. Besides, as was pointed out by this Court in the case of *Midnapur Zemindary Co.* v. *Kumar Naresh Narain Roy* (1), where a similar objection was unsuccessfully urged, the contention of the defendants cannot possibly prevail in view of the provisions of sections 18 and 21 of the Civil Procedure Code, even if it be assumed that it is doubtful whether the property lay within the jurisdiction of the Pabna Court or the Faridpur Court, the decree of the Subordinate Judge cannot be set aside, as it has not been suggested, much less established, that there has been a failure of justice. The first contention must consequently be overruled.

The second ground raises the question, whether the disputed village which is admittedly known as Elalair Kandi or Khairaddi Kandi is comprised in the *patni taluk* Goalnagar Maldah which is held by the defendants under the Maharaja of Natore. The burden of proof lies *prima*

facie upon the plaintiff to establish the incorrectness of the entry made in the finally published Record of Rights which must be presumed to be correct until proved by evidence to be incorrect under sub-section (3) of section 103 B of the Bengal Tenancy Act. But for this circumstance, it could not be presumed that because the defendants hold a *patni taluk* under the plaintiff, a particular tract in dispute is comprised within the tenure. *Protap Chandra Roy* v. *Judhister Das* (8), *Sheodeni Foy* v. *Chatoorbhuj Foy* (9), *Gopini Debi* v. *Lokenath Tewari* (10). But where, as in the present case, evidence has been adduced by each of the contestants in support of their respective cases and the relevent facts are before the Court, the question of burden of proof is immaterial, and importance should not be attached to the question on whom the initial onus lay; see the observations of Viscount Haldane in *Kundan Lal* v. *Begam-un-nisa* (2) and of Sir Lawrence Jenkins in *Seturatnam Aiyar* v. *Venkatachala Gounden* (3). When we approach the evidence from this standpoint, what is the position? Two facts are undisputed, namely, first that the disputed tract is situated within the Zemindary of the plaintiff, and secondly, that the defendants hold under the plaintiff a *patni taluk* known as Goalnagar Maldah. The dispute is whether the village in controversy which is known as Edalair Kandi or Khairaddi Kandi is comprised within the *Patni Taluk* Goalnagar Maldah. The plaintiff asserts that the answer should be in the negative. The defendants contend that Goalnagar Maldah includes Edalair Kandi or Khairaddi Kandi and also Maldah. The Subordinate Judge has found that the case for the defendants has been completely negatived by the evidence adduced on behalf of the plaintiff. The maps exhibited in the Trial Court, namely, the Survey maps made in 1854 of Edalair, Kandi, Khairaddi Kandi, Maldah, Dhalah and Dhurai as also the Dearah Survey map made in 1369 show conclusively that Edalair Kandi or Khairaddi Kandi is a distinct *mouzah* from Maldah. This is also borne out by the *mouzawar* register and the *mahalwar* register of Pergana Chapila and the general register of revenue-paying lands. It is further corroborated by a large body of oral evidence on the record, and for our present purpose it is sufficient to refer specially to the statement of Raj Mohan Das, one of the witnesses examined by the defendants, who asserted in examination-in-chief that Khairaddi Kandi before diluvion was high enough to be beyond the reach of water even during the rains, and that to its north lay the Mouzah Atravi and to its south lay the Mouzah Goalnagar Maldah. There could be no doubt as to the meaning of the statement made by the witness, because he added that there were pillars to demarcate the boundary between Khairaddi Kandi and Goalnagar Maldah. There can, in our opinion, be no room for doubt that the Subordinate Judge has correctly held that Goalnagar Maldah is merely another name for Maldah and that Edaliar Kandi or Khairaddi Kandi is a quite distinct village. It is not disputed that one Bhairab Chandra Mazumdar was the holder of the *patni* under the Maharaja of Natore and that it ultimately passed into the hands of Fakruddin Ahmed *alias* Azimuddin Chaudhury. The *patni taluk* was sold for arrears of rent, and on the 5th December 1881, the defendants became purchasers at the execution sale in the name of their officer Beni Madhab Chaki. The *patni taluk* which was thus brought to sale was expressly stated in the sale certificate as situated in Goalnagar Maldah, *prima facie*, then, the defendants are entitled to possession of lands comprised in Goalnagar Maldah, and they must consequently prove that the disputed land which is known as Edalair Kandi or Khairaddi Kandi is part and parcel of Goalnagar Maldah. This they have signally failed to establish. Reliance has been placed by the defendants on the plaint dated 13th June 1882, the decree of the Trial Court dated 17th January 1883, and the decree of the Appellate Court dated 21st September 1883 in a suit instituted by the Official Trustee of Bengal as trustee to the estate of one Pogose of Calcutta against some persons for recovery of possession of twelve *bighas* of land. In the plaint it was stat-

(8) 23 Ind. Cas. 69; 19 C. L. J. 408; 19 C. W. N. 143.
(9) 8 Ind. Cas. 785; 12 C. L. J. 376.
(10) 11 Ind. Cas. 693; 19 C. W. N. 140.

ed that the lands then in dispute were situated in "Goalnagar Maldah commonly called Khairaddi Kandi." The title of Pogose is, however, traced to an execution sale held on the 19th November 1879 for the realisation of a rent decree obtained by Pogose against Fakruddin Ahmed *alias* Azimuddin Chaudhury. The subject-matter of that sale was land and buildings of what was known as the Maldah Factory, described as situate in Mouzah Khairaddi Kandi. This clearly does not establish that Khairaddi Kandi was in fact identical with Goalnagar Maldah; indeed, it may be a matter for controversy whether notwithstanding the comprehensive terms of section 13 of the Indian Evidence Act as explained in the decision of the Judicial Committee in *Dinomoni Chowdhrani* v. *Brojo Mohini Chowdhrani* (11) the litigation between Pogose and his adversaries could be treated as an instance in which the right now in dispute was claimed, recognised or exercised. Apart from this, we have the fact that notwithstanding the sale of the factory on the 19th November 1879, the *patni* was sold at the instance of the Maharaja of Natore nearly two years later on the 5th December 1881. We agree with the Subordinate Judge that this tends to show that Azimuddin Chaudhury held the factory and the *patni taluk* in two distinct rights; the first passed to the Official Trustee as Trustee to the estate of Pogose, the second ultimately passed to the present defendants. This is also confirmed by the circumstance that the objection urged to the claim of the Official Trustee that his title had been superseded by that of the auction-purchaser of the *patni taluk* was not upheld. The case for the defendants is not further advanced by the recitals (assuming them to be admissible in evidence) contained in the *darpatni* lease granted by one of them to Prosanna Kumar Ganguly on the 12th September 1882, and, the decree dated 6th November 1903 in a partition suit amongst members of their family; these recitals do not contain even an assertion of right or claim with regard to the property now in suit, but only an allegation that a tract of land is known by one of three alleged names "Mouza Goalnagar Maldah *alias* Edalair Kandi commonly called Khairaddi Kandi." There is, in our opinion, no escape from the conclusion that the Subordinate Judge has correctly held that the lands of Edalair Kandi or Khairaddi Kandi are wholly outside the lands of the *Patni taluk* Goalnagar Maldah or Maldah held by the defendants under the Maharaja of Natore. The second ground consequently fails.

The third ground raises the question, whether the defendants have acquired indefeasible title to the disputed land by adverse possession for the statutory period. The hypothesis that they have acquired such title is found hedged all round by inextricable difficulties, when we bear in mind a fundamental fact, which is admitted by both the parties, namely, that the disputed site has been subject to the destructive action of the river Padma. The case for the plaintiff is that the diluvion commenced shortly after the revenue survey operations of 1854 and that the land was re formed towards the end of 1907 or the early part of 1908. The case for the defendants is that the diluvion began only so late as 1886, and that the land was re formed in 1904. The determination of the question, when the diluvion commenced and when the re-formation took place, depends upon the appreciation of conflicting oral evidence. The Subordinate Judge has, upon a careful analysis of that evidence, held that the dates indicated by the respective parties cannot be accepted as absolutely correct. He has found that the testimony of the witnesses points to the conclusion that the diluvion commenced about the year 1890 and that the re formation took place during the early months of 1908. The evidence has been placed before us, and we see no reason to differ from the view adopted by the Subordinate Judge. The question of acquisition of title by adverse possession must consequently be investigated on this basis. In this connection, it is important to bear in mind the decision of the Judicial Committee in *Secretary of State for India* v. *Krishnamoni Gupta* (4) which overruled the case of *Koly Churn Sahoo* v. *Secretary of State for India* (12) decided by a Full Bench of

(11) 20 I. A. 24; 29 C. 187; 6 C. W. N. 386; 12 M. L. J. 88; 4 Bom L. R. 167; 8 Sar. P. C. J. 224 (P. C.).

(12) 6 C. 725; 8 C. L. R. 90; 4 Shome L. R. 95; 3 Ind. Dec. (N. S.) 470.

this Court in 1881. Lord Davey relied upon the earlier decision of the Judicial Committee in *Trustees & Agency Company v. Short* (13), in support of the proposition that on the dispossession of a trespasser by the *vis major* of the floods, the constructive possession of the land is in the true owner; in other words, the land after submersion becomes derelict, and so long as it remains submerged, no title can be made against the true owner. If we apply this elementary principle to the circumstances of the present case, it follows that the defendants, in order that they may succeed on the strength of title by adverse possession, must prove, either that they had by adverse possession acquired such title since the date of re-formation and before the commencement of this litigation, or, that they had acquired such title to the extinction of the title of the true owner before the date of the diluvion. As regards the first alternative, the defendants cannot possibly succeed, because at the date of the institution of the suit on the 14th April 1919, only eleven years had elapsed from the date of the re-formation. As regards the second alternative, the defendants are in a similar jeopardy. The best attested instances of alleged possession do not extend beyond the 3rd February 1881 consequently not more than nine years had elapsed when the diluvion took place in 1890. There is thus no escape from the conclusion that even if we assume that the defendants were in actual occupation, their possession did not extend over the statutory period of twelve years either before the diluvion or after the re formation. In addition to this, it is equally clear that the possession they allege does not satisfy the test formulated by Lord Robertson in *Radhamoni Debi* v. *Collector of Khulna* (5), namely, that the possession must be adequate in continuity, in publicity and in extent of area to take the title out of the true owner. Reference may also be made to the decision in *Jogendra Nath Roy* v. *Baladeo Das* (6), which is an authority for the proposition that the possession required must be actual, visible, exclusive, hostile and continued during the time necessary to create a bar under the Statute of Limitation. See also *Amrita Sundari* v. *Sherajuddin* (7). This is specially necessary in a case between landlord and tenant, because as explained in *Ishan Chandra* v. *Raja Ramranjan* (4) the tenant's possession of the lands encroached upon can commence to be adverse only when the title adverse to the landlord is asserted or the landlord becomes aware of the encroachment; this is essential to enable the tenant to acquire title to a limited interest by adverse possession thereof; see also *Gopal Krishna* v. *Lakhiram* (15), *Saroda Kripalala* v. *Akhil Chandra Biswas* (16), *Muthuraku Thevan* v. *Robert Gordon Orr* (17). The defendants thus find themselves in a situation of much embarrassment from the points of the view indicated and it is superfluous to investigate in detail how far the evidence of alleged possession is trustworthy, but we may add that no solid arguments have been advanced to shake the conclusion of the Subordinate Judge that evidence is on the whole unreliable. There is little doubt that so far back as in 1881, steps were taken by them to fabricate evidence of possession by the acceptance of collusive *kabuliyats* which either related to fictitious tenancies or to lands situated beyond the limits of Khairaddi Kandi *alias* Edalair Kandi but designedly misdescribed as comprised within the ambit of its boundaries. We agree with the Subordinate Judge that the defendants have signally failed to establish their alleged adverse possession of the disputed lands so as to extinguish the title of the true owner.

The result is that the decree of the Subordinate Judge is affirmed and this appeal dismissed with costs.

BUCKLAND, J.—I agree.

W. C. A. & N. H.

Appeal dismissed.

(13) (1888) 13 App Cas. 793; 58 L. J. P. C. 4; 59 L. T. 677; 37 W. R. 433; 53 J. P. 132.

(14) 2 C. L. J. 125.

(15) 14 Ind. Cas. 212; 16 C. W. N. 634.

(16) 41 Ind. Cas. 530; 28 C. L. J. 18; 21 C. W. N. 903.

(17) 10 Ind. Cas. 575; 35 M. 618; 21 M. L. J. 615; 10 M. L. T. 12.

VINAYAK KESHAV GULVE v. BALA SHIVRAM HINGNE.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 5 OF 1921.

December 8, 1921.

Present:—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

VINAYAK KESHAV GULVE—PLAINTIFF—APPELLANT

versus

BALA SHIVRAM HINGNE—DEFENDANT—RESPONDENT.

Adverse possession—Mortgaged land—Possession, when adverse—Suit for possession—Title in plaintiff—Burden of proof.

In case of mortgaged land there can be no question of adverse possession unless the party claiming adverse possession had come into possession not only against the mortgagor but also against the mortgagee.

In a suit for possession the onus lies on the defendant to prove that the plaintiff having proved title is not entitled to possession of the suit property.

Second appeal from the decision of the Joint Judge, Poona, in Appeal No. 327 of 1919, reversing a decree passed by the Joint Subordinate Judge at Khed, in Civil Suit No. 732 of 1917.

Mr. *Coyajee* (with him Mr. *P. B. Shingne*), for the Appellant.

Mr. *M. H. Mehta*, for the Respondents.

JUDGMENT.—The plaintiff sued for possession of the suit property on the ground that he had purchased it from one Shripati on the 7th February 1916. The suit property together with certain other property was once in the ownership of Tabaji, who will be found at the head of the pedigree at page 1 of the print. The property was mortgaged in 1880 by Shivram the son and Bhau the grandson of Tabaji. In 1882, Shivram redeemed his share while Bhau continued the mortgage by a fresh mortgage, Exhibit 34. If the property was claimed to be joint and remained joint, so that Bhau's mortgage was a mortgage of an undivided half, then it could be said that Shivram and Bhau were tenants in-common. But that is not the case which has been made out by either side. Clearly the title to half the property which was mortgaged by Bhau remained in Bhau, and the evidence shows that Shivram got possession of his half share. Thus the title remained in Bhau. The mortgagee, who was called as a witness, no doubt was unable to say when the mortgage was redeemed, but it is found that the mortgage has been redeemed. There can be no question of adverse possession unless the defendants had come into possession not only against the mortgagor, but also against the mortgagee. But they have not been able to prove that that is what has happened. It seems to me that the Appellate Court in reversing the decree of the lower Court has attached too much importance to the question of boundaries, although the learned Judge was satisfied that the disputed portion in this suit was in area about half of the land mortgaged in 1880, and that its assessment was about the half of what was then paid by the family. It seems, therefore, an inevitable deduction that the suit property is the share in the joint property which fell to Bhau after Shivram had redeemed half the joint property. There is no reason why Shivram's family who are admittedly in possession of one half should now seek to claim the other moiety without definitely proving that they had been holding that moiety adversely against the world for twelve years. I think, therefore, that the onus lay on the defendants to prove that the plaintiff having proved title was not entitled to possession of the suit property. Therefore, the appeal must be allowed, the decree of the lower Appellate Court set aside, and that of the Trial Court restored with costs in this Court and the Court below.

Inquiry as to mesne profits from the date of this Court's decree for three years or until possession is given.

J. P.

Appeal allowed.

Advocate High Court
Jammu & Kashmir
Srinagar

CALCUTTA HIGH COURT.
FULL BENCH.

FULL BENCH REFERENCE No. 1 OF 1921.
In re: CRIMINAL REVISION No. 518 OF 1921.
January 16, 1922.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, Justice Sir William Teunon, KT., Justice Sir Thomas Richardson, KT., Mr. Justice Newbould and Mr. Justice Ghose.

RAM SAGAR MONDAL—2ND PARTY—PETITIONER

versus

ALEK NASKAR—1ST PARTY AND BHOLA NATH MONDAL—2ND PARTY—OPPOSITE PARTIES.

Criminal Procedure Code (Act V of 1898), s. 133, proceedings under—Obstruction of public way—Defendant setting up title—Magistrate, jurisdiction of, if ousted—Discretion of Magistrate to require party to assert his claim by civil suit—Power of Magistrate to continue the proceedings on failure to do so—Construction of Statutes.

Where in proceedings under section 133, Criminal Procedure Code, arising out of an alleged obstruction of a way used by the public, the defendant sets up a claim of right the Magistrate's jurisdiction is not ousted even though he finds that the claim is made in good faith. [p. 183, col. 2; p. 186, col 2; p. 187, col. 2; p. 191, col. 2; p 195, col. 1.]

If the Magistrate does not consider such a claim of title to be well-founded, though he considers it to be made in good faith, he can, in the exercise of his discretion, allow the defendant a reasonable time to assert his claim by a civil suit and if the latter does not go to the Civil Court within such time or fails there, the Magistrate can continue the proceedings under section 133, Criminal Procedure Code. [p 183, col. 2; p. 186, col. 2; p. 187, col. 2; p. 191, col. 2, p 195, co. 1.]

On its own facts the case of *Belat Ali* v. *Abdur Rahim* (1) was not wrongly decided [p. 186, col. 2; p. 187, col. 1.]

Per *Sanderson, C. J.*—The rules laid down in English cases should not be taken to bind a Court in construing an Indian Act. [p. 184, col. 2.]

The proper course is in the first instance to examine the language of the Statute and to ask what is its natural meaning uninfluenced by any considerations derived from the previous state of the law and not to start with enquiring how the law previously stood, and then assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view. If a Statute, intended to embody in a Code a particular branch of the law, is to be treated in this fashion, its utility will be almost entirely destroyed, and the very object with which it was enacted will be frustrated. The purpose of such a Statute surely was that on any point specifically dealt with by it, the law should be ascertained by interpreting the language used instead of, as before, roaming over a vast number of authorities in order to discover what the law was, extracting it by a minute critical examination of the prior decisions. [p. 185, col. 1.]

(1) 8 C. W. N. 148; 1 Cr. L. J. 70.

Norendra Nath Sarcar v. *Kamalbasini Dasi*, 23 C. 53; 23 I. A. 18; 6 Sar. P. C. J. 667; 6 M. L. J. 71; 12 Ind. Dec. (N.S.) 874 (P. C.); and *Bank of England* v. *Vagliano*, (1891) A. C. 107; 60 L. J. Q B. 145; 64 L. T. 353; 39 W. R. 657; 55 J. P. 676, relied upon.

Per *Teunon, J.*—There is no reason why in a codifying enactment such as the Code of Criminal Procedure, the Court should introduce any rule of interpretation borrowed from the English Law. [p. 187, col. 1.]

In proceedings under section 133, Criminal Procedure Code, when a claim of private title is asserted, the good faith or bad faith of the defendant raising this plea is immaterial. [p. 187, col. 1.]

Sub-section (2) of section 133 does not appear to favour the reference of parties to Civil Courts. [p. 187, col. 2.]

Per *Richardson, J*—It is wrong in principle for any Court or Judge to impose fetters on the exercise by themselves or others of powers which are left by law to their discretion in each case as it arises. [p. 190, col. 1.]

Rule against an order passed by the Sub-Divisional Magistrate, Alipore.

FACTS appear from the following Order of Reference made by Mr. Justice Newbould and Mr. Justice Suhrawardy on the 23rd August 1921:—

This Rule is directed against an order passed by the Sub-Divisional Magistrate of Alipore in proceedings under section 133 of the Code of Criminal Procedure. Ali Naskar and others instituted proceedings under that section against the petitioners before us, Ram Sagar Mondal and another person, alleging that they had obstructed a public road. Ram Sagar Mondal showed cause denying the existence of the alleged public road and setting up a claim to the land in dispute. On the 5th April last, the Magistrate passed the following order:

"I have heard the Vakils for both the parties. The second party contend that in a criminal case I held that there was no pathway so the conditional order ought to be discharged. The Vakil for the first party has urged that this was a case of assault and my finding ought not to bind the present parties. I have given a careful consideration to the arguments advanced. I am of opinion that the claim of the second party though not substantiated is not mere pretence and is not raised to oust the jurisdiction of this Court but it is raised *bona fide*, so I think that following the ruling laid down in *Manipur Dey* v. *Bidhu Bhusan Sarkar* (1), I will give the second party a chance to go to the Civil Court. The second party should file a case within reasonable time and I allow them time

(1) 26 Ind. Cas. 146; 42 C. 158; 18 C. W. N. 1083; 15 Cr. L. J. 698.

till 25th May 1921 to do so, and if the second party does not go to the Civil Court within this time, the trial will be continued. Put up on 15th May 1921." The petitioner did not go to the Civil Court and on the 25th May 1921, the Magistrate refused to re-consider his order and directed witnesses to be summoned.

On behalf of the petitioner it is contended that on the Magistrate's finding that the petitioner's claim was *bona fide* his jurisdiction under section 133, Criminal Procedure Code, came to an end and he was not justified in continuing these proceedings, because the petitioner failed to bring a suit in the Civil Court. On behalf of the opposite party it is contended that the finding that the claim, though made *bona fide*, was not substantiated, justifies the Magistrate's order which is supported by decisions of this Court. There is ample authority for the general proposition that in proceedings of this nature a *bona fide* claim of right raised by the person who is alleged to have obstructed a public way ousts the Magistrate's jurisdiction. This rule is clearly stated in *Queen-Empress* v. *Bissessur Sahu* (2), which has been frequently followed. But in the case of *Luckhee Narain Banerjee* v. *Ram Kumar* (3), a distinction is drawn at page 573 between a claim of right which the Magistrate thinks well-founded and claim of right which the Magistrate does not think well-founded but considers to have been made *bona fide*. It was laid down that in the former case the Magistrate will take no further proceedings but in the latter he should allow the defendant an opportunity of asserting his claim by civil proceedings and that if he does not go to a Civil Court within a reasonable time or fails there the Magistrate will proceed.

We doubt the correctness of this view of the law. It seems to us that once the Magistrate has found that claim of right is made in good faith by the defendant he should stay proceedings under section 133, Criminal Procedure Code. We think it would be a waste of his time for him to enquire whether the defendant's claim is well-founded when he has no jurisdiction to decide the question of right. Also it appears to us unfair that a person in possession of land under a *bona fide* claim of right should be compelled by the Magistrate's order to be the plaintiff in a civil suit to maintain his right. A Magistrate might have doubts as to the *bona fide* of the defendant's claim and give him an opportunity of bringing a suit in order to prove his good faith but that is quite a different matter from compelling the defendant to institute a suit after the Magistrate has held that his claim is made *bona fide*.

In *Luckhee Narain's case* (3) it was found that the Magistrate was justified in coming to the conclusion that the claim of right was not *bona fide* raised and his order directing the removal of the obstruction was upheld. But though the remarks are an *obiter dictum* they have been followed and effect given to them in at least one decision of this Court, *Belat Ali* v. *Abdur Rahim* (4). In that case the same point arose as arises in the present case and the learned Judges, who upheld an order of the Magistrate similar to that passed in the present case, cited the remarks in *Luckhee Narain's case* (3) in support of their decision. It is, therefore, necessary to make a Reference to a Full Bench to give effect to our opinion that the Magistrate's order is wrong.

It is not necessary to cite a large number of cases in which the broad principle, that a *bona fide* claim of right ousts the Magistrate's jurisdiction under section 133, Criminal Procedure Code, has been affirmed. In many of them *Luckhee Narain's case* (3) has been relied on in support of this principle without any reference to the exception introduced by what may be called the doctrine of two degrees of *bona fide*. In one of them *Nasaruddi* v. *Akiluddi* (5) Prinsep, J., who was one of the Judges who decided *Luckhee Narain's case* (3), held that the Magistrate's order should be set aside on a finding that the plea was raised in good faith without any reference to the distinction between such a plea that is well-founded and one that is not well-founded. None of the other High Courts in India appear to have made such a distinction. It will be sufficient to cite those cases of this Court in which this distinction has been considered. In *Mukunda Lal Dey* v. *Haribole Saha* (6), Banerjee and Stevens, JJ., at the conclusion of their judgment reversed their opinion on this point. *Manipur Dey* v. *Bidhu Bhusan*

(2) 17 C. 562 at p. 565; 8 Ind. Dec. (N. S.) 914.
(3) 15 C. 564 at p. 570; 7 Ind. Dec. (N. S.) 960.
(4) 8 C. W. N. 143; 1 Cr. L. J. 70.
(5) 3 C. W. N. 345.
(6) 2 C. W. N. 554.

Sarkar (1) is the case relied on by the Trying Magistrate. There though Sharfuddin, J., in his judgment held that the party should be referred to the Civil Court if the claim is not substantiated though raised *bona fide*. Teunon, J.. while holding, that the Magistrate must decide whether the question was raised in good faith stated that he did not agree in all the reasons advanced by his learned colleague. The case of *Peary Lal Mullick* v. *Surendra Krishna Mitter* (7), *Peary Lal Mullick* v. *Surendra Kishore Mittar* (8) came up to this Court twice. In this case the Magistrate's order was similar to that passed in the present case. On the first occasion Richardson and Shamsul-Huda, JJ., held that the Magistrate should not have passed the order in the form in which he made it without taking evidence and remanded the case. On the second occasion Shamsul-Huda and Ghose, JJ., held that the claim was based on substantial grounds and that it was not "necessary to consider whether, if and when a claim is found to be *bona fide* and not a mere pretence to oust the jurisdiction of the Civil Court it is necessary to consider further, as appears to have been laid down in *Luckhee Narain Banerjee* v. *Ram Kumar* (3), whether the claim is well-founded, and if not well-founded whether the Magistrate has a right to direct one of the parties...within a reasonable time and on his failure to do so to resume the proceedings." We may also refer to the case of *Kamini Kumar Biswas* v. *Emperor* (9). There the Magistrate passed an order suspending proceedings for one month to allow the defendants an opportunity of establishing their claims in the Civil Court and cited *Luckhee Narain's case* (3) in support of this order. The Magistrate's order was set aside by Rampini and Sharfuddin, JJ., on the ground that the petitioner's claim appeared to be *bona fide*. It, therefore, appears that though the general rule has been frequently applied, some doubt has been felt as to the correctness of the *dictum* which makes an exception by distinguishing well-founded and ill founded *bona fide* claims. The point is one of considerable importance and as we doubt the correctness of the decision in the case of *Belat Ali* v. *Abdur Rahim* (4), a Reference to a Full Bench is necessary and we refer it accordingly. We formulate the points to be decided as follows:—

When in proceedings under section 133, Criminal Procedure Code, arising out of an alleged obstruction of a way used by the public, the defendant sets up a claim of right which is found by the Magistrate to be made in good faith, is the Magistrate's jurisdiction entirely ousted?

Or can the Magistrate, if he does not think this claim well-founded though he considered it made in good faith, allow the defendant a reasonable time to assert this claim by a civil suit and if he does not go to the Civil Court within such time or fails there, can the Magistrate continue the proceedings under section 133, Criminal Procedure Code?

Was the case of *Belat Ali* v. *Abdur Rahim* (4) giving effect to the *dictum* in *Luckhee Narain Banerjee* v. *Ram Kumar* (3) rightly decided?

Babu *Manmatha Nath Mukerji* (with him Babu *Srish Chandra Biswas*), for the Petitioner.—The facts of the case are shortly these: One Alek Naskar and others brought a criminal case against me under section 133 of the Criminal Procedure Code. It was alleged that the petitioner-second party had included within their homestead a portion of a public road and had created a cowshed thereon. We showed cause denying the existence of the alleged public road and set up our claim to the land in dispute. The learned Magistrate was of opinion that our claim, though not substantiated, was not a mere pretence and had not been raised to oust the jurisdiction of the Court but that it had been raised *bona fide*. He thereupon fixed the 25th May 1921 within which we were directed to go to the Civil Court, in default the proceedings against us were to continue. We did not go to the Civil Court and for that reason the Magistrate directed witnesses to be summoned. Against that order we obtained the Rule out of which the present reference arises. The Rule was heard by Newbould and Suhrawardy, JJ., who has referred the matter for consideration by the Full Bench. (Reads the Order of Reference). If the

(7) 53 Ind. Cas 160; 23 C. W. N. 774; 20 Cr. L. J. 752.
(8) 54 Ind. Cas. 487; 24 C. W. N. 247; 21 Cr. L. J. 87.
(9) 35 C. 283; 7 C. L. J. 188; 12 C. W. N. 267; 7 Cr. L. J. 105.

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Magistrate is not satisfied of the *bona fide* he may allow the parties to go to the Civil Court. The principle adopted in England goes to jurisdiction. But the case is wrong when they do not say that the parties should be referred to Civil Court in case of *bona fides*. The case of *Luckhee Narain Banerjee* v. *Ram Kumar* (3) has some bearing to the present case. Prior to this case there was no distinction between well-founded and *bona fide* claims. Intention to institute a suit is a test of a man's *bona fides*. That was held in *Leg.* v. *Sandford* (10). Refers to *Nasaruddi* v. *Akiluddi* (5). There the decision in *Luckhee Narain Banerjee* v. *Ram Kumar* (3) was followed to this extent that the Magistrate should have refrained when he found that there was a *bona fide* claim of rights till that rights have been publicly declared by a competent Court. I submit that is the right view to take in the present situation. Refers to *Queen-Empress* v. *Bissessur Sahu* (2). There also the general rule laid down in *Luckhee Narain Banerjee* v. *Ram Kumar* (3) was followed.

[SANDERSON, C. J.—Look at *Queen-Empress* v. *Bissessur Sahu* (2)].

There may have been confusion between jurisdiction and judicial discretion in some of the decisions. The word 'jurisdiction' has been rather loosely applied then. A Magistrate may enquire but not make a declaration till decision by a Civil Court. The Court ought not to go on further when the claim of right is a *bona fide* one. Refers to *Preonath Dey* v. *Gobordhone Malo* (11). There also "jurisdiction" and "judicial discretion" have been confusedly used. The head-note in the case is rather misleading. There they say that if the claim is *bona fide* that would not oust the jurisdiction of the Magistrate under sections 133 and 137 of the Criminal Procedure Code. Refers to *Mukunda Lal Dey* v. *Haribole Saha* (6). The Magistrate may find that it is a public way but the defendant may entertain a *bona fide* claim of right at the same time.]

[RICHARDSON, J.—That case has not much practical value.]

Except this that the case in *Luckhee Narain Banerjee* v. *Ram Kumar* (3) has been followed. What is generally done is that the Magistrate holds a summary enquiry, finds whether the claim is *bona fide* or not and then decides the matter finally. Refers to *Matuk Dhari Tewari* v. *Hari Madhab Das* (12). There it was held that the Magistrate on ascertaining the *bona fides* of the claim should refer the parties to the Civil Court. Refers to *Belat Ali* v. *Abdur Rahim* (4) and *Matuk Dhari Tewari* v. *Hari Madhab Das* (12). In the last case the different functions of the Judge and the Jury have been laid down. There it has been laid down that the Magistrate has first of all to determine the *bona fides* of the case and then refer the parties to the Civil Court. The next case is *Manipur Dey* v. *Bidhu Bhusan Sarkar* (1). There for the first time a distinction is made out between a well founded *bona fide* claim and a not well founded *bona fide* claim. There, there was no enquiry made as to the *bona fides* of the claim and, therefore, the case was sent back for such enquiry. In effect their Lordships followed the decisions in *Belat Ali* v. *Abdur Rahim* (4) and *Luckhee Narain Banerjee* v. *Ram Kumar* (3). The judgment of Sharfuddin, J. did not decide what ought to be done after the Magistrate was satisfied of the *bona fides* of the claim. Refers to *Mahomed Ashrafuddin* v. *Sheikh Karim Buksh* (13). There it has been held that when a question of title is raised the question should be decided by Civil Courts. Refers to *Kamini Kumar Biswas* v. *Emperor* (9). There it was directed that the proceedings should be dropped after the parties have put forward *bona fide* claim although Magistrate was not satisfied of the *bona fides*. Refers to *Peary Lal Mullick* v. *Surendra Krishna Mitter* (7). This case came up again after remand to this Court and reported in *Peary Lal Mullick* v. *Surendra Kishore Mitter* (8).

It is an artificial distinction to draw a line between a well founded and a *bona fide* claim. A Criminal Court should see whether the claim is on substantial grounds and is *bona fide*, then it has no jurisdiction to entertain the case any further. My point is in every Criminal Court when it professes to deal with properties and not with offences belonging to individuals they have limited powers. Their duty is then to preserve the peace or remove the nuisance. It is only in exceptional cases, *viz.*, in proceed-

(10) (1874) 30 L. T. 601.
(11) 25 C. 278; 13 Ind. Dec. (N. S.) 187.
(12) 31 C. 979; 9 C. W. N. 72; 2 Cr. L. J. 11.
(13) 24 Ind. Cas 603; 18 C. W. N. 1148; 19 C. L. J. 631; 15 Cr. L. J. 516.

ings under sections 137 and 145 of the Criminal Procedure Code that the Criminal Court can make a final declaration. It is an error to suppose that because there is no Statute Law in this country there should be no ouster of jurisdiction. It is a principle of natural justice. Refers to Crais' Interpretation of Statutes, (2nd Edition) 472. Section 135, Criminal Procedure Code does not prevent the accused to put forward a *bona fide* claim of right. The rule as stated in Crais' Interpretation of Statutes, if it is in consonance with common law and principles of natural justice, ought to be given effect to in this country also. The cases only lay down that if there is a *bona fide* claim the parties should be referred to Civil Court. The moment the Court finds that it ought to stay its hands because the parties have *bona fide* claim, there ends his jurisdiction. I submit, therefore, that a distinction between a well founded or an ill founded claim is absolutely incomprehensible. It is an impossibility for the Court to find that a claim is *bona fide* but at the same time it is not well founded. This distinction does not appear to have troubled the other High Courts too. Refers to *Bhagat Pershad* v. *Ramrup Karmokar* (14), *Fakir Mullick* v. *Emperor* (15), *Lakshman Chandra Ghose* v. *Bilash Roy* (16).

Babu *Dasarathi Sanyal* (with him Babu *Lalit Mohan Sanyal*), for the Opposite Party.—Three questions have been referred to the Full Bench.—Whether jurisdiction is ousted, if not entirely ousted whether the Magistrate could allow the proceedings to be continued and lastly whether the case in *Belut Ali* v. *Abdur Rahim* (4) has been rightly decided. My submission is that jurisdiction has not been ousted. The provisions have been carefully made. A Magistrate's jurisdiction does not cease because a *bona fide* claim is set up. Refers to sections 133, 134, 136 of the Code of Criminal Procedure. The Jury has also the same function to discharge. The function of the Jury and the Magistrate are both the same. Refers to *Norendra Nath Sarcar* v. *Kamalbasini Dasi* (17), *Satis Chandra* v. *Ram Dayal* (18). Penal Statute has been defined in *Nassir* v. *Chunder* (19). The power exercised by a Magistrate is not summary judgment. Until the case in *Luckhee Narain Banerjee* v. *Ram Kumar* (3) the law was different. The law has changed. Refers to Acts XXI of 1841 and XXV of 1861.

[SANDERSON, C. J.—What do you mean by "*bona fide* is established"?]

He succeeds in showing cause. No procedure for ouster of jurisdiction is indicated in the Act. Under section 137 (2), Criminal Procedure Code, the Magistrate has to see whether the order is reasonable and proper.

[RICHARDSON, J.—The onus under section 137 is upon the defendant. Assuming the Magistrate is satisfied that the claim is *bona fide* do you agree that he must hold that the order is not reasonable and proper?]

Yes. The grounds of public policy and of uncertainty previous to the Full Bench decision in *Luckhee Narain Banerjee* v. *Ram Kumar* (3) are no longer existing. We cannot invoke the principles of English Law to override the plain provisions of Indian Statutes. The provisions of Chapter X of the Criminal Procedure Code are not penal. Refers to *Nassir* v. *Chunder* (19). There although section 183 is mentioned it is not penal. If the facts do come under the purview of section 188 irrespective of the provisions of section 136, the offence would be complete.

[SANDERSON, C. J.—In *Basaruddin Bhuiah* v. *Baharali* (20) the change was made. Need we go behind this?]

Yes, to explain the case of *Chundernath Sen, In the matter of the Petition of* (21). I will show how *bona fide* dispute originated. Refers to sections 308 to 310, 312, 320, Act XXV of 1861. At that time decision under section 303 was final and Civil Court had no jurisdiction. Refers to section 320, Criminal Procedure Code of 1861. There is no expression 'right of way' in the section. And because of this expression some Judges thought that cases would come under section 308. In section 320 only a temporary relief is granted pending decision of a Civil Court. But not so in section 308 which deals with public thoroughfare. Then

(14) 27 Ind. Cas 224; 21 C. L. J. 116; 16 Cr. L. J. 160.
(15) 47 Ind. Cas. 671; 28 C. L. J. 211; 19 Cr. L. J. 947.
(16) 61 Ind. Cas. 175; 22 Cr. L. J. 351.
(17) 23 C. 563; 23 I. A. 18; 6 Sar. P. C. J. 637; 6 M. L. J. 71; 12 Ind Dec. (N. S.) 371 (P. C.).
(18) 59 Ind. Cas. 143; 48 C. 348 at pp. 418, 419; 32 C. L. J. 94; 24 C. W. N. 982; 22 Cr. L. J. 31.
(19) 9 W. R Cr. 41 at p. 47; B. L R Sup Vol. 951.
(20) 11 C. 8; 5 Ind. Dec (N. S.) 762.
(21) 5 C. 875, 6 C. L. R. 379; 2 Ind. Dec. (N S) 1165.

there was a change of Code in 1872. Refers to section 521. In section 532 the word 'right of way' is added.

[TEUNON, J.—Section 532 corresponds to section 147 of the present Code?]

With this important qualification that breach of peace is essential. Section 521 corresponded with section 320 of the Code of 1861 which corresponds with section 133 of the present Code.

[SANDERSON, C. J.—What was the provision in Act X of 1882?]

They were sections 133, 147 which was the old section 532 *plus* breach of the peace. My submission is that on account of section 320 of 1861 and section 532 of 1872 the question of *bona fide* dispute was introduced in our case laws until the decision in *Lackhee Narain Banerjee* v *Ram Kumar* (3) where the principles of English Law were invoked. Refers to *Angelo* v. *Cargill* (22). That was a decision of Sir Richard Coush under the Act of 1861. When the matter is brought before the Magistrate he can determine whether it is a thoroughfare or not. Refers to *Roy Omesh Chunder Sen* v. *Ichanath Mozumdar* (23). That case was decided on account of the distinction between sections 521 and 532 of the Code of 1882. The functions exercised by the Jury and the Magistrate cannot be differentiated. Refers to *Petamber Jugi* v. *Nasaruddy* (24). That case also proceeds on the same footing. It follows *Roy Omesh Chunder Sen* v. *Ichanath Mozumdar* (23).

[TEUNON, J.—Was the case in *Bechcram Bhuttacharjee, In re* (25) under the Act of 1861?]

Yes. The next case of importance is *Chundernath Sen, In the matter of the Petition of* (21). It was under the Code of 1872. Here again section 532 was brought into requisition. The functions of the Magistrate and the Jury as provided in the Act were lost sight of. There it was question of discretion and discretion only, and the matter should be decided under section 532. In those days there was doubt whether the Civil Courts could interfere with a final order by Criminal Court. The matter was set at rest by *Chunilal's case* [*Chunilal* v. *Ram Kishen Sahu* (26)]. Refers to *Basaruddin Bhuiah* v. *Baharali* (20), *Askar Mea* v. *Sabdar Mea* (27), *Lal Miah* v. *Nazir Khalashi* (28). Uptill this time the principle of English Law was not imported. In *Luckhee Narain Banerjee* v. *Ram Kumar* (3), for the first time they were introduced. If it is a question of discretion then Courts have the right to mould the precedence provided it is consistent with the law. All the claim that was made in the present case was that in a previous criminal case the Magistrate held that it was a private way. It is entirely a question of discretion to exercise jurisdiction or refer the parties to Civil Court if the claim made is *bona fide* and well-founded and postpone the case for a decision of the claim under section 344 and then finally decide the case. That I submit is the effect of the decision in *Luckhee Narain Banerjee* v. *Ram Kumar* (3). The Courts have power to mould the procedure consistent with the law. Refers to *Pulin Behari* v. *Emperor* (29). A Magistrate can postpone a case for a reasonable cause. I submit it being a question of discretion the order in question is fully with jurisdiction. The previous case was simply an assault case. I submit the Magistrate gave him two months' time to institute the suit. That was very kind and indulgent on the part of the Magistrate. The proceedings were started on the Police report by a responsible Magistrate.

[SANDERSON, C. J.—Was the Police report made before or after the conditional order?]

It was made before the conditional order was passed. A *prima facie* case was made out. The question was raised by the second party. As a matter of indulgence the Court gives him an indulgence to establish his right of way in a Civil Court. I submit there is nothing wrong in that. There was no material before the Magistrate to judge of the *bona fides* of the claim. Here the question of title is in question and the Magistrate has jurisdiction to decide it according to principles of English Law.

Babu *Manmatha Nath Mukherjee* in reply.—Refers to Chapter VII High Court Rules

(22) 9 B. L. R. 417; 18 W. R. Cr. 41.
(23) 21 W. R. Cr. 64.
(24) 25 W. R. Cr. 4.
(25) 15 W. R. Cr. 67.
(26) 15 C. 460 at p. 468; 12 Ind. Jur. 425; 7 Ind. Dec. (N. S.) 892 (F. B.).
(27) 12 C. 137; 6 Ind. Dec. (N. S.) 93.
(28) 12 C. 696; 6 Ind. Dec. (N. S.) 471.
(29) 16 Ind. Cas 257; 16 C. W. N. 1105 at p. 1136; 15 C. L. J. 517; 13 Cr. L. J. 603.

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Appellate Side, rule 5. A reference to the Full Bench in a criminal matter does not empower it to decide a case finally. It is a matter of discretion with the Full Bench to finally decide a case and no definite provisions have been made in the rule as in rules 2 to 4. I would ask you to accept as correct the findings of the Magistrate. The Magistrate says that my plea was not a pretence and, therefore, he referred me to Civil Court. I submit when it is raised not to oust the jurisdiction of the Court but *bona fide*.

[TRUNON, J.—What does the Magistrate mean by it?]

I submit the finding is based on the material before him. I submit there is no provision of law to oblige me to run to Civil Court simply because section 137 is held *in terrorem* over me. The moment he finds that my claim is *bona fide* he should have dropped the proceedings. The proceedings are both penal and summary. Take the case of section 145, Criminal Procedure Code. His decision on the question of title has no value whatsoever except to support his order. The word 'summary' means that an enquiry if held in the absence of a proper machinery or procedure, will be summary. Although it is not provided for in the Criminal Procedure Code in a case of *bona fide* defence it is the first question to be gone into but it has not the power to do.

[TRUNON, J.—Whence does the principle come from?]

See Crais' Statutes, 472.

[TRUNON, J.—If it is to be followed in India would we not find some provision in General Clauses Act?]

I submit it is a principle based on sound common sense. It has got to be followed on the ground of eternal justice. The Magistrate has no power to such claims. He could not waste his time because his decision would have no effect in Civil Courts. What does it mean if I have got a *bona fide* claim? I submit a Magistrate ought to stop his hands when he is satisfied of the *bona fides* of a claim.

[SANDERSON, C. J.—What do you say of the case in *Angelo* v. *Cargill* (22)].

That may be a historical case but it has never been mentioned in any of the subsequent cases. In that case it has nowhere been stated that the Magistrate had come to any finding of the *bona fide* of the claim nor were the facts such as to enable the Court to hold that the claim was *bona fide*. That is my submission with regard to that case. It is true that section 133 does not say that a person will be punished for non-compliance but the consequences are penal as provided in section 136, Criminal Procedure Code.

[RICHARDSON, J.—The proceedings under this Chapter have been described as *quasi*-civil and *quasi*-criminal.]

Yes. I submit a Magistrate is under no circumstances relieved from enquiring into the *bona fides* of the claim. It is only in exceptional cases that the Magistrate can interfere and must interfere without going into the *bona fides* of the claim. The English rule does not apply because there is no provision in the law empowering a Magistrate to proceed further when a *bona fide* claim is made.

[SANDERSON, C. J.—Look at section 147. The Magistrate has got some facilities in section 133.]

Except this that under section 147 the chief thing to be averted is the breach of the peace.

[RICHARDSON, J.—Under section 147 the Magistrate would not go into the question of title?]

Only incidentally if it appears to him that such right exists. The framework of that section ought to be looked into.

JUDGMENT.

SANDERSON, C. J.—This is a Reference to a Full Bench by my learned brothers Newbould and Suhrawardy, JJ. The questions which are submitted are:—

1. "When in proceedings under section 133, Criminal Procedure Code, arising out of an alleged obstruction of a way used by the public, the defendant sets up a claim of right which is found by the Magistrate to be made in good faith, is the Magistrate's jurisdiction entirely ousted?"

2. "Or can the Magistrate, if he does not think this claim well-founded though he considers it made in good faith, allow the defendant a reasonable time to assert this claim by a civil suit and if he does not go to the Civil Court within such time or fails there, can the Magistrate continue the proceedings under section 133, Criminal Procedure Code?"

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"Was the case of *Belat Ali* v. *Abdur Rahim* (4) giving effect to the dictum in *Luckhee Narain Banerjee* v. *Ram Kumar* (3) rightly decided?"

The following facts may be taken from the case:—

"This Rule is directed against an order passed by the Sub-Divisional Magistrate of Alipore in proceedings under section 133 of the Code of Criminal Procedure. Ali Naskar and others instituted proceedings under that section against the petitioners before us, Ram Sagar Mandal and another person, alleging that they had obstructed a public road. Ram Sagar Mandal showed cause denying the existence of the alleged public road and setting up a claim to the land in dispute." On the 15th April last, the Magistrate passed the following order:—

"'I have heard the Vakils for both the parties. The second party contend that in a criminal case I held that there was no pathway, so the conditional order ought to be discharged. The Vakil for the first party has urged that this was a case of assault and my finding ought not to bind the present parties. I have given a careful consideration to the arguments advanced. I am of opinion that the claim of the second party though not substantiated is not mere pretence and is not raised to oust the jurisdiction of this Court but it is raised *bona fide*, so I think that following the ruling laid down in *Manipur Dey* v. *Bidhu Bhusan Sarkar* (1), I will give the second party a chance to go to the Civil Court. The second party should file a case within a reasonable time and I allow them time till 25th May 1921 to do so, and if the second party does not go to the Civil Court within this time, the trial will be continued. Put up on 25th May 1921.' The petitioner did not go to the Civil Court and on the 25th May, the Magistrate refused to re-consider his order and directed witnesses to be summoned."

On behalf of the petitioner it was contended that on the Magistrate's finding that the petitioner's claim was "*bona fide*" his jurisdiction under section 133, Criminal Procedure Code, came to an end and he was not justified in continuing the proceedings, because the petitioner failed to bring a suit in the Civil Court. On behalf of the opposite party it was contended that the finding that the claim, though made *bona fide* was not substantiated, justified the Magistrate's order which is supported by decisions of this Court.

The case of *Luckhee Narain Banerjee* v. *Ram Kumar* (3) was referred to in the case as follows:—"But in the case of *Luckhee Narain Banerjee* v. *Ram Kumar* (3) a distinction is drawn at page 573 between a claim of right which the Magistrate thinks well founded and a claim of right which the Magistrate does not think well-founded but considers to have been made *bona fide*. It was laid down that in the former case the Magistrate will take no further proceedings but in the latter he should allow the defendant an opportunity of asserting his claim by civil proceedings and that if he does not go to a Civil Court within a reasonable time or fails there the Magistrate will proceed."

The two learned Judges doubted the correctness of this view of the law and consequently they made this Reference to the Full Court.

With regard to the first question, in my judgment, the first step to be taken is to examine the sections of the Criminal Procedure Code, applicable to this matter, which are sections 133 to 139, and to interpret these sections according to the natural meaning of the language used.

I do not propose to discuss these sections in detail. It is sufficient for me to say that if the ordinary and natural meaning is given to the language used in these sections, in my judgment it is clear that the Magistrate had jurisdiction thereunder to decide the case even though a claim of title was raised by the petitioner, and even though, as the Magistrate held, the claim was "raised *bona fide*" and "was not a mere pretence and was not raised to oust the jurisdiction of the Court."

It was, however, argued on behalf of the petitioner that it had been held in England that, when the title to property is in question, the exercise of a summary jurisdiction by Justices of the Peace is ousted, and it was further argued that the same principle should be applied to the sections now under consideration. It was also urged that the principle is a principle of natural justice and should be applied unless an exception is made in the Act.

I cannot accept these arguments. In the first place I do not agree that the rule laid down in the English cases should be taken to

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bind the Court in construing the Indian Act in question: secondly, it is to be noted that the Code of Criminal Procedure is an Act for consolidating and amending the law relating to Criminal Procedure, and in my judgment the principle of construction laid down by Lord Herschell in the case of the *Bank of England* v. *Vagliano* (30) and affirmed by the Privy Council in *Norendra Nath Sarcar* v. *Kamalbasini Dasi* (17) should be applied to this Act. The passage in the latter case is as follows:—"It is hardly necessary for their Lordships to do more than express their concurrence with the judgment of the High Court. But they think it may be useful to refer to some observations in a recent case before the House of Lords as to the proper mode of dealing with an Act intended to codify a particular branch of the law. 'I think,' said Lord Herschell in the *Bank of England* v. *Vagliano* (30) 'the proper course is in the first instance to examine the language of the Statute and to ask what is its natural meaning uninfluenced by any considerations derived from the previous state of the law and not to start with enquiring how the law previously stood, and then assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view. If a Statute, intended to embody in a Code a particular branch of the law, is to be treated in this fashion, it appears to me that its utility will be almost entirely destroyed, and the very object with which it was enacted will be frustrated. The purpose of such a Statute surely was that on any point specifically dealt with by it, the law should be ascertained by interpreting the language used instead of, as before, roaming over a vast number of authorities in order to discover what the law was, extracting it by a minute critical examination of the prior decisions.....'" Applying that principle to the sections of the Consolidating and Amending Act now under consideration, and giving to the language of the sections the natural meaning, in my judgment the Magistrate had jurisdiction to decide the questions before him, even though the defendants in the proceedings before the Magistrate set up a claim of title to the land in question.

Numerous cases were cited to us during the course of the argument, and it is said that there is a discrepancy to be found between the decisions of this Court. I think that to some extent there is a discrepancy. But on the whole, in my judgment, the weight of the decisions is in favour of the view which I have expressed.

For instance as long ago as 1872 in *Angelo* v. *Cargill* (22) the Court, when dealing with a section of the Criminal Procedure Code then in force, held that the Magistrate had jurisdiction to decide whether the place was a thoroughfare and whether there was an obstruction, though the defendants claimed the land as their own property. The sections then under discussion do not differ materially from the sections now under discussion and the Advocate-General appearing for the defendants in that case, raised in his argument the identical points which have been raised on behalf of the petitioner in this case, yet the Court held that the Magistrate had jurisdiction.

In *Luckhee Narain Banerjee* v. *Ram Kumar* (3) which was decided in 1898, the decision, in my judgment, implied that the Magistrate had jurisdiction though the learned Judges stated that this Court in revision in several cases had given directions as to the mode in which the Magistrates should exercise their powers. The following passages in the judgment may be referred to. Page 570: "The ground upon which these decisions have proceeded is that there is no provision made in Chapter X of the Code for an enquiry into disputed questions of title; and that it cannot be held to have been the intention of the Legislature that question of this nature raised *bona fide* should be finally decided in a summary manner and to the exclusion of any recourse to the Civil Courts. These decisions go, not actually to the jurisdiction of the Magistrates, as the English rule referred to does, but rather to the mode in which, in revision, this Court has held that the Magistrates should exercise their powers, following the principles of the English rule so far as may be;" page 573, *viz.*, "Our observations in this judgment are, of course, directed to that part of section 133, which relates to the case now before us and deal with obstructions to public ways. We may

(30) (1891) A. C. 107; 60 L. J. Q. B. 145; 64 L. T. 358; 39 W. R. 657; 55 J. P. 676.

observe that in cases in which danger to public health or safety is involved, we by no means suggest that the Magistrate is fettered, in the exercise of the powers given to him under these sections, by the considerations to which we have adverted." It seems clear that if the Magistrate has jurisdiction in cases, where public health and safety are endangered, he must also have it in cases where they are not endangered, for the jurisdiction to deal with the two classes of cases is conferred by the same words in the Act.

These passages seem clearly to imply that the Magistrates had jurisdiction, but that this Court had from time to time given directions as to the mode of exercising that jurisdiction. It is to be noticed that the learned Judges in the last-mentioned case drew attention to the case of *Chuni Lal* v. *Ram Kishen Sahu* (26) whereby it was decided that the right of an owner of land to bring a suit under section 42 of the Specific Relief Act against one of the public, who formally claimed to use such lands as a public road and who has thereby endangered the title of the owner, is not barred by an order of a Criminal Court under section 137 of the Criminal Procedure Code

In *Queen Empress* v. *Bisseswur Sahu* (2) the learned Judges held that the Magistrate "ought not to have made the order if there was a *bona fide* contention on Bisseswar's part that the path was not a public way" and the learned Judges quoted with approval the passage from the judgment in *Luckhee Narain Banerjee* v. *Ram Kumar* (3). The head note of that case seems to me to go further than the actual decision.

Again, *Fakir Mullick* v. *Emperor* (15) (decided in 1916) is, in my judgment, a decision confirming my view that the Magistrate had jurisdiction even though a *bona fide* claim of right had been set up.

It was, at the end of the argument, practically conceded that to say that the Magistrate had no jurisdiction or that "the Magistrate's jurisdiction was entirely ousted" was putting the case too high, but the argument was urged that under the circumstances of the case the Magistrate ought to have stayed his hand and should not have proceeded with the enquiry when he found that the defendants were putting forward a claim of title in the land, *bona fide*, and the Magistrate should have allowed the parties to litigate the question in the Civil Court.

In my judgment, therefore, the first question should be answered in the negative.

The second question may conveniently be divided into two parts. With regard to the first part—the learned Vakil for the petitioner did not complain of the ruling at page 571 in *Luckhee Narain Banerjee* v. *Ram Kumar* (3) which runs as follows:—

"When such a question is *bona fide* raised the Magistrate ought not to make an order under this section of the Code; he should allow an opportunity for the determination of the question by the Civil Court." But objection was taken by the learned Vakil to the passage at page 573: "If the Magistrate does not think this claim well-founded, so far as he can judge, but considers that it is made *bona fide*, he should allow the defendant an opportunity of asserting it by civil proceedings." It was urged that the defendants who might be in possession of the land, should not be forced into the position of plaintiffs in a civil suit to maintain the claim of right. It was argued further that the distinction between an ill-founded *bona fide* claim and a well-founded *bona fide* claim is unintelligible. In my judgment there is considerable force in those arguments. At the same time I am unable to say that the Magistrate had no jurisdiction to make the order of 15th April 1921. It seems to me that it was a matter for the discretion of the Magistrate. He had apparently on that date, on the materials then before him, come to the conclusion that the claim of title set up by the defendants had no substance in it; although he believed that the claim was not set up as a mere pretence. Having given the defendants an opportunity of instituting a suit in the Civil Court, of which the defendants failed to avail themselves, the Magistrate proposed to enquire further into the facts of the case. In view of the judgment which I have already given on the first question I am unable to say that he had no jurisdiction to continue the proceedings under section 133 of the Criminal Procedure Code.

With regard to the case of *Belat Ali* v. *Abdur Rahim* (4) which is the subject of the second part of the second question, in my judgment, it cannot be said, having regard

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to the facts of that case, that it was wrongly decided.

It is necessary for the Court to decide whether the Rule in this case should be made absolute or discharged. The Magistrate, as I read his judgment, came to the conclusion on the materials then before him, that there was no real substance in the claim of title, and consequently, in my judgment, the Rule should be discharged.

TRUNON, J.—In this matter the facts have been sufficiently set out in the order made by the Referring Bench and also in the judgment of his Lordship the Chief Justice. It is, therefore, unnecessary for me to recapitulate them.

In many cases decided under Chapter X of the Code of Criminal Procedure there has been considerable conflict of judicial opinion, and much that is not to be found in the sections themselves has been imported into them by the Courts.

In a case such as the present it appears to me that there are but two questions for the Magistrate (or for the Jury, if under sections 135 and 138, a Jury be substituted for the Magistrate) to decide, namely, (1) whether the way in question is one which is or may be lawfully used by the public, and (2) whether such way has been unlawfully obstructed. These two questions should be decided on evidence in the same manner as any other questions arising in criminal proceedings. There appears to me to be no reason why in a codifying enactment such as the Code of Criminal Procedure, we should introduce any rule of interpretation borrowed from English Law. It is also not for us, but for the Legislature, to say whether questions of title should or should not be decided in the Courts of Magistrates. When in proceedings under section 133, a claim of private title is asserted the good faith or bad faith of the defendant raising this plea, in my opinion, is immaterial. There is no reference to good faith in the sections themselves and if on evidence the Magistrate (or the Jury) be satisfied that the path is a public path, the Magistrate should act on that decision and conclude the controversy for the time being. The defendant, if aggrieved, still has his remedy in the Civil Courts.

Whether in any individual case before making his conditional order absolute, the Magistrate should give the defendant an opportunity of establishing by suit his claim of private title is at most a question of discretion and I am not prepared to lay down any general rules for the exercise of such judicial discretion. I may, however, point out that sub-section (2) of section 133, does not appear to favour any such reference of parties to the Civil Courts.

In the result I should answer the questions referred to us, which I take to be three in number, as follows:—To the first question my answer is 'No.' To the second question my answer is that in the exercise of his discretion the Magistrate may take the course indicated in the question

To the third question my answer is that I am not prepared to say that on its own facts the case of *Belat Ali* v. *Abdur Rahim* (4) was wrongly decided.

For the reasons given I agree in discharging this Rule.

RICHARDSON, J.—Section 133, and the following sections of the present Code substantially repeat the corresponding sections of the earlier Codes. The word 'thoroughfare,' however, used in the Codes of 1861-1869 and 1872 is re-placed in the Codes of 1882 and 1898 by the expression 'way which is or may be lawfully used by the public.' The purpose in view is the removal of unlawful obstructions from public ways and the abatement of certain other nuisances affecting the public health or safety such as the carrying on of a trade "injurious to the health or physical comfort of the community." Proceedings are initiated by a conditional order in appropriate terms. If the order is not obeyed, inquiry may follow whether it is a reasonable and proper order or not, the result depending on the finding arrived at upon that issue. The inquiry may be made, at the choice of the defendant, by a Magistrate or by a Jury.

The first and principal question referred to this Bench may be thus stated. Whether, a conditional order having been made for the removal of an alleged unlawful obstruction from an alleged public way, the Magistrate's jurisdiction to proceed further is ousted if the defendant raises a *bona fide* claim of right or title.

Under the Code of 1861 69 it was held that it was for the Magistrate to determine

whether a way was or was not a "thoroughfare" [*Becharam Bhuttacharjee, In re* (25) and *Angelo* v. *Cargill* (22)]. But under the Code of 1872 there seems to have been either an abrupt transition to a different view or a reversion to some earlier view; witness the observations of Phear, J. in *Roy Onesh Chunder Sen* v. *Ichanath Mozumdar* (23) decided in 1874, less than two years after *Angelo's case* (22) and without any reference thereto, and see also *Petamber Jugi* v. *Nasaruddy* (24) and *Chundernath Sen, In the matter of the Petition of* (21).

The view then taken was apparently determined by two considerations. In the first place the power given by the provision in the two earlier Codes corresponding to section 147 in the later Codes, enabled a Magistrate to intervene in any case of dispute concerning a right of way, public or private. The provision was not restricted, as it now is, to disputes likely to lead to a breach of the peace. In the second place, it was doubted at the time whether an order made by a Magistrate under what I may call the section 133 procedure would be conclusive in the Civil Courts on the question of highway or no highway. There was some conflict of opinion and it was not till 1882 that the point was decided by a Full Bench in favour of the Civil Court *Chunilal* v. *Ramkishen Sahu* (26). Upon these considerations, it was laid down that where there was any dispute concerning the existence of a "thoroughfare" the Magistrate should follow, not the section 133 procedure, but the different procedure appropriate to cases of dispute under which the Magistrate's final order would be subject, by express enactment, to the result of proceedings taken in a competent Court by a party aggrieved.

Section 147 assumed in the relevant particular its present form in the Code of 1882 and this change in the law made it clear that section 147 and section 133 were entirely independent provisions and that neither section could be used to throw any light on the interpretation of the other, the object, scope and language being totally different. If there was any overlapping, that merely meant that in some cases where a public way was concerned, the Magistrate might have alternative procedures open to him. At the same time there was no reason why the restricted operation of section 147 as compared with the corresponding previous provision, should of itself enlarge the powers given by section 133. It became necessary, therefore, to re-examine the position and this was done in *Luckhee Narain Banerjee* v. *Ram Kumar* (3) which has since been treated as the leading case.

The judgment then delivered has already been referred to and I will only say that, as it seems to me, the learned Judges attempted to find a basis for previous decisions in the rule or maxim of English Law, that "where the title to property is in question, the exercise of a summary jurisdiction by Justices of the Peace is ousted." (Paley on Summary Convictions, 8th Edition, page 157). It is this maxim which they set before themselves as one to be followed in India "so far as may be." The difficulty lies in this qualification, as the Magistrate cannot in the same case both have and not have jurisdiction. No satisfactory conclusion can be reached without considering whether the maxim should be, not partially, but wholly accepted or rejected.

The maxim is probably due in its origin to conditions which no longer obtain. There was a time when few Justices of the Peace had any training in law. Formerly also Statutes were less scientifically drawn than they now are and were in consequence more loosely interpreted according to their supposed reason or equity. An illustration lies ready to hand in the deer-killing case cited by Paley on page 158, where Holt, C. J., said this:—

"And, therefore, if there was a dispute concerning the limits of a walk in a forest; and one claims as part of his walk what is in fact a part of the division of another, and accordingly kills deer there, the case is out of the intent of the Act, but is plainly within the words. The intent of the Act was to punish rogues and vagabonds and not to persons who by mistake in the execution of their trust exceed what the law warrants." *Rex* v. *Speed* (31).

But however the rule originated, it has been explained in more recent times as a presumption applicable to the construction of statutory powers conferred on Justices of the Peace—a presumption which may or may not be displaced by the language

(31) (1700) 1 Ld. Raym. 583; 91 E. R. 1920.

employed. In *Reg.* v *Cridland* (32) Cromptor, J., said: "Being an old maxim of law, which has been so generally applied for ages, we must assume that it is still intended to be applied by every Act relating to such matters though not specifically mentioned," and in *White* v *Feast* (33), Blackburn, J., was explicit. "All summary jurisdiction," he observed, "is the creature of Statute and on the principle that title could not be intended to be decided by an inferior tribunal, there has arisen the well-established rule that every Statute giving summary jurisdiction has the implied restriction as to title and the Justices must hold their hands if a *bona fide* claim of right is set up. On the other hand, in some Statutes, as the Highway Acts, the terms used to show that the Justices were not to hold their hands even if a right were set up."

No doubt the Justices were supposed to know all about the local highways and one reason why in my opinion this presumption should not be intruded into the Criminal Procedure Code, is that I doubt whether it has been consistently applied in England. It was not applied, for instance, in *Williams* v *Adams* (34), and *Vaughan, Ex parte* (35). while it was applied in *Reg.* v. *Justices of Forest* (36) and *Reg.* v. *Stimpson* (37). At any rate where it is not applied, the Justices retain full jurisdiction of the nature affirmed in *Reg.* v. *Bolton* (38), and where it is applied the jurisdiction ceases on a *bona fide* claim of title being raised.

In England, again, the Superior Courts derive their jurisdiction to decide questions of right and title from the Common Law and may at one time have regarded encroachments with suspicion. The jurisdiction of the Indian Courts from the highest to the lowest depends on Statute. No doubt Civil Courts of various grades have been created for the special purpose of deciding questions of right and title. But as time goes on, various powers may be conferred either on existing Courts or on newly created Courts outside the range of the ordinary Civil Courts. If the presumption that none but a Civil Court is to decide a question of right or title is admitted in one case, it may be extended to other cases and to other tribunals created, it may be, for some particular purpose or to administer some particular Act. Quite recently a tribunal was created by the Calcutta Improvement Act for purposes of that Act and only the other day the President of the Tribunal was vested with certain powers to deal with rents in Calcutta. Indian Statutes being of the modern character, it seems to me wholly advantageous and desirable that they should be interpreted by the ordinary canons without resort to an adventitious presumption recognised, it may be, in England, but not sanctioned by general principle and not authorised by anything in the Indian General Clauses Act, which is itself, so far as it goes, a statutory Code of construction. It is for the Legislature when it creates a new jurisdiction to define and limit the extent of that jurisdiction, as it does, for example, in the Small Cause Courts Act, and when the question arises what powers are or are not conferred, the answer ought to be found within the four corners of the Statute.

In conferring powers relating to land or any other subject matter on Magistrates, it is easy to say, if that is the intention, that the Magistrate's jurisdiction is ousted if a *bona fide* claim of right or title is raised. Or the restriction may be qualified so that the Magistrate's jurisdiction will not be affected unless the claim made is not merely *bona fide* but also fair and reasonable [*c.f.* *White* v. *Feast* (33), *Rex.* v. *French* (39)].

When we come to the actual language and scheme of these sections, it is clear that the question of public way or no public way, if it arises, is directly involved in the enquiry which the Magistrate or the Jury have to make. To use words which occur in the cases, the question is an essential element in, or goes to the foundation and merits of, the enquiry. Ever, therefore, if this

(32) (1857) 7 El. & Bl. 853 at p. 871; 27 L. J. M. C. 28; 3 Jur. (N. S.) 1213; 5 W. R. 679; 119 E. R. 1463; 29 L. T. 210; 110 R. R. 860.

(33) (1872) 7 Q. B. 333; 41 L. J. M. C. 81; 26 L. T. 611; 20 W. R. 382.

(34) (1862) 2 B. & S. 312; 31 L. J. M. C. 109; 8 Jur. (N. S.) 816; 5 L. T. (N. S.) 790; 127 R. R. 379; 121 E. R. 1089.

(35) (1866) 2 Q. B. 114; 7 B. & S. 902; 36 L. J. M. C. 17; 15 L. T. 277; 15 W. R. 198.

(36) (1866) 35 L. J. M. C. 211.

(37) (1863) 9 Cox C. C. 356; 32 L. J. M. C. 208; 4 B. & S. 401; 10 Jur. (N. S.) 41; 8 L. T. 536; 129 R. R. 753; 122 E. R. 472.

(38) (1841) 1 Q. B. 66; 4 P. & D. 679; 5 Jur. 1154; 18 E. R. 1054; 10 L. J. M. C. 49; 55 R. R. 209.

(39) (1902) 1 K. B. 637; 71 L. J. K. B. 382; 86 L. T. 587; 50 W. R. 555; 63 J. P. 487; 20 Cox. C. C. 200; 18 T. L. R. 440.

were an English Statute it might well be debated whether the Magistrate had not a complete jurisdiction. But if, as I think, the language should be interpreted without any presumption one way or the other, it is plain that the Magistrate or the Jury have full jurisdiction to deal with a question of right or title for the purpose of determining whether a conditional order is reasonable and proper. The Jury, where there is a Jury, would presumably be persons acquainted with the locality, the Legislature relying not on their knowledge of law but on their local knowledge.

That construction is supported by the authority of Sir Richard Couch, C. J. in *Angelo's case* (22) though the learned Chief Justice did not consider the question of ouster of jurisdiction now raised. It is strange that *Angleo's case* (22) does not appear to have been cited in argument or referred to in any subsequent case before the present. The case was decided, as I have mentioned, under the Code of 1861 1869. I do not know whether the subsequent enlargement of the revisional jurisdiction of this Court was a factor in altering the course of opinion. Under the Code of 1861-69, the High Court could only intervene in respect of error in law. Under later Codes the High Court in revision may question "the correctness, legality or propriety" of any finding, sentence or order of an inferior Court and make an appropriate order.

If then the Magistrate has this jurisdiction, it is difficult to justify the general instructions laid down in *Lukhee Narain's case* (3) dictating how he should act in the exercise of his discretion. Such rules, with all respect, trespass beyond the legitimate sphere of interpretation and revision into the sphere of legislation. It is "wrong in principle for any Court or Judge to impose fetters on the exercise by themselves or others of powers which are left by law to their discretion in each case as it arises." *Saunders* v. *Saunders* (40).

The instructions involve the distinction referred to in the second question submitted between *bona fide* claims of title which are well founded and *bona fide* claims which are ill-founded. This distinction was a new departure, which has not met with undiluted favour. [See *Mukunda Lal Dey* v. *Haribole Saha* (6) and *Peary Lal Mullick* v. *Surendra Keshore Mitter* (8)].

I do not say that an order giving a defendant whose claim the Magistrate considers ill-founded a limited opportunity to go to the Civil Court is not within the Magistrate's jurisdiction, but he also has jurisdiction, and in some cases it may be his duty, to act himself on his own finding that the claim is ill-founded. It is matter for his discretion. As I apprehend, it would, in the same sense, be within the Magistrate's discretion in such case to terminate his proceedings leaving it to either party desiring to do so to seek a remedy in the Civil Court in the usual way. All that can be said beforehand is that the existence of a *bona fide* dispute of title may be an element for the Magistrate's consideration.

Then, again, there is the difference which the learned Judges authorised between the treatment of obstructions to public ways and the treatment of the other nuisances, specified in section 133, which affect the public health or safety. In the case of these other nuisances, the learned Judges say, the Magistrate is not to be fettered in the exercise of the powers given him by the considerations applicable to obstructions to public ways. This difference of treatment is not easy to support. Questions of right, if not of title, may arise, for instance, in connection with the issue whether some trade should or should not be carried on in some locality. That no real distinction exists is shown by the fact that in one or two subsequent cases (no doubt of an exceptional character) this doctrine of urgency has been extended to obstructions to public ways, though nothing in the way of danger to the public health or safety seems to have been involved [*Belat Ali* v. *Abdur Rahim* (4) and *Fakir Mullick* v. *Emperor* (15)].

It cannot be said that the possibility of a conflict between the Civil and the Criminal Courts was eliminated by the judgment in *Luckhee Narain's case* (3). Even under the procedure there laid down a defendant might neglect the opportunity given him of going to the Civil Court pending the Magistrate's proceedings. But he might still succeed, after the Magistrate

(40) (1897) P. 89; 66 L. J. P. 57; 76 L. T. 330; 45 W. R. 583.

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had made a final order against him, in establishing in the Civil Court that the way was not a public way. Would the Magistrate be bound by the Civil Court decree? Sir Richard Couch thought that the Civil Court had no power, in effect, to reverse the Magistrate's order because otherwise there might be a conflict of jurisdiction. "The consequence of that," he said, "would be that there might be another order by the Magistrate, another Jury appointed, another similar finding, and then another suit, and so on. The law does not allow that." *Meechoo Chunder Sircar* v. *Ravenshaw* (41). The Full Bench in *Chunilal's case* (26) overruled the view that the Magistrate's order could not be brought in question in the Civil Court, but were silent as to the effect of conflicting decisions. It may be that few Magistrates would go against a decree of the Civil Court. The danger may be remote. Nevertheless it exists and in some combination of circumstances the point may arise and cause difficulty.

In my opinion, the attempt made in *Luckhee Narain's case* (3) to find a half way house between holding that the Magistrate has no jurisdiction where a *bona fide* claim of title is raised and holding that he has full jurisdiction, placed the law on an unsound and uncertain basis. There can only be two alternatives, either the Magistrate has this jurisdiction or he has not. If he has the jurisdiction, it is beyond the province of this Court to curtail it. And the real difficulty in choosing between the two alternatives for the purpose of answering the first question submitted is this, that in actual practice the distinction which *Luckhee Narain's case* (3) draws between well and ill-founded claims has been generally disregarded, and the raising of a *bona fide* claim of title has been treated, apart from exceptional cases decided on the ground of urgency, as being in itself an effective bar to the Magistrate proceeding further, [*cf. Queen-Empress* v. *Bissessur Sahu* (2), *Preonath Dey* v. *Goborchone Malo* (11) and *Kamini Kumar Biswas* v. *Emperor* (9)]. The case is often cited and profession is made of following it, but in general the result has been as I have said. In that state of things my doubt has been whether this Bench should radically alter a practice which goes back to the Code of 1872 or whether it should be left to the Legislature which is understood to be engaged in the revision of the present Code, to put its intentions beyond all doubt. On the whole, however, for the reasons which I have endeavoured to express I agree with my Lord and Teunon, J., that the first question referred to us should be answered in the negative. If it were answered in the affirmative further questions would arise which need not now be considered as to the time at which the objection to the Magistrate's jurisdiction should be taken and as to the position of a Jury where the claim is made after the case goes to them. Subject to what I have already said I agree that an affirmative answer should be returned to the first branch of the second question. Farther than that I express no opinion in regard to *Belat Ali's case* (4).

I agree that in the result the Rule should be discharged.

NEWBOULD, J.—There is very little difference in practice between the rule of English Law that a *bona fide* claim of title ousts the jurisdiction of Justices proceeding in a summary way and the effect of decisions of this Court in revision that a Magistrate should stay his hand when in proceedings under section 133, Criminal Procedure Code, he finds that a claim of title is raised *bona fide*. No reference was made to this distinction when the case was argued before my learned brother Suhrawardy, J., and myself. Had there been we should have framed the questions which we referred for decision by a Full Bench differently. The form in which we have put the questions requires a decision on the point of ouster of jurisdiction. Now that I have considered these questions from the point of view of a member of a Full Bench and am no longer bound to follow previous decisions of Divisional Benches, I am convinced that there is no ouster of jurisdiction. I have read the judgment which my learned brother, Richardson, J., has just delivered and find myself so entirely in agreement with his views that I do not think it necessary to say more than that I fully agree with that judgment.

(41) 19 W. R. 345; 11 B. L. R. 9.

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GHOSE, J.—The questions referred to the Full Bench for determination are as follows:—

"When in proceedings under section 133, Criminal Procedure Code, arising out of an alleged obstruction of a way used by the public, the defendant sets up a claim of right which is found by the Magistrate to be made in good faith, is the Magistrate's jurisdiction entirely ousted?

"Or can the Magistrate, if he does not think this claim well-founded though he considers it made in good faith, allow the defendant a reasonable time to assert this claim by a civil suit and if he does not go to the Civil Court within such time or fails there, can the Magistrate continue the proceedings under section 133, Criminal Procedure Code?

Was the case of *Belat Ali* v. *Abdur Rahim* (4), giving effect to the dictum in *Luckhee Narain Banerjee* v. *Ram Kumar* (3), rightly decided?"

The present reference has arisen out of an application to this Court under the provisions of section 439 of the Code of Criminal Procedure by one Ram Sagar Mandal, described as one of the second party, against whom proceedings under section 133, Criminal Procedure Code, had been instituted on the complaint of one Alek Naskar and several others. It was alleged that Ram Sagar Mandal and another person had included within their homestead a portion of a public road and had erected a cowshed thereon. Ram Sagar Mandal showed cause denying the existence of the alleged public road and setting up a claim to the land in dispute. The Magistrate was of opinion that the claim of Ram Sagar Mandal, though not substantiated, was not a mere pretence and had not been raised to oust the jurisdiction of the Court but that it had been raised *bona fide*. He thereupon directed that the second party should go to the Civil Court within a date fixed by him, namely, within the 25th May 1921, and that in the event of the second party not going to the Civil Court within the said period, the trial should be continued. The petitioner did not go to the Civil Court and thereupon the Magistrate directed witnesses to be summoned.

On behalf of the petitioner it was contended before the Division Bench and also before us that on the Magistrate's finding that the petitioner's claim was *bona fide*, his jurisdiction under section 133, Criminal Procedure Code, came to an end and that he was not justified in continuing the proceedings under section 133, Criminal Procedure Code, simply because the petitioner had failed to bring a suit in the Civil Court. On behalf of the opposite party, the contention was put forward that, having regard to the findings arrived at by the Magistrate, the jurisdiction of the Magistrate had not been ousted and that he was justified in making the order in the manner in which he did.

In order to appreciate the contentions set out above, it is necessary to refer to the terms of section 133 and of the sections which follow in Chapter X of the Criminal Procedure Code and to some of the more important cases decided under section 133 of the Criminal Procedure Code. The sections, it need hardly be stated, have to be interpreted according to the natural meaning of the words used. Section 133, so far as it relates to the case before us, lays down that whenever the Magistrates mentioned in the section consider on receiving a Police report or other information and on taking such evidence, if any, as they think fit, that any unlawful obstruction or nuisance should be removed from any way, river or channel which is or may be lawfully used by the public or from any public place, they may make a conditional order directing the removal of such obstruction or nuisance or directing the person responsible for the obstruction or nuisance to appear before a Magistrate and move to have the order set aside or modified in manner indicated in the Statute. Section 134 deals with the service of notification of the conditional order made under section 133. Section 135 lays down the courses open to the person against whom the conditional order has been made. He can either perform the act directed in the conditional order within the time limited therein or appear and show cause against the conditional order or he can apply to the Magistrate to appoint a Jury to consider whether the conditional order is reasonable and proper. The procedure which is to be followed in the event of the person affected failing to take advantage of the provisions of section 135, and also in the event of the person affected following the provisions of section 135, is indicated in sections 136 to 141 of the Cri-

RAM SAGAR MONDAL v. ALEK NASKAR.

minal Procedure Code. Farther, in cases where there is likelihood of imminent danger or injury of a serious kind to the public, the Magistrate is empowered by section 142, to issue, whether a Jury is to be or has been appointed or not, such an injunction to the person against whom the conditional order has been made, as is required to obviate or prevent such danger or injury pending the determination of the matter.

It may be noted in passing that section 133 of the present Code of Criminal Procedure corresponds to section 521 of the Code of 1872, which again corresponds to section 308 of the Code of 1861. Under the Code of 1872, it was held by this Court that in proceedings under section 521 of that Code, if a claim of private right were set up in respect of what was alleged to be a thoroughfare or public place, the Magistrate could not make any order under section 521, and the following sections, but was to proceed under section 532 (which corresponds to section 147 of the Code of 1882, and of the present Code), so that the person claiming such private right should have an opportunity of having the question raised by him duly enquired into and determined. It is unnecessary to refer to the cases in support of this view: they will be found collected in the case of *Chunder-nath Sen, In the matter of the Petition of* (21) The *ratio* of the decisions was that it was no part of the duty either of the Magistrate or of a Jury acting under section 526 of the Code of 1872, to determine the rights of parties in property. Then came the Code of 1882, and in the case of *Basarud in Bhuiah* v. *Baharali* (20) Mr. Justice Wilson observed as follows:—"It has been more than once held by this Court that the powers now embodied in sections 133 to 137, with regard to the obstruction of public ways, are not to be exercised where there is a *bona fide* dispute as to the existence of the public right. In the present case it is plain that the right of way is really in dispute, and that its existence is at least open to doubt. No order, therefore, can be made under the sections referred to, until the public right has been established by proper legal proceedings, civil or criminal." It is to be remembered that the Code of 1882 and the present Code of 1898 did not and does not in section 147 as in section 532, the corresponding section of the Code of 1872, give a Criminal Court power to deal with such a matter. The case in *Basaruddin Bhuiah* v. *Baharali* (20) was followed without any discussion in the cases reported as *Asker Mea* v. *Sobdar Mea* (27) and *Lal Mioh* v. *Nazir Khalashi* (28).

In *Lukhee Narain Banerjee* v. *Ram Kumar* (3) the question was discussed at some length and the cases under the Code of 1872 were referred to. It was pointed out by Prinsep and Pigot, JJ., that in accordance with the last mentioned decisions it had been held by this Court that a Magistrate proceeding under the like sections of the Code of 1882, was not, when a *bona fide* claim of title was set up, to proceed to make an order but was to allow the party setting up such a claim to substantiate it if he could do so by civil proceedings. It was further pointed out that there were no proper provisions in Chapter X of the Code of Criminal Procedure for an enquiry into disputed questions of title and that it could not have been held to have been the intention of the Legislature that questions of this nature raised *bona fide* should be finally decided in a summary manner and to the exclusion of any resource to the Civil Courts. In the case in *Lukhee Narain Banerjee* v. *Ram Kumar* (3), the learned Judges after pointing out that these decisions in question did not go to the jurisdiction of the Magistrate but only to the mode in which Magistrates should exercise their powers, observed further as follows on page 571:—

"When such a question is *bona fide* raised the Magistrate ought not to make an order under these sections of the Code, but should allow an opportunity for the determination of the question by the Civil Court.

"The claim of title must, however, in order that it should be allowed to have this effect, be *bona fide* and not a mere pretence to oust jurisdiction, and it is for the Magistrate to say whether the claim be *bona fide* or a mere pretence. The Magistrate cannot, of course, in determining this, decide contrary to the facts that the claim is not made *bona fide* but must have reasonable and probable cause for his decision, which will be subject to revision by this Court. The rule, however, that a *bona fide* claim of title ought not to be determined in summary proceedings before the Magistrate is subject to this, that the objection must be raised by the defendant at or before the hearing; he cannot be heard afterwards to object to the result of proceed-

ings to which he has deliberately submitted himself."

The broad principle thus laid down in *Luckhee Narain Banerjee* v. *Ram Kumar* (3) has been followed or referred to with approval or has been acted upon in numerous cases in this Court and does not seem to have been questioned at all in subsequent cases: but the controversy, such as it has been, has raged round a distinction drawn in *Luckhee Narain Banerjee* v. *Ram Kumar* (3) between a claim of right which the Magistrate thinks well-founded and a claim of right which the Magistrate does not think well-founded but considers to have been made *bona fide*. The remarks, last referred to, have been considered in several cases as has been pointed out in the referring order; they have been followed and effect given to them in the case of *Belat Ali* v. *Abdur Rahim* (4).

The rule laid down in the case in *Luckhee Narain Banerjee* v. *Ram Kumar* (3) that a *bona fide* claim of title ought not to be determined in summary proceedings before the Magistrate is often described as amounting to this, namely, that the Magistrate, having jurisdiction to enter upon the enquiry and having rightly entered upon it, becomes incapacitated to proceed because some fact appears which ousts his jurisdiction. No doubt it is a principle of the English Common Law that the jurisdiction of Justices is ousted by a *bona fide* claim of title on the part of a defendant; but it is to be noted that in England it has been held that although a claim of title is put forward *bona fide* by the defendant, if such a claim is necessarily involved in the very question which the Magistrates have to decide, their jurisdiction is not ousted [*Reg.* v. *Bradley* (42)]. In this country we have to proceed upon the words of the Statute as we find them. Now, excess of jurisdiction may either exist at the time when the Magistrate embarks upon the enquiry under section 133 and when the conditional order is made and in that case there is no jurisdiction to hear the case at all—a contingency which is excluded by the terms of the Statute itself, or it may crop up in the course of the hearing. When the Magistrate embarks upon an enquiry under section 133, Criminal Procedure Code, there is clearly no want of jurisdiction as has been shown above; and having regard to the very careful and guarded language used by the learned Judges in *Luckhee Narain Banerjee* v. *Ram Kumar* (3), I find it difficult to say that the assertion of a *bona fide* claim of title ousts the jurisdiction of the Magistrate in the sense in which the expression is used and understood in England. One test for ascertaining whether a matter is within the jurisdiction of the Magistrate or not is to consider the nature of the arguments used against the Magistrate. If there was no jurisdiction the Magistrate ought not to have entered into the enquiry at all: but if the argument is that the Magistrate's authority is not fettered in any way in cases where danger to public health or safety is involved but is fettered in other cases, it is quite clear that the Magistrate has jurisdiction. Where a Magistrate decides one way when he ought to have decided another way, that is not, in my opinion, absence or want of jurisdiction. The manner in which the Magistrate's discretion ought to be exercised in a particular set of circumstances is a different matter altogether and has nothing to do with questions of jurisdiction.

In my opinion there cannot be any manner of doubt having regard to the provisions of section 133 that the Magistrate has complete jurisdiction when he makes the conditional order under section 133. If the person, against whom the conditional order has been made, has a *bona fide* claim of right, he should draw the attention of the Magistrate to it at the earliest possible moment. On such a claim being put forward it is for the Magistrate to say whether the claim has been advanced before him with some show of reason and whether it is something more than a bare assertion; in other words it is for the Magistrate to say whether there is a real or substantial question between the parties to be tried out. If the Magistrate is of opinion that there is such a question, he ought to stay his hands at once and take no further action in the matter but refer the parties to the Civil Court. Whether or not the claim can be ultimately maintained in the Civil Court is altogether another matter; it is not for the Magistrate to enquire into all the circumstances to see if it is impossible. But if the claim of

(42) (1894) 70 L. T. 379; 63 L. J. M. C. 183; 10 R. 188; 17 Cox C. C. 739; 58 J. P. 199.

right put forward is of a character unknown to the law, the Magistrate is under no obligation to stay his hands although it is *bona fide*; in other words a mere belief in a right, although *bona fide*, ought not to be sufficient to induce the Magistrate to stay his hands. This does not mean, however, that the Magistrate is to embark upon a prolonged enquiry into what has been described as the degrees of *bona fide* in the claim of right advanced before him. For instance, where the encroachment or obstruction complained of is upon a way admittedly public, there cannot be any question that the Magistrate must proceed beyond the stage of the conditional order, even if a claim of right were put forward by a person believing in the claim.

The view taken above is not inconsistent with what has been held to be the proper procedure to be followed in cases of emergency where there is likelihood of imminent danger or injury of a serious kind to the public. Indeed the Magistrate's discretion in cases of danger to public health or safety cannot be fettered as is amply recognised at page 573 of I. L. R. 15 Cal. [*Luckhee Narain Banerjee* v. *Ram Kumar* (3)].

I, therefore, answer the first question by saying that if the Magistrate finds that there is a real or substantial question to be tried out between the parties he ought in the exercise of his discretion to stay his hands and not proceed any further after making the conditional order under section 133. In my opinion it is not a case of ouster of jurisdiction and there is no ouster of jurisdiction.

I answer the second question by saying that the Magistrate is entitled to continue the proceedings where the objector shows nothing more than a mere belief in the claim of right put forward. The Magistrate is not entitled to direct the objector to go to the Civil Court because in his opinion the claim of right cannot be ultimately maintained. So far as the case of *Belat Ali* v. *Abdur Rahim* (4) is not inconsistent with the above view, it was rightly decided.

As regards the matter out of which the present reference has arisen, I read the Magistrate's order as meaning that he was of opinion that no real or substantial question of title between the parties had been raised before him. If I am right in this interpretation of the Magistrate's order, it follows that the Magistrate was not bound to stay his hands. In this view of the matter I would discharge the Rule which was issued by the Divisional Bench.

S. D. *Rule discharged.*

PATNA HIGH COURT.

CRIMINAL REVISION No. 612 OF 1921.
January 22, 1922.

Present :—Mr. Justice Jwala Prasad.

BIRNARAYAN SINGH—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 439—Accused acquitted—Judgment of acquittal recorded—Case "not false" according to Magistrate's own impression—Direction that case be entered as 'true' in Police register—Magistrate's own impression and direction, recorded as part of judgment—Revision—High Court's power to expunge—Judicial or executive order—Government of India Act, 1915 (5 & 6 Geo. V, C. 61)—Acquittal - Not guilty—Judicial functions—Executive powers—Evidence of character—Admissibility of judgment of acquittal for injuring character of acquitted person.

In a case of extortion against a Police Officer the Trying Magistrate, finding the prosecution evidence as insufficient and unconvincing and the defence evidence as more convincing, recorded a judgment of acquittal but added that his own impression was that the case was "not false" and that it should be entered as "true" in the Police register. The Police Officer sought in revision that that part of the Magistrate's judgment which cast a slur upon his character and was inconsistent with the verdict of acquittal may be expunged:

Held, 1 that, the order of the Magistrate being a judicial one, the High Court had power to deal with it under section 439, Criminal Procedure Code, and that it had also power to deal with it under its general superintendence under the Government of India Act: [p. 199, col. 2.]

Emperor v. *Thomas Tellako*, 14 Ind. Cas. 643; 13 Cr. L. J. 259; 5 Bur. L. T. 20, referred to.

(2) that as a judicial order the order objected to was illegal and inconsistent with the judgment of acquittal: that as an executive order it had no business to be in a judgment; and that, therefore, whether executive or judicial, it should be expunged from the judgment. [p. 199, col. 2.]

No suggestions of any kind can be made against the accused when a verdict of not guilty is recorded except that of establishing his complete innocence. [p. 198, col 2.]

Rex v *Plummer*, (1902) 2 K. B. 339 at p. 348; 71 L. J. K. B. 805; 66 J. P. 647; 86 L. T. 836; 18 T. L. R. 6.9; 51 W. R. 137; 20 Cox C. C. 243, referred to.

Even a judgment of acquittal, merely upon the benefit of doubt being given to the accused by reason of suspicious circumstances in the case of the

prosecution is entitled to be regarded as a complete exoneration of the accused [p. 198, col. 1.]

A Magistrate exercising judicial functions has to divest himself for a moment of his executive powers and has to forget himself that he has to deal with the person before him as an executive authority. [p. 199, col. 2]

Judgments of acquittal are not admissible in evidence even in a case where the character of the person is directly under enquiry under section 110 of the Code of Criminal Procedure; far less can it be permitted to be used by the Magistrate in this case for the purpose for which he recorded it in his judgment, namely, to throw a slur upon the character of the Sub-Inspector for executive or administrative purposes. [p. 198, col. 2 p. 199, col. 2.]

Emperor v *Noni Gopal Gupta*, 10 Ind. Cas 582; 15 C. W. N. 593; 38 C. 559; 12 Cr. L. J. 286; *Pulin Behary Das* v. *Emperor*, 16 Ind. Cas. 257; 16 C. W. N. 1105; 15 C. L. J. 517; 13 Cr .L. J. 609 and *Rajendra Narayan Singh* v. *Emperor*, 18 Ind. Cas. 149; 17 C. W. N. 238; 16 C. L. J. 467; 14 Cr. L. J. 5, referred to.

Petition for revision against an order passed by the Deputy Magistrate, Daltonganj, dated the 17th September 1921.

Mr. *Sambhu Saran*, for the Petitioner.

Mr. *H. L. Nandkeolyar*, Assistant Government Advocate, for the Crown.

JUDGMENT.—This Rule was issued by Adami and Bucknill, JJ., against the following order passed by the Magistrate of Daltonganj, dated the 17th September 1921 :—

"At the same time my impression after going through all the evidence and Police papers, etc, in the case is that the case is not false. I do not believe that any money was extorted from Ram Pratap Singh, but it seems to me that the other two complainants were made to pay some money before they were let off, but on account of their being influenced by Ram Pratap Singh and Jai Pragash Singh, who wanted to improve upon the facts, they have not told a genuine story and have mixed up facts and thus made their evidence untrustworthy and unsafe. Enter true; sections 384 and 384—114, Indian Penal Code."

The petitioner is the Sub-Inspector of Police and was called upon to stand his trial before the Magistrate upon charges under the aforesaid sections 384 and 384-114, Indian Penal Code along with one Mahadeo Puri, for having extorted money from three persons, namely, Ram Pratap Singh (P. W. No. 1), Badri Dusadh (P. W. No. 2) and Bukhan Dusadh (P. W. No. 3), of village Sundipura, in connection with an enquiry into a case of wrongful confinement, assault, etc, alleged before the Sub-Inspector by a woman, Deomonia Mallahin, against 24 persons of the village.

The defence in the case of the accused was that the entire case was false and concocted, having been engineered by a veteran enemy of the accused. The trial ended in the acquittal of the accused of all the charges. The Magistrate examined the facts of the case and the evidence in a very great detail.

The case of the prosecution and the witnesses on behalf of the prosecution was that money was paid to the accused persons on the sixth day of their arrival in the village. To rebut this the defence filed diaries of the case of Deomonia Mallahin from the 16th to the 20th of April showing that the Sub-Inspector reached village Sundipura on the 16th of April, at 11 A. M, and left the village at 4 A. M. on the 20th, and thereby proving that he could not be in the village on the date on which the extortion is said to have taken place. In support of this, the Sub-Inspector also filed the personal diary of the Head Constable Abdul Rashid. The learned Magistrate accepted the defence case to be true and stigmatised the case of the prosecution to be false in the following words :—

"Thus there can be no doubt that the statement that money was paid to the accused persons at Sundipura on the sixth day of their arrival there (on the 21st April 1921) is false."

Similarly he characterised the statement of the witnesses on the point in the following words :—

"That it was perhaps forgotten that the witnesses thereby rendered their evidence valueless by their statements being shown to be contrary to facts."

The learned Deputy Magistrate proved by means of documentary evidence stated by him in his judgment that Ram Pratap Singh, complainant, had perjured himself at every material point of the case. He relied upon the bail-bonds (Exhibits G, H, I, J and K) containing the thumb impressions of the bailors, showing that those persons were present in Daltoganj Court on the 18th of April and consequently "if any payment was made, it must have been made on or before the 19th of April."

As to the persons named above having

been called upon by the Sub-Inspector for purpose of negotiation at or about the time the search of the house was made, the learned Magistrate accepted the version of the accused that the houses were searched by the Head Constable and that the Sub-Inspector was examining the complainant and the witnesses on the 18th and the 19th and took bail from the accused on the fifth day. This he arrived at also upon a reference to the documentary evidence in the case, and came to the following conclusion :—

"The prosecution evidence on this point has already been shown to be unreliable and the prevaricating statements made by the prosecution witnesses on these points clearly show that they were not speaking the truth. I hold that the defence version on this point is the correct one."

As regards the actual payment and the motive for payment, the learned Magistrate devoted three typed pages of his judgment in order to show the material contradictions and improbabilities in the story told by the complainants and their witnesses of their having been threatened to be tied by ropes and having made the payments alleged by them to the Sub-Inspector. He held that Ram Pratap Singh and his cousin Jai Pragash Singh were the most influential men in the village and were clever men and could not easily be duped into doing a thing they did not like. As a result of the close investigation and scrutiny of the evidence upon the point of payment by the three persons Ram Partap Singh, Badri Dusadh and Bhukhan Dusadh, the learned Magistrate recorded a clear and definite finding in the following words: —

"It will be seen from the above that the prosecution evidence is discrepant and self-contradictory almost at every point regarding payment and time and motive. The diaries of the case of Deomonia conclusively show that all the prosecution witnesses have told lies regarding the date of payment."

He also criticises the attitude of Ram Pratap Singh and Jai Pragash Singh in the matter. He closes his examination of the evidence in the following words :—

"From the above it will be seen that the prosecution evidence is insufficient and unconvincing and having been rebutted in material details by the much more convincing defence evidence in the form of documents cannot be accepted. Coupled with the nature of the evidence, there are the irregularities in the proceedings, and the effect of all these taken together is to make the case a failure. The result is that I hold that the prosecution has failed to prove its case and I find that none of the two accused is guilty of the charges framed against him. I accordingly acquit them under section 253, Criminal Procedure Code".

The trial of the case and the enquiry into the charges of the accused ended here. The only issue before the Court upon the charges was whether the prosecution proved its case or not against the accused, or to put it shortly, whether the accused were guilty or not of the offences charged. All the points that arose in connection with the charges for the determination of the Court were set forth in the preceding paragraphs of his judgment and his decisions were recorded thereon seriatim with detailed reasons for those decisions. The judgment, therefore, was complete, and after the aforesaid verdict of acquittal was recorded, no other point arose before the Magistrate. It is said that the remark in question was added obviously for the purpose of administrative entry of the case being true or false under paragraph 314, Chapter XIII, of the Police Manual. Now, the object of this rule is to have a record of the opinion of the Magistrate upon the first information reports and final reports in cognizable case received from stations and outposts. Clause (*d*) of the rule requires the entry of the case to be in the form of one of the following in the general register :—true, intentionally true, mistake of law, mistake of fact, non-cognisable or not investigated, and the order with respect to the entry is to be made by the Magistrate of the district, the Magistrate in charge of criminal cases at Sadar and the Magistrate in charge of Sub-Divisions [*vide* clause (*b*)]. This rule does not apply to Magistrates trying the case. The register has to be filled in by the classes of Magistrates mentioned above, and he is obviously to do that upon the result of the case. The Magistrate trying the case may not necessarily be one of the three kinds of Magistrates, namely, the District Magistrate, the Magistrate in charge of criminal cases in Sadar or the Sub Divisional Magistrate, as is contemplated by the rule. Therefore, it was

not the judicial function of the Magistrate, who tried this case, to record this order in his judgment of the case. That judgment was a judgment of acquittal, and on a perusal of that judgment another Magistrate (whose duty was to record an entry in the register) was to find out what should be the nature of the entry. The entry in question is purely executive and administrative, and after the case had ended in the acquittal of the accused, the Magistrate had nothing more to decide as to what his personal impression was as regards the guilt or innocence of the accused. The judgment recorded in the present case by the Magistrate was a judgment entirely in favour of the accused. Nowhere throughout the judgment he suspected the defence made by the accused. On the other hand, he accepted all the counter-versions of the case, at each stage, made by the accused. In the present case the accused being a responsible officer, namely, the Sub-Inspector of Police chose to give evidence and his own version of the case. He took upon himself the responsibility of disclosing what truly happened. He did not content himself with only throwing doubt upon the case of the prosecution to obtain an acquittal by reason of the benefit of the doubt, as is often done by an accused in an ordinary position. He went further and laid his own case in order to show what the truth was. The investigation of the Magistrate, and, I may observe, a careful and searching investigation led to the conclusion that the prosecution case was improbable, false and concocted at every stage, and that the version of the accused was true in its substance. In vain have I ransacked the judgment of the Court to find out a single sentence about doubt and suspicion thrown upon the case of the defence. It was, as I may be able to say, an honourable acquittal. Even a judgment of acquittal, merely upon the benefit of doubt being given to the accused by reason of suspicious circumstances in the case of the prosecution is entitled to be regarded as a complete exoneration of the accused. A judgment of the type recorded by the Magistrate in the present case stands on a still higher footing and is a verdict of an honourable exoneration of all the charges and stigma cast upon the accused. Still with a view to make a record of an executive character the Magistrate thought it best to give his own impression and an impression derived, as he says (1) from the evidence generally which he had already discussed in detail and come to the conclusion that the prosecution case was false and the version of the defence was true, (2) an impression derived from the Police papers, most of them may not be relevant and the accused had not the opportunity to meet and (3) an impression derived from what he says "etc", which is too vague to find place in the judgment. The Magistrate was not entitled to use all these kinds of expressions against the accused, in order to give him a character which may injure the accused and which may throw a suspicion upon the careful judgment that he had already recorded just preceding the paragraph in question. The leading case of *Rex* v. *Plummer* (1) is an authority for the proposition that no suggestions of any kind can be made against the accused when a verdict of not guilty is recorded except that of establishing his complete innocence. Bruce, J., in that case observes :—

"As to the note by Mr. Greaves in Russell on Crimes, 4th Edition, Vol. III, page 146, referred to in the judgment of Wright, J., where it is suggested that a verdict of not guilty is not to be taken as establishing the innocence of the person acquitted, because the verdict may have been arrived at simply in consequence of the absence of evidence to prove the guilt, I think, it is a very dangerous principle to regard a verdict of not guilty as not fully establishing the innocence of the person to whom it relates".

This decision has been followed in a number of cases in India, *Emperor* v. *Nani Gopal Gupta* (2) *Pulin Behary Das* v. *Emperor* (3) and *Rajendra Narayan Singh* v. *Emperor* (4). Judgments of acquittal are not admissible in evidence even in a case where the character of the person is directly under enquiry under

(1) (1902) 2 K. B. 339 at p. 348; 71 L. J. K. B. 805; 66 J. P. 647; 86 L. T. 836; 18 T. L. R. 659; 51 W. R. 137; 20 Cox C. C. 243.

(2) 10 Ind. Cas. 582; 15 C. W. N. 593; 38 C. 559; 12 Cr. L. J 286.

(3) 16 Ind. Cas. 257; 16 C. W. N. 1105; 15 C. L. J. 517; 13 Cr. L. J 609.

(4) 18 Ind. Cas. 149; 17 C. W. N. 238; 16 C. L. J. 467; 14 Cr. L. J. 5.

section 110 of the Code of Criminal Procedure; far less can it be permitted to be used by the Magistrate in this case for the purpose for which he recorded it in his judgment, namely, to throw a slur upon the character of the Sub Inspector for executive or administrative purposes, that is, to complete a record or register as required under the Police Manual. Even assuming for the sake of argument that the trying Magistrate in the present case could under the Police Manual make an entry as to the case being false or true, his direction to enter the case "true" is against his clear finding that it is false.

Now, what is the meaning of the words "Enter true. Sections 384 and 384—114, Indian Penal Code" recorded by the Magistrate? An entry made under the said rule of the Police Manual of the falsity of a case, such as "Enter false", has been interpreted to mean a discharge of the accused or a dismissal of the complaint even where the word "dismissal" was not recorded under section 203 of the Code of Criminal Procedure. Therefore, the true interpretation of the words 'Enter true. Sections 384 and 384—114, Indian Penal Code" means that the case of the complainants of a particular charge of extortion, which formed the subject matter of specific charges against the accused, was true. This is wholly inconsistent with what the learned Magistrate has himself recorded in his judgment that the case of the prosecution was not proved and was concocted and false. The principal charges under sections 384 and 384-114, Indian Penal Code, which the Magistrate now wants to be recorded as true, were held by him to be false. Therefore, this entry, if it has any judicial meaning, is inconsistent with the considered judgment of the Magistrate and is sought to be supported only upon his impressions. As a judicial order it is, therefore, illegal, and is not in accordance with his judgment. No reason has been given and, therefore, it must not stand in the judgment. As an executive order, it has no business to be there in a judicial pronouncement, without giving proper opportunity to the accused of meeting those impressions. The privilege of passing an opinion in a case of this kind has been overstepped. Non-compliance with the strict provisions of the law took away the privilege which was given to the Magistrate against the subject. Such an entry has been interpreted by certain authorities as an entry of a purely executive character. If it is so, the Magistrate exercising the judicial functions has to divest himself for a moment of his executive powers and has to forget himself that he has to deal with the person before him as an executive authority. What he would have done in his executive capacity, we are not concerned with. What he will do in his executive capacity we do not want to know, nor can we stand in his way; but we do not want that a judicial pronouncement should be disfigured, and the judicial functions exercised by a Magistrate should be blurred in the manner in which the Magistrate has done in the present case. We do not at all want to enter into a general enquiry into the character of the Sub-Inspector. He may or may not be a habitual offender, all the specific charges brought against him have been held not to be true and he has been acquitted without any suggestion of misconduct.

It has also been argued that this Court cannot interfere with the order in question. I have clearly shown that if it is a judicial order, this Court has power to deal with it. If it is an executive order, it must not remain in the judgment. Taking any view of the case, this Court has jurisdiction in the case. It has been said that section 439 of the Code of Criminal Procedure does not intend to cover a case of this kind, where the order passed is not based upon the evidence but upon an impression, the order being to enter true. When the order is deleted, the reasons in the preceding paragraph must also go. The High Court has also power to deal with a case of this kind under its general superintendence under the Government of India Act. The power of the High Court to delete irrelevant orders of this kind has been upheld in the case of *Emperor* v. *Thomas Pellako* (5) where the irrelevant remarks and the Judge's opinion on certain matters contained in the judgment were ordered to be expunged and deleted on the ground that they were "ill-judged and

(5) 14 Ind Cas. 643; 13 Cr. L. J. 259; 5 Bur. L. T. 20.

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should not have found a place in a judgment in a criminal trial." This case is stronger than that.

I would, therefore, direct that the order of the Magistrate, whether it is executive or judicial, in the two concluding paragraphs of his judgment should be expunged.

S. D. *Rule made absolute.*

CALCUTTA HIGH COURT.

CRIMINAL REVISION NOS. 514 AND 515 OF 1921.

September 15, 1921.

Present:—Mr. Justice Newbould and Mr. Justice Ghose.

JIARATDIN MOHAMMED AND OTHERS—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 188—Criminal Procedure Code (Act V of 1898), s. 144, order under, legality of, whether can be questioned.

The mere fact that an application to revise an order under section 144, Criminal Procedure Code, was rejected by the High Court on the ground that when the application was made, the period of the order had elapsed, would not preclude a Magistrate in a trial, under section 188 of the Penal Code, from questioning the legality of the order under section 144 of the Criminal Procedure Code.

Criminal revision against an order of the District Magistrate, Dinajpur, dated the 3rd May 1921, affirming that of the Sub-Divisional Magistrate, Thakurgaon, dated the 11th January 1921.

Babus *Manmatha Nath Mukerjee* and *Pannalal Chatterjee*, for the Petitioners in Rule No. 514.

Babu *Dasarathi Sanyal*, for the Petitioners in Rule No. 515.

JUDGMENT.—These two Rules are directed against a conviction of the petitioners under section 188, Indian Penal Code. They were convicted on two trials; but the appeals against the conviction were heard jointly by the learned District Magistrate of Dinajpore. The convictions were based on the disobedience of an order under section 144, Criminal Procedure Code, which was passed by the Sub-Divisional Magistrate of Thakurgaon forbidding the people in general especially the proprietor of Nitbazar *hat* contiguous to Lahiri *hat* which was owned by a different proprietor to hold the Nitbazar *hat* on Mondays and Fridays. At the hearing of the appeals, it was urged that there

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was no necessity of an order under section 144 of the Code of Criminal Procedure. The question of the legality of the order does not appear to have been properly considered by the lower Appellate Court. That Court appears to have held that the order must be held to have been legally passed because an application to the High Court against that order failed. But the application was rejected by this Court on the ground that at the time it was made the period of the order had elapsed and it was stated when the order was passed that the question of the legality of the order could be raised at the trial of the petitioners should they be prosecuted under section 188, Indian Penal Code. We, therefore, direct that the orders passed by the Appellate Court in these two cases be set aside and the appeals be re-heard. We think it desirable, as requested by the petitioner's Vakil, that the appeals should be re-heard not by the District Magistrate but by the Sessions Judge; and we order accordingly.

W. C. A. *Rules made absolute.*

LAHORE HIGH COURT.

CRIMINAL CASE NO. 92 OF 1920.

April 16, 1920.

Present:—Mr. Justice Scott-Smith.

SUNDAR DAS AND ANOTHER—CONVICTS—PETITIONERS

versus

EMPEROR—RESPONDENT.

Punjab Excise Act (I of 1914), ss. 58, 59, 65, 78—Licensee of liquor-shop contravening rules as to keeping correct registers—Sentence of fine and order for forfeiture of liquor, validity of.

The mere making of an incorrect entry in the registers, kept under rules framed under sections 58 and 59 of the Punjab Excise Act, is not an offence in itself. It is only a wilful contravention of any regulation made under sections 58 or 59 which is punishable under section 65 of the Act. [p. 201, col. 2.]

An order directing forfeiture of liquor and empty bottles found in the shop is illegal and cannot be passed under section 78 of the Act. [p 201, col. 2; p. 202, col. 1.]

Petition, under section 439 of the Criminal Procedure Code, for revision of an order of the Sessions Judge, Gujranwala, dated the 2nd September 1919, confirming that of the Revenue Officer, exercising the powers of a Magistrate, First Class, Gujrat, dated the 16th May 1919.

Mr. *Mokand Lal Puri*, for the Petitioners.

JUDGMENT.—The brief facts of the case, out of which the present applications for revision arose, are as follows :—

Sundar Das and Ganpat Rai are joint licensees of a liquor shop at Mauza Tanda in the Gujrat District. Two cases were started, one against Sunder Das under section 61 of the Excise Act for illicit possession of country spirit at Mauza Lakhanwal where he has no shop, and the other against Sundar Das, Ganpat Rai, and Haveli Ram, son of Sunder Das, who works in the shop at Tanda, under sections 65 and 77 of the Excise Act read with rule No. 314 framed under sections 58 and 59 of the Act. Sunder Das had a pass for the importation of two dozen bottles and four dozen half-bottles of liquor for the shop at Tanda but on arrival of the consignment at Gujrat four of the large bottles were found to be missing. When the consignment reached Tanda, Haveli Ram entered in the register prescribed for the purpose, the reciept of two dozen large bottles and four dozen small bottles. He did not show that any of the bottles covered by the pass were missing.

In the case under section 61 of the Act Sunder Das was convicted by the Trial Court but his conviction was set aside by the learned Sessions Judge on appeal, it being held by that officer that Sundar Das was not found in possession of any illicit liquor at Mauza Lakhanwal. In the other case he convicted all the three accused persons and fined them Rs. 25 each. The Magistrate disposed of both the cases by one judgment and at the end passed an order of forfeiture under section 78 of the Act by which he confiscated all the liquor found in the shop at Tanda, 80 empty bottles also found there, and the bottles of liquor said to have been found in Sundar Das's possession at Lakhanwal. He did not state in the judgment in which case the order of forfeiture was passed. If it was passed in the case under section 61 of the Excise Act it should have been set aside by the Sessions Judge when he accepted the appeal of Sundar Das.

It is asked in revision that the convictions and sentences under sections 65, 77 and rule 314 of the Excise Act be set aside and that the order of forfeiture should also be set aside. The theory of the prosecution was that Sunder Das used to keep some of the bottles of liquor recieved in a consignment and take them to Lakhanwal and sell them there illegally, that this was known to Haveli Ram who entered in the register the total number of bottles covered by the pass no matter whether he received the full number or not. As the conviction of Sundar Dass under section 61 has been set aside the alleged reason for the wrong entry by Haveli Ram in the register cannot be said to be proved. His explanation is that he intended in the evening to make an entry in the remarks column showing that so many bottles were missing and so many were broken out of the consignment covered by the pass. Counsel points out that under rule 314 all that is necessary is that the licensee should maintain the registers prescribed and that these should show the true accounts of transactions from day to day. It was admitted by the Excise Inspector that the amount of sales is entered in the evening of the day of sale and it is, therefore, contended that if the register be examined in the middle of the day it cannot be expected to show a complete account of all the transactions which had taken place on that day and that it is only when the entries are completed in the evening that the record of transactions is correct and up to date. It is quite clear that Haveli Ram should not have shown 24 large bottles as received when only 18 bottles actually reached him. But the mere making of an incorrect entry in the register was not in itself an offence. It is only a wilful contravention of any regulations made under section 58 or 59 which is punishable under section 65 of the Excise Act. Haveli Ram's explanation cannot, in my opinion, be said to be an unreasonable one and having regard to the fact that no sufficient reasons have been shown why he shold have wilfully made a wrong entry, I think he is entitled to the benefit of the doubt. In my opinion he has been wrongly convicted of an offence under section 65 (*b*) of the Act and if his conviction is set aside those of Sundar Das and Ganpat Rai must also be set aside.

I, therefore, allow the revisions and setting aside the convictions acquit Sundar Das, Ganpat Rai, and Haveli Ram and order refund of the fines paid by them. As the accused persons in both the cases have

been acquitted the order of forfeiture is hereby set aside.

I would also point out that the order of forfeiture of the liquor and empty bottles in the shop at Tanda was illegal and could not have been passed under section 78 of the Act. The offence, if any, committed at Tanda was merely a contravention of a rule as to the keeping of the registers framed under sections 58 and 59 of the Act. No offence would appear to have been committed in respect of the liquor and of the empty bottles within the meaning of section 78.

R. N.

Revision allowed.

ALLAHABAD HIGH COURT.
CRIMINAL REVISION No. 476 OF 1921.
August 13, 1921.
Present:—Mr. Justice Lindsay.
SUNEHRI AND OTHERS—APPLICANTS
versus
EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 367, 424—Judgment perfunctory—Illegality.

Where a District Magistrate dispopses of an appeal against an order under section 110, Criminal Procedure Code, passed in a case in which 42 witnesses were examined for the prosecution and 106 for the defence, in a few lines, making only some general observations on the volume of evidence, the judgment is perfunctory and not in accordance with law, and should be set aside.

Criminal revision against an order of the District Magistrate, Moradabad, dated the 1st July 1921.

Mr. *Nehal Chand*, for the Applicants.

Mr. *R. Malcomson*, Assistant Government Advocate, for the Crown.

FACTS appear from the following judgment of the District Magistrate, Moradabad:—

In this case Sunehri and five others have been ordered by the Sub-Divisional Officer to give security for good behaviour for one year or in default to suffer one year's imprisonment. They are alleged to form one gang and to be habitually engaged in committing theft, robbery, dacoity and burglary. A very large number of witnesses have been examined on each side. The number of witnesses called to the defence exceeds a hundred but I must weigh the quality of the evidence rather than count the number of witnesses. A large number of respectable persons, some of whom are closely connected with Sunehri, depose to the bad character of the gang. The defence witnesses, on the other hand, for the greater part belong to the same caste as most of the accused, that is to say, they are Gujars, a very turbulent tribe in these parts.

I consider that the case against the accused would probably have been stronger had the Police been a little more careful in testing the witnesses before they produced them in Court. But even setting aside the weaker witnesses for the prosecution there remains a very large mass of evidence which to my mind amply establishes the evil reputation of the accused as thieves, robbers, burglars and dacoits. The defence witnesses on the other hand have been unwilling to back their opinions with their money and not one of them has come forward to stand as security for the accused.

The appeal is dismissed.

JUDGMENT.—The first ground taken in this revision is that the judgment of the Appellate Court is very perfunctory. That ground, in my opinion, is a good ground. I must set aside the orders of the District Magistrate and send the case back for re-trial and for proper consideration of the evidence. The case is a case under section 110 of the Code of Criminal Procedure and 42 witnesses were examined for the prosecution and 106 witnesses for the defence. The learned District Magistrate has disposed of the appeal in a few lines and has only made some general observations upon the volume of evidence which was put before him. This is not a proper way of disposing of an appeal of this kind and the learned District Magistrate's judgment is not in accordance with law. The order is set aside and the case is sent back for re-trial and for the recording of a proper judgment.

N. H.

Order set aside.
Case sent back.

PATNA HIGH COURT.

CRIMINAL REVISION No. 242 OF 1922.
June 2, 1922.
Present:—Mr. Justice Adami.

RAMPABITAR SINGH AND OTHERS—PETITIONERS

versus

KASIM ALI KHAN AND OTHERS—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 145—Parties having good and valid claim to joint possession—Jurisdiction—Dispossession within two months, nature of—Dispossession under decree, whether included.

A Magistrate has no jurisdiction to take proceedings under section 145 of the Code when a party has a good and valid claim to joint possession. [p. 204, col. 2.]

Semble.—For the purpose of a decision under section 145 the dispossession within two months must be forcible and wrongful dispossession, and possession delivered under a decree would not be a dispossession of that character. [p. 204, col. 1.]

Criminal revision against an order of the Deputy Magistrate, Gaya.

Messrs. *K. P. Jayawal, S. S. Bose* and *H. Chakravarty*, for the Petitioners.

Mr. *Hassan Jan*, for the Opposite Party.

JUDGMENT.—This application is directed against an order passed in proceedings taken under section 145, Criminal Procedure Code, declaring the first party to be in possession of an area of 4', 36 acres of land in village Horio.

The first and second parties were co-sharer landlords of the village, each having an eight anna share.

In 1914 Gajadhar Singh and others in order to pay off the amount due by them under three decrees obtained by Karan Singh, sold 50 *bighas* of *kasht* land to Kali Charan Singh and mortgaged 26 *bighas* of their *kasht* holding to him. In 1917 Kali Charan Singh sold the 50 *bighas* to Beehan Khan and Dhanukdhari Singh and assigned the mortgage to Beehan Khan and Sadho Lal. Beehan Khan was admittedly the Farzidar of Qasim Ali the first party, and Danukdhari and Sadho are claimed by the second party as the Farzidars of their brother and *karta*, Ram Chariter Singh. One Bhageswari Prasad held a money-decree against Karan Singh, and in 1914 attached the three decrees obtained by Karan against Gajadhar, but he sold the decree to Qasim Ali first party in 1915, and the latter in execution of the three decrees of Karan Singh, entered a petition of satisfaction stating that the whole amount due on the three decrees had been paid. It is the case of the first party, that Qasim alone paid the amount, the second party ever that they paid their half share of the amount in the name of Dhanukdhari their Farzidar, while the first party claim to have been in sole possession of the *kasht* lands after their purchase, the second party claim that they held joint possession, having paid half the purchase price. The first party in 1920 instituted a suit on the basis of the mortgage assigned to Beehan and Dhanukdhari in 1917, making the second party among others defendants. In that suit it was found that the mortgage bond was not properly attested and valid and that consideration did not pass, it was also held that Qasim Ali had not acted fairly and that he had managed to abstract certain documents which went to help the defendant's case. The Subordinate Judge also held that Qasim Ali did not alone pay the amount which satisfied Karan's decrees. The suit was dismissed. While that suit was pending the second party instituted a suit for partition and obtained a preliminary decree in 1920. After that decree trouble arose between the parties as to possession of the lands and on a Police report, proceedings under section 144 were started, the first party claiming exclusive possession and the second party joint possession. Thereafter the proceedings under section 144 were converted into proceedings under section 145, and later on the proceedings were revised, but the revised proceedings did not contain clear particulars of the disputed land. The second party were called on to supply particulars of the lands they claimed, but as the final decree in the partition suit had not been passed the lands allotted to them had not been demarcated, they delayed filing the particulars until after the final decree had been passed. They eventually claimed possession of 3 ½ *bighas* out of the disputed area, being lands in the area allotted to them by partition. The learned Magistrate considered that the delay in furnishing particulars told against the second party, petitioners, but I am inclined to think that

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On a report of the Police, dated the 18th of November 1921, a notice was issued under section 144 of the Code of Criminal Procedure against certain persons forbidding them to hold a new bazar and interfering with the long standing old Gondra bazar. This order was disobeyed and the offenders were prosecuted and convicted under section 188, Indian Penal Code.

The Police on the 13th of December 1921 reported that in spite of the conviction of the aforesaid persons their friends and helpers were threatening "to break again the old Gondra bazar" and were determined to hold a new bazar quite close to it and were ready to create a serious breach of the peace. Accordingly, he prayed for a general notice against the people preventing them from going to the particular plots where the new bazar was proposed to be held and to persuade customers to sit on the new bazar. As prayed by the Police, the Magistrate directed a general notice to be issued on the public and served on the spot, in the following order :—

"Issue a general order directed to the public frequenting the new market, or attending it to buy and sell, requiring them not to do so for the space of two months from date of service, and not to help in any way the continuance of the new bazar so that thereby there may be a speedy remedy to prevent an imminent breach of the peace between the old bazar people and these setting up and continuing the new one."

On the 20th of December, the Sub-Inspector of Police reported against the present petitioners, stating that in spite of the order of the Magistrate under section 144, these persons. "set the orders at defiance and did not care for the legal orders duly promulgated. They persuaded people and customers to sit in the new bazar though they were quite willing to obey the orders and go to the old bazar."

Says the Sub Inspector :—

" They have deliberately disobeyed the orders and I, therefore, pray that they may be prosecuted under section 188, Indian Penal Code, for such disobedience."

The Magistrate called upon the petitioners to show cause why they should not be prosecuted for the disobedience of the orders under section 144 lawfully promulgated. On the 4th of January 1922 the petitioners showed cause. They denied that they ever held the market and also that any market was held on the land in question, or that they kept any shop thereon. They also attacked the order of the Magistrate and the notice issued against them on various legal grounds. In short, they disclaimed any connection with the new bazar or the plot on which it was held. They also denied having in any way disobeyed the order of the Magistrate.

The Magistrate on the same day considered that objection and held that no sufficient reason was shown as to why the order under section 476 of the Code of Criminal Procedure should not be passed directing their prosecution, He held that, "the notice was general notice directed to the public under clause (3) of section 144, Criminal Procedure Code, in order to prevent an imminent likelihood of a breach of the peace between the people connected with the two bazars, the old and the new, meeting at the same place and on the same days of the week."

Continuing the Magistrate says :—

" Every member of the market going to the bazar prohibited under the said order, which was duly promulgated by beat of drum, and helping by his presence to continue the bazar in defiance of the said order which was a lawful one, is liable to prosecution for disobedience of order under section 188, Indian Penal Code. The local Police has reported that these men after the proclamation persuaded the people and the customers to sit on in the new bazar."

It was contended that the order of the Magistrate under section 144 was wholly illegal and without jurisdiction inasmuch as it was a general order prohibiting no new market to be held in the vicinity of the old market and such an order was calculated to interfere with the lawful exercise of the right of the people owning and possessing the land on which the new market was held. It is true that the general order under section 144 of the Code restraining the holding of a *hat* or market is not permissible

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Rakhal Das Singh [*Sinha*] v. *Emperor* (1). But the notice in the present case, which has been read to me, shows that the prohibition related only to the holding of the market on the same days as the old market is held and the object of the prohibition is to prevent a breach of the peace. The order passed by the Magistrate and the notice issued under section 144 in the present case are covered by the decision of a Full Bench in the case of *Bykuntram Shaha Roy* v. *Meajan* (2), and also by the decision in the case of *Nagendro Nath Biswas* v. *Rakhal Das Sinha* (3), which has been quoted by the Magistrate in his explanation submitted to this Court. The last ruling has discussed the previous authorities in the case and has held that the order such as the one that was passed in the present case under section 144 is legal. It is also clear that the disobedience of such an order is punishable under section 188, Indian Penal Code, prosecution for which might be started either by the sanction given under section 195 of the Code of Criminal Procedure, or by an order passed under section 476 of the Code. This view is also supported by the case of *Projapat Jha* v. *Emperor* (4). I, therefore, hold that there is no defect or want of jurisdiction in the order passed by the Magistrate under section 144 of the Code of Criminal Procedure. It is not a general order, but it only prohibits the holding of the new market on the same days as those on which the old market is held. The prohibition against any person going to the place and sitting there for the purpose of holding the market or for the purpose of helping others and customers to carry on the market seems to me to be covered by section 144 under which a Magistrate may direct "any person to abstain from a certain act." The fact that the petitioners have no concern with the land in question in the sense that they do not own or possess it, does not absolve them from the responsibility of obeying the prohibition enjoined upon them under section 144 and directing them to abstain from doing the aforesaid act. The contention would have applied had the order of the Magistrate been "to take certain order with certain property" in the possession or under the management of these persons under another clause of section 144. Therefore, in agreement with the view of the learned Government Advocate, I hold that the petitioners cannot plead in their defence that they are not liable for prosecution under section 188, Indian Penal Code, because they do not own or possess the land in question. The order under section 144 was, therefore, valid and a disobedience of that order is punishable under section 188, Indain Penal Code, and if the petitioners in defiance of the order of the Magistrate under section 144 went to the place and persuaded people and customers to sit in the new market they disobyed the order of the Magistrate, but the disobedience of such an order itself is not punishable under section 188 unless that disobedience, "causes or tends to cause obstruction, annoyance or injury to any person lawfully employed".

In other words, the petitioners would not come within the purview of section 188 unless the disobedience of the order of the Magistrate caused any annoyance, injury or obstruction to the old bazar which was being held in the vicinity. The petitioners deny in their petition, showing cause, having committed the offence.

Now, let us see whether the order of the Magistrate under section 476 of the Code of Criminal Procedure does in any way take into account the fact that there was no obstruction, annoyance or injury caused to the rival market. The order of the Magistrate is silent upon the point. It stops short with holding that the petitioners disobeyed the notice promulgated under section 144 of the Code of Criminal Procedure. The report of the Police is also silent upon the point, and the only ground urged by the Police for an action to be taken under section 188, Indian Penal Code, is that the petitioners "did not care for the legal orders duly promulgated". It appears to me that neither the Police nor the Magistrate directed their minds to the most essential element for constituting an offence under section 188, Indian Penal Code, namely, that the disobedience complained of must cause or tend

(1) 15 Ind Cas. 655; 19 C. W. N. 248; 13 Cr L. J. 511.
(2) 18 W. R. Cr. 47; 10 B. L. R. F. B. 434.
(3) 49 Ind. Cas. 97; 23 C. W. N. 141; 20 Cr. L. J. 113.
(4) 5 Ind. Cas. 154; 14 C. W. N. 234 at p. 236; 11 Cr. L. J. 49.

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to cause obstruction, annoyance or injury to any person lawfully employed. Now, if a conviction had taken place in the absence of the aforesaid element requisite for an offence under section 188, the conviction would have been set aside, *Brojo Nath Ghose* v. *Emperor* (5). It may be urged, and it has been urged by the learned Government Advocate in this case that the previous reports of the Police clearly indicated that there was a serious danger to a breach of the peace and the order of the Magistrate passed under section 144 also set forth the said fact; but that is not enough. That was a condition required to be fulfilled for the initiation of proceedings under section 144 and for the notice to be issued under that section under which a Magistrate can assume jurisdiction only when there is a danger to a breach of the peace. The prosecution for the disobedience of an order can only lie when the subsequent disobedience of the order promulgated under section 144 was likely to cause annoyance, obstruction or injury to a person lawfully employed. The reply to the argument of the learned Government Advocate was given by Prinsep, J., in the case of *Brojo Nath Ghose* v. *Emperor* (5) in the following order:—

"Now, there is not only no evidence as to the probable result of disobedience to the order under section 144, but there is no sufficient ground upon which such a finding could have been arrived at. No doubt, within our experience, the establishment of a rival *hat* at a place near to an old *hat* and to be held on the same day has often led to a breach of the peace, but it would not be safe or proper that such occurrences do sometimes take place should alone form a sufficient ground for a conviction under section 188, Indian Penal Code. It would be as well to consider that the prevalence of a crime in a particular locality was evidence that the accused did commit such a crime without any evidence thereof."

The present case has not reached the stage of conviction, but only has reached the direction by the Magistrate under section 476 of the Code of Criminal Procedure; but the principle of the aforesaid decision should apply to the case in its present stage also, inasmuch as in giving direction for the prosecution the Court is bound to find that there was a *prima facie* case with respect to all the elements which are essential to constitute the offence with respect to which the order under section 476 of the Code is passed. An order which does not set forth all the elements of an offence covered by it is, therefore, without jurisdiction. Under similar circumstances their Lordships of the Calcutta High Court in the case of *Frojapat Jha* v. *Emperor* (4), referred to above, set aside the sanction given by the Magistrate for a prosecution under section 183, Indian Penal Code. Their Lordships observed:—

"A Magistrate should not sanction a prosecution under section 188, unless he thinks that all the elements necessary for a conviction are present. In the judgment of the Magistrate and in the subsequent order of the Sessions Judge, there is nothing to show that either officer ever applied his mind at all to the question whether the disobedience of this order caused or tended to cause annoyance, injury, obstruction or a riot. In the explanation (as in the present case) submitted by the Magistrate he has entirely ignored the two grounds on which the Rule was issued and has confined himself to discussing other points in the petition with respect to which he was not consulted. We, therefore, derive no assistance from his explanation in dealing with this point. There is nothing to show, as we have stated, that the Magistrate thought that disobedience to his order tended to cause a riot. That being so, we think the sanction is wrong, and must be set aside".

Accepting the soundness of the aforesaid view, I set aside the order passed in this case against the petitioners under section 476 of the Code of Criminal Procedure. The proceedings are quashed.

J. P.

Proceedings quashed.

(5) 4 C. W. N. 226.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 912 OF 1918.
December 6, 1921.

Present :—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

GANESH RAMCHANDRA KULKARNI AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

LAXMIBAI VENKATESH NARAYAN AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act XIV of 1882), ss. 13, 244—Res judicata—*Suit by Hindu widow dismissed as barred by s.* 244, *Civil Procedure Code—Subsequent suit by reversioners, maintainability of*—Vatan *lands—Alienation by widow—Legal necessity.*

In execution of a money-decree obtained against a *vatandar* during his lifetime the property was put up for sale by the Court after his death and purchased by a *vatandar* of the same *vatan*. In the execution proceedings the judgment-debtor was represented by his widow who subsequently filed a suit for a declaration that the sale was illegal. The suit was dismissed as barred by section 244 of the Civil Procedure Code, 1882. The widow died and within twelve years the plaintiff who was one of the reversionary heirs sued for possession of the lands The defence raised was that the suit was barred by *res judicata* and that the sale was binding upon the reversioner:

Held, (1) that the suit was not barred by *res judicata* as there was no adjudication on the merits as between the widow and the purchaser which could affect the reversioners; [p. 210, col. 1.]

(2) that the sale was valid and binding upon the reversioners as it was in execution of a money-decree against her deceased husband and therefore for a legal necessity. [p. 210, col 1.]

Obiter.—At a Court sale an auction-purchaser can get only such rights as could have been conveyed to him by a private sale. [p. 210, col. 1.]

Second appeal from the decision of the Assistant Judge, Belgaum, in Appeal No. 87 of 1916, modifying the decree passed by the Subordinate Judge at Gokak, in Civil Suit No. 502 of 1913.

Mr. *Nilkanth Atmaram*, for the Appellant.

Mr. *H. G. Kulkarni*, for Respondent No. 2.

JUDGMENT.

SHAH, J.—In this second appeal we are concerned only with Survey No. 4 and the eastern half of Survey No. 46 of Kamatnur. These were *vatan* lands held by Gopal. He died in 1894. In execution of a money-decree obtained against Gopal during his lifetime, the property was put up for sale by the Court and purchased by one Narayan in 1896. He got possession in September 1897. He was a *vatandar* of the same *vatan*. In these execution proceedings the judgment-debtor was represented by his widow. It does not appear whether she raised any objection to the sale in the execution proceedings: but she filed Suit No. 682 of 1897 for a declaration that the sale was illegal. This suit was dismissed on the ground that it was barred by section 244 of the Code of Civil Procedure of 1882 and that she should have raised the objection in the execution proceedings. The sale certificate does not in terms state whose right, title and interest were put up for sale but it shows that there was a sale of the lands in question. The widow died in November 1901. The present suit is filed by some of the reversioners as the heirs of Gopal. The claim is resisted in respect of these particular lands by the defendants who claim under Narayan on the ground that the sale is binding upon the reversioners and that they have acquired a title by adverse possession for over twelve years from the time they got possession in 1897.

The Trial Court held that the cause of action accrued to the reversioners on the death of the widow in 1901 and that as the claim was made within twelve years from that time the suit was not time-barred. It further held that as the land was *vatan* property the sale was inoperative as it was not liable to be sold after the death of the last male holder. Accordingly the plaintiffs' claim in respect of the lands was decreed.

The lower Appellate Court has dismissed the plaintiffs' suit on the ground that the question whether the sale was invalid was *res judicata* in virtue of the decision in Suit No. 687 of 1897 filed by Kashibai.

In the appeal before us it is urged that the sale is not binding upon the reversionary heirs of Gopal and that the question is not *res judicata*.

As regards the plea of *res judicata*, the lower Appellate Court apparently had only the decree in the suit and not the judgment. A certified copy of the judgment has been put in here as it was not possible to deal with this point satisfactorily without referring to the judgment. The lower Appellate Court should have insisted upon having the judgment before deciding the point. It appears from the judgment that the suit was dismissed on the ground that it related to a question which should have been raised in execution proceedings and

that it was barred by section 244 of the Code then in force. There was no adjudication on the merits of the question. It does not appear that in the execution proceedings the widow had raised any objection to the sale. Thus there was no adjudication as between the widow and the purchaser which could affect the reversioners. The plea of *res judicata* must, therefore, fail.

As regards the question as to the validity of the sale, it seems to us that it was valid and binding upon the reversioners. The auction-purchaser is a *vatandar* of the same *vatan*; and an alienation of of these *vatan* lands by Gopal during his lifetime in favour of the purchaser would not have been invalid under section 5 of the Bombay Hereditary Offices Act. But Gopal did not effect any alienation during his lifetime. The widow inherited her husband's property including these *vatan* lands. She would be able to alienate her husband's immoveable property for legal necessity: and though there would be a special restriction on her powers in virtue of section 5 of the Bombay Hereditary Offices Act, she might be able to deal with the *vatan* property as a Hindu widow for legal necessity provided the alienee was a *vatandar* of the same *vatan*. That being her position, it is clear that at the Court sale the auction purchaser could get only such right as she could have conveyed by a private sale to him. At the date of the sale Gopal was dead: and though the sale deed refers to the lands it seems to me that at the date of the sale the purchaser could get only the right, title and interest of the widow. In the present case the sale was in execution of a money-decree against Gopal. The widow would be bound to pay the decretal debt of her deceased husband: and unless it were proved that she had other moveable estate of her husband from which the debt could have been defrayed the sale would be for a legal necessity and as such it would be binding upon the reversioners. We have the fact that she allowed the *vatan* property to be sold in execution of the decree, which she was bound to satisfy. An alienation by her for that purpose would be binding upon the reversioners: and I do not see any reason why the Court sale should not convey such title as a sale by her for the purpose could have conveyed. On the whole, therefore, I am of opinion that the sale was good not only during her lifetime, but also against the reversioners.

The decree of the lower Appellate Court as regards these lands is right and must be confirmed with costs. The appeal is dismissed.

MACLEOD, C. J.—I agree.

J. P. & N. K. *Decree confirmed.*

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE ORDER NOS. 372 AND 373 OF 1919.

August 23, 1921.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Panton.

KUSUM KUMARI DASI—DEFENDANT APPELLANT

versus

DASARATHI SINHA—PLAINTIFF—RESPONDENT.

Hindu Law—Succession—Posthumous son, rights of—Alienation by widow, if binding—Analogy of adopted son—Analogy of family settlement, application of.

The right of succession, under Hindu Law, is a right which vests immediately on the death of the owner of the property and cannot under any circumstances remain in abeyance in expectation of the birth of a preferable heir. To this fundamental rule there is an apparent exception in the case of a child already conceived and in the womb of its mother who will, on his birth, divest the estate of any person with a title inferior to his own who has taken in the meantime. [p. 212, cols 1 & 2.]

The title of a posthumous son relates back to the time of the death of his father. [p 213, col 2]

The rights of an after-born son in the case of a disposition of the estate by his mother before his birth should be determined on the analogy of his rights in the event of a partition before his birth. Consequently a posthumous son would not be bound by an alienation by his mother of his paternal estate before his birth. [p. 214, cols. 1 & 2.]

The analogy of a family settlement being binding on the minors is not applicable to such a case, nor is that of an adopted son's rights to question previous act of the adopting widow. [p 215, col. 2.]

Obiter dicta—An unborn child is supposed to be born when it is for its benefit to be so considered but this fiction does not apply when the advantage accrues to third persons. [p. 213, col 1]

An alienation made by the widow for legal necessity before adoption is valid and will bind the adopted son; but an alienation made without such necessity is good only up to the date of adoption; after that date, the alienee has no power to retain the property as against the adopted son and must deliver it to him. The rights of the adopted son are, for this purpose, deemed to spring into existence at the moment of his adoption and displace the rights of the widow; they do not await the determination of the widow's estate by her death as in the case of reversioners. [p. 214, col. 1.]

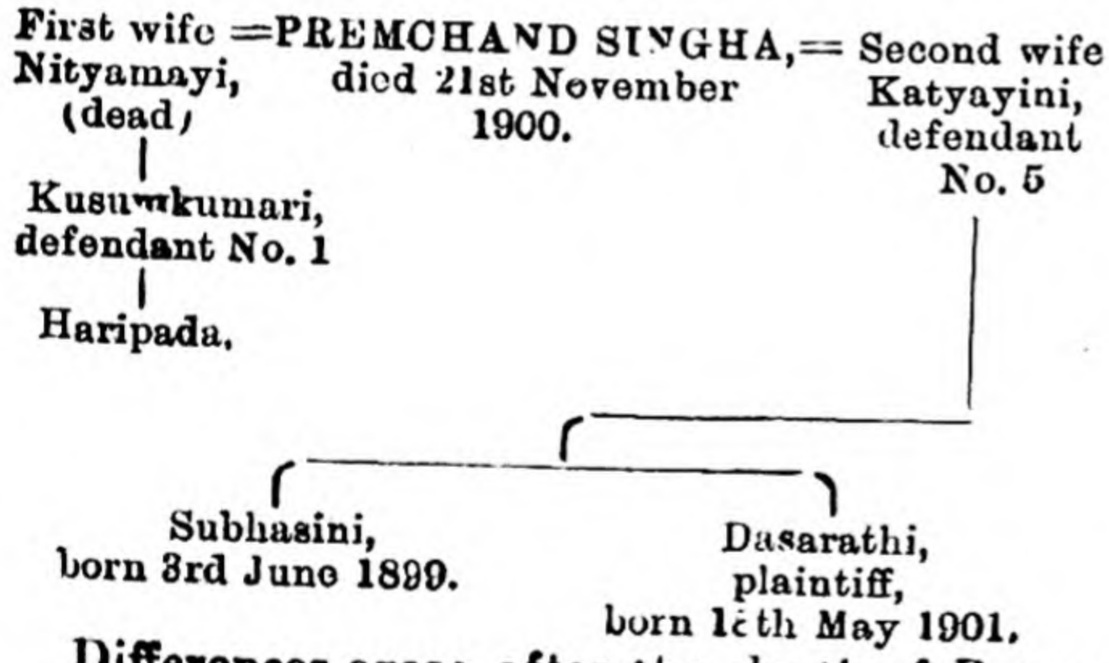
KUSUM KUMARI DASI v. DASARATHI SINHA.

Appeals against the decision of the Subordinate Judge, Hughli, dated the 25th July 1919, reversing that of the Munsif, Howrah, dated the 21st December 1919.

Babu *Bhupendra Kumar Ghose*, for the Appellant.

Babu *Manmohan Bose*, for the Respondent.

JUDGMENT —The subject-matter of the litigation which has led up to these two appeals is the estate left by one Premchand Sinha, who died on the 21st November 1900. He had married twice. By his first wife, Nrityamoyee, who died in his lifetime, he had a daughter, Kusum Kumari, who had been already married and had a son, Haripada by name. By his second wife, Katyayini, he had a daughter, Subhasini, who was born on the 3rd June 1899. His second wife was pregnant at the time of his death and gave birth to a posthumous son on the 18th May 1901, who was subsequently named Dasarathi. The relationship of the parties is set out in the following genealogical table:



Differences arose after the death of Premchand Sinha between his widow and her step-daughter as to the title to properties which stood in the name of the daughter, but which, it was alleged by the widow, really formed part of the estate left by her husband and was held by the daughter only as ostensible owner. Ultimately, a deed of relinquishment was executed on the 2nd May 1901 between the widow and her step-daughter. On the 20th November 1915 the posthumous son represented by his sister as next friend, commenced this litigation for declaration of his title to all the properties left by his father and for recovery of possession with mesne profits. The claim rested on the hypothesis that the posthumous son was not bound by the settlement which had been effected a few days before his birth between his mother and his step-sister, on the assumption that his mother was entitled to the interest of a Hindu widow in the estate and her step-sister was one of the next reversioners. The claim was resisted by the step-sister, who was the first defendant, and by a purchaser at a sale in execution of a decree for arrears of rent, who was joined as the second defendant. The Court of first instance dismissed the suit on the ground that the plaintiff was bound by the deed of relinquishment. On appeal, the Subordinate Judge has taken the contrary view and has remanded the suit for investigation of the other points in controversy between the parties. The step-daughter and the execution purchaser have preferred separate appeals. The substantial question which arises for consideration in these appeals is, whether the posthumous son is bound by the deed of relinquishment between his mother and step-sister, executed shortly before his birth.

The position of a posthumous son has not escaped the attention of authoritative writers on Hindu jurisprudence. Indeed, at one time, his rights were so much respected that when a son was born after a partition had taken place between a father and his sons, the partition was opened up again in order to give him the share, which he would have had, if he had then been alive; Vishnu-XVIII-3; Yajnavalkya II-122. Reference may in this connection be made to *Krishna* v. *Sami* (1); *Narasimha Razu* v. *Veerabhadra* (2) and *Rai Bishen Chand* v. *Asmaida Koer* (3). Jimutavahana went so far as to hold that the rule was still applicable where the property to be distributed was inherited from the grandfather; because distribution of such property was illegal so long as the mother was capable of bearing children, and, consequently, the rights of an afterborn child could not be prejudiced by the illegal act. Dayabhaga I 45, VII-10 Raghunandan II-30, 31, 36. This extreme view, however, is obsolete, and other writers, such as Manu IX-9,216; Gautama XXVIII-26; and Narada XIII-44, hold that a son born after a partition could only take his father's

(1) 9 M. 64; 3 Ind. Dec. (N. S.) 441 (F. B.).
(2) 17 M. 287; 6 Ind. Dec. (N. S.) 199.
(3) 11 I. A. 164 at p. 169; 6 A. 560 at p. 574; 4 Sar. P. C. J. 512; 3 Ind. Dec. (N. S.) 861 (P. C.).

share, representing him to the exclusion of the previously divided brethren; *Nawal Singh* v. *Bhagwan Singh* (4). Vijnaneswara reconciles this conflict of opinion, holding that the latter texts lay down the general rule, while the former are limited to the case of a son, who was in his mother's womb at the time of partition. Jimutavahana takes the same view in cases where the partition is made, by the father, of his self-acquired property. Consequently, in all cases where the number of sons would add to the number of sharers, if the pregnancy be known at the time, the distribution should be deferred till its result is ascertained; if it is not known and a son is afterwards born, a re distribution must take place of the estate as it then stands. Mitakshara I 6, 1-12; Dayabhaga VII-4; *Yekeyamian* v. *Agniswarian* (5), *Kalidas* v. *Krishan Chandra Das* (6). If the father had divided the whole property among his sons, retaining no share for himself, it is said that the sons with whom partition has been made must allot, from their shares, a portion equal to their own, to an after born son, on the principle that the unborn son cannot be deprived of his share in the paternal estate by a prior partition; Vishnu as quoted by Jagannath, Colebroke Book II-268; *Chengama Nayudu* v. *Munisami Nayudu* (7). The application of this principle is expressly limited to the case of partition between father and sons and is not extended to a son born to a separate co-parcener other than the father, of the family after partition. The texts cited are applicable only to the case of the son *en ventre sa mere* at the date of partition: *Ganpat Venkatesh Despande* v. *Gopalrao Venkatesh* (8), *Shivajirao* v. *Vasantrao* (9).

The anxiety thus evinced for the protection of the unborn son is reflected in the rules recognised in cases of succession. The right of succession, under Hindu Law, is a right which vests immediately on the death of the owner of the property, and cannot, under any circumstances, remain in abeyance in expectation of the birth of a preferable heir. To this fundamental rule, there is an apparent exception in the case of a child already conceived and in the womb of its mother, and it is well settled that a child, who is in the mother's womb at the time of the death is, in contemplation of law, actually existing and will on his birth devest the estate of any person with a title inferior to his own, who has taken in the meantime: See *Lakhi Priya* v. *Bhairab Chandra* (10), *Keshub* v. *Bishnu Persaud* (11), *Beroyali* v. *Nubokissen* (12), *Kalidas* v *Krishan Chandra Das* (6), *Jotendromohun Tagore* v. *Ganendromohun Tagore* (13).

The favoured position which a child in embryo thus occupies under the Hindu Law in respect of partition and succession is by no means singular, for whatever may have been the law in early times, it is a rule generally adopted in mature systems of jurisprudence that a child in embryo is to be considered as born, when it will be for its benefit so to be considered, although the question is not free from metaphysical difficulties whatever view we may accept on the subject. In the Roman Law, existence was, for certain purposes, assumed to begin before birth. Thus, although upon the authority of Ulpian (Dig. 25, 4, I, I). "The fruit of the body before it is born is part of the mother or the womb," and natural capacity for rights begins with the birth of men, that is, the complete separation of a living human being from the mother. Paul points out the ways in which the embryo in the mother's womb is recognized by law: "Attention is bestowed upon that which is in the womb, just the same as if it had come to life, whenever a question arises as the embryo's own privileges, although in no way benefiting another before it is born." Dig. 1, 5, 7. "Our speaking of him whose birth is anticipated as though he were in existence, is correct when the question is as to his own right," Dig. 50, 16,231. "The ancients paid regard to the child in the womb in such way that they maintained all rights in its favour

(4) 4 A. 427; A. W. N. (1882) 98; 2 Ind. Dec. (N. S.) 1065.
(5) 4 M. H. C. R. 307.
(6) 2 B. L. R. (F. B.) 103 at pp. 118, 121; 11 W. R. (A. C. J.) 11; 4 Mad. Jur. 296; 1 Ind. Dec. (N. S.) 639.
(7) 20 M. 75; 7 Ind. Dec. (N. S.) 52.
(8) 23 B. 636; 1 Bom. L. R. 128; 12 Ind. Dec. (N. S.) 425.
(9) 2 Ind. Cas. 249; 33 B. 267; 10 Bom. R. L. 778.
(10) (1833) 5 Sel. Rep. S. D. A. 315 (new Ed. 369) 7 Ind. Dec. (O. S.) 612.
(11) (1860) Sev. 240.
(12) (1863) Sev. 238.
(13) I. A. Sup. Vol. 47 at p 67; 9 B. L. R. 377; 18 W. R. 359; 2 Suth. P. C. J. 692; 3 Sar. P. C. J. 82

intact until the time of birth, as may be seen in the law of inheritance." Dig. 5, 4. 3. See Markby's Jurisprudence 132; Holland's Jurisprudence page 83, Sohm's Institutes (Ledlie) Art. 20 Savigny, System, Art. 62; Maskeldy's Roman Law (Dropsie) Art. 669; Salkowski Roman Law (Whitfield) Art. 32; Goudsmit Pandects (Gould) Art. 21; Thibaut Jurisprudence (Lendley) Art. 103, and a valuable note thereon in the Appendix by the learned translator. Similarly, under the English Law, as Sir William Blackstone puts it, "an infant in *ventre sa mere* is supposed to be born for many purposes; it is capable of having a legacy or a surrender of a copyhold estate made to it; it may have an estate assigned to it and it is enabled to have an estate limited to its use and to take afterwards by such limitation as if it were then actually born"; Commentaries, Volume I-130; *Doe d. Clarke* v. *Clarke* (14). That questions of considerable nicety may arise in the application of this doctrine to unforeseen combinations of events may be conceded, and one of the most curious cases in the books is probably that of *Walker* v. *G. N. Ry. Co. of Ireland* (15) where the question of the liability of a carrier of passengers for injury to an unborn child came under consideration. But whatever difficulties may arise in the application of the principle, it is well settled that an unborn child, when it is for its benefit to be so considered, is not ordinarily regarded as born for the benefit of third persons. See Savigny, System, Art. 62, (tr. Rattigan p. 9; tr. Guenoux, II p. 13) where he says: "This fiction is universally restricted for the benefit of the child, and no one else ought to be permitted to employ it for his own purposes." See also Voet. Com. Book I, Tit. V. Art. 5 (tr. Buchanan, p. 108), where it is pointed out that although those in the womb are considered as born, whenever it is for their advantage, this fiction of law ceases, if the advantage be not to those in the womb, but to third persons. See further the judgment of Lord Chancellor Westbury in *Blasson* v. *Blasson* (16) where it was said "that the fiction or indulgence of the law, which treats the unborn child as actually born, applies only for the purpose of enabling the unborn child to take a benefit which, if born, it would be entitled to, and that it is limited to cases where *de commodis ipsius partus quæritur*." Lord Chancellor Hardwicke, however, in *Wallis* v. *Hodson* (17), while noticing that the Civil Law confined the rule to cases in which it was for the benefit of the child to be considered as born, stated broadly the rule to be that such child was to be considered living to all intents and purposes. On these principles, we must regard it as well settled that the title of the posthumous son must be deemed to relate back to the time of death of his father.

Reference has been made in the course of argument to the analogy of an adopted son who also, by a well-recognised fiction of law, enjoys, for many purposes, the rights and privileges to which he would have been entitled, if he had been in actual existence at the time of the death of the father; *Tarinee* v. *Bamun Das* (18), *Bamundoss Mookerjee* v. *Musammat Tarinee* (19). No useful purpose is likely to be achieved, however, by an endeavour to assimilate and to establish a complete analogy between the legal fictions applicable to cases of a posthumous son and an adopted son, as is well illustrated by the futile attempt made in the case of *Tarinee* v. *Bamun Das* (18) to maintain the fanciful argument that a widow authorised to adopt a son was in a state of constructive pregnancy. As was ruled by this Court in *Harek Chand* v. *Bejoy Chand* (20) the title of a son adopted by a widow under authority from her husband does not relate back to the death of the husband, and when the adoption has taken place his fictitious birth in the new family cannot be antedated for all purposes See also *Sri Virada Pratapa Raghunada Deo* v. *Sri Brozo Kishoro Patta Deo* (21), *Khubneswari Debi* v. *Nilcomul*

(14) (1795) 2 H. Bl. 399; 126 E. R. 617; 3 R. R. 430.
(15) (1891) 28 L. R. Ir 69.
(16) (1864) 2 De G. J. & S. 665; 34 L. J. Ch. 18; 5 N. R. 65; 10 Jur. (N. S.) 1113; 11 L. T. 353; 13 W. R. 18; 46 E. R. 534; 189 R. R. 280.
(17) (1749) 2 Atk. 114; 26 E. R. 472.
(18) (1850) 6 Beng. S. D. A. 538; 11 Ind. Dec. (o. s.) 435.
(19) 7 M. I. A. 169; 1 Sar. P. C. J. 616; 19 E. R. 273.
(20) 2 C. L. J. 87; 9 C. W. N. 795.
(21) 3 I. A. 154; 1 M. 69; 11 Mad. Jur. 188; 25 W. R. 291; 3 Sar. P. C. J. 583; 2 Suth. P. C. J. 263; 1 Ind. Dec (N. S.) 45 (P. C.).

Lohiri (22), *Faiauddin Ali Khan* v. *Tincowri Saha* (23), *Lakshmana Rau* v. *Lakshmi Ammal* (24), *Hanmant Ramchandra* v. *Bhimacharya* (25). Consequently, we need not review the decisions which deal with the question, how far the adopted son may dispute the previous acts of the widow. There has been much divergence of judicial opinion on that subject, as is clear from the decision in *Lakshman Bhau Khopkar* v. *Radhabai* (26), *Moro Narayan Joshi* v. *Balaji Raghunath* (27), *Ram Krishna* v. *Tripurabai* (28), *Ram Krishna Kuppuswami* v. *Tripurabai* (29) and *Sreeramulu* v. *Kristamma* (30); the case last mentioned has now been overruled by a Full Bench in *Vidyanatha Sastri* v. *Savithri Ammal* (31). The result of the authorities as they now stand appears to be that an alienation made by the widow for legal necessity before adoption is valid and will bind the adopted son; but an alienation made without such necessity is good only up to the date of adoption; after that date, the alienee has no power to retain the property as against the adopted son and must deliver it to him. The rights of the adopted son are, for this purpose, deemed to spring into existence at the moment of his adoption and displace the rights of the widow; they do not await the determination of the widow's estate by her death as in the case of reversioners.

We are of opinion that the rights of the posthumous son in the case of a disposition of the estate by his mother before his birth should be determined on the analogy of his rights in the event of a partition before his birth. This view is not opposed to the decision in *Goura Chowdhrain* v. *Chummun Chowdry* (32). In that case it was ruled that proprietary right is created by birth and not by conception; so that a child in the womb takes no estate; where, when the succession opens out, a female member of the family has conceived, the inheritance remains in abeyance until the result of the conception can be ascertained; if the child be still born, the estate goes not to her heir but to the heir of the last owner. It must further be observed that the deed of compromise, which was challenged by the posthumous son in that case, had been executed by his father before his birth, and the Court declined to uphold the contention that a father was debarred from making an alienation while there was a possibility of his wife being *enciente*, to say nothing of the contingency whether the child in *utero matris* would be son or a daughter or be still born. This view, even if it be assumed to be correct in all its generality, does not militate against the conclusion that the posthumous son is not bound by an alienation by his mother of his paternal estate before his birth. In the case before us, there is the significant fact that the deed of relinquishment was executed by the mother two weeks before his birth. The Subordinate Judge has rightly pointed out that there was no necessity for this expedition and that the principle applicable to cases of family settlements cannot be rightly invoked in such circumstances.

It need not be disputed that in the absence of proof of mistake, inequality of position, undue influence, coercion, fraud or like ground, a partition or family arrangement made in settlement of a disputed or doubtful claim is a valid and binding arrangement which the parties thereto cannot deny, ignore or resile from; and this principle is applicable where some of the members of the family are minors, or where the settlement has been effected by a qualified owner whose acts in this respect will bind the reversioner; *Sham Sundar Lal* v. *Achhan Kunwar* (33). *Bijoy Gopal* v. *Girindra Nath* (34), *Upendra Nath*

(22) 12 I. A. 137; 12 C. 18; 9 Ind. Jur 398; 4 Sar. P. C. J. 651; 6 Ind. Dec. (N. S.) 12 (P. C.).
(23) 22 C. 565; 11 Ind. Dec. (N. S.) 377.
(24) 4 M. 160; 1 Ind. Dec. (N. S.) 946.
(25) 12 B. 105; 12 Ind. Jur. 274; 6 Ind. Dec. (N. S.) 556.
(26) 11 B. 609; 12 Ind. Jur. 30; 6 Ind. Dec. (N. S.) 401.
(27) 19 B. 809; 10 Ind. Dec. (N. S.) 543.
(28) 1 Ind. Cas. 647; 33 B. 88; 10 Bom. L. R. 1029.
(29) 12 Ind. Cas. 529; 13 Bom L. R. 940.
(30) 26 M. 143; 2 M. L. J. 197.
(31) 42 Ind. Cas. 245; 41 M 75; 33 M L. J. 387; (1917) M. W. N. 653; 22 M. L. T. 275; 6 L. W. 542 (F. B.).
(32) W. R. 1864, 340.

(33) 25 I. A. 183; 21 A. 71; 2 C W. N. 729; 7 Sar. P. C. J. 417; 9 Ind Dec. N S. 755.
(34) 23 Ind. Cas. 102; 41 C. 793; 18 C. W. N. 673; 19 C. L. J. 620; 12 A. L. J. 711; 16 Bom, L. R. 4 5; 16 M L. T. 68; 27 M. L. J. 123; 1 L. W. 533; (1914) M W. N. 430 (P. C.).

v. *Bindeshri Prosad* (35), *Khunni Lal* v. *Gobind Krishna Narain* (36), *Hiran Bibi* v. *Sohan Bibi* (37), *Behari Lal* v. *Daud Husain* (38), *Keramutulla Meah* v. *Keramutullah Meah* (39), *Kokla* v. *Pearey Lal* (40), *Shyam Lal* v. *Rameshwari* (41), *Srinath Bose* v. *Nibaran Chandra Roy* (42). But the cases which hold that a minor may be bound by a family settlement effected *bona fide* and for his benefit by his guardian, are clearly distinguishable on the ground that the settlement put forward was effected on behalf of the infant; to this class belong the decisions in *Keramutulla Meah* v. *Keramutullah Meah* (39), *Abdul Husain* v. *Mahomed Ibrahim Rowther* (43), *Viswanathaswami* v. *Kamulu Ammal* (44), *Prakkateri Parkum Vatakakka Chettiatath Kandyil* v. *Koram* (45) and *Anantanarayana* v. *Savithri Ammal* (46). In the case before us, the settlement was not effected on behalf of the infant, who had not been born at the time of the negotiations or the execution of the deed. We are not unmindful of the principle, repeatedly emphasised by the Judicial Committee, that it is of the utmost importance to the right administration of justice that the substance and the real meaning of the parties and not the form of expression and the literal sense of the transaction are to be constantly kept in view as the basis of the decision; *Dhurm Das Panday* v. *Musammat Shama Soondri Dibiah* (47), *Hunoomanpersaud Panday* v. *Musammat Babooee Munroj Koonweree* (48), *Hari Saran Maitra* v. *Bhubaneswari Debi* (49). This doctrine, however, is plainly of no assistance to the appellants. When the deed was executed, the possible birth of a male heir to the deceased was not kept in view. The settlement was effected at a time when the widow was assumed to be the holder of the estate for life and the immediate reversioners were her daughter and step-daughter. If the child in the womb should be still born, the relative position of the parties would not be altered in any way. If the child should turn out to be a daughter, the relative position would not be affected in substance, though the number of reversionary heirs would be increased from two to three. On the other hand, if the child should turn out to be a son, the estate would vest absolutely in him; the widow of the last owner would have no interest therein and her daughter and step daughter would not be reversioners at all. In view of this aspect of the case, it would, indeed, be a bold fiction to hold that a deed executed between two ladies at a time when one was ostensibly the widow in possession as heiress at-law to her husband and the other was one of the reversionary heirs, was in essence a transaction carried out for the benefit of an unborn son whose birth would destroy the rights, present and contingent, of both the parties to the instrument. We hold accordingly that the Subordinate Judge has correctly held that the plaintiff is not bound by the deed.

The result is that the order of remand made by the Subordinate Judge is confirmed and the appeals are dismissed with costs.

S. D.

Appeal dismissed.

(35) 32 Ind Cas. 468; 22 C. L. J. 452; 20 C. W. N. 210.
(36) 10 Ind Cas. 477. 38 I. A. 87; 33 A. 376; 13 C. L J. 575 15 C. W. N. 545; 8 A. L. J. 552; 13 Bom L. R. 427; 10 M. L. T. 25; (1911) 1 M. W. N. 432; 21 M. L. J. 645 (P. C.).
(37) 24 Ind. Cas. 309; 18 C. W. N. 929; 27 M. L. J. 149; 1 L. W. 648 (P. C.).
(38) 18 Ind. Cas. 721; 35 A. 240; 11 A. L. J. 352.
(39) 49 Ind. Cas. 886; 23 C. W. N. 118.
(40) 21 Ind. Cas. 29; 35 A. 502; 11 A. L. J. 765.
(41) 33 Ind. Cas. 278; 23 C. L. J. 82.
(42) 53 Ind. Cas. 945; 25 C. W. N 859.
(43) 35 Ind. Cas. 243; 19 M. L. T. 346; 3 L. W. 379.
(44) 31 Ind. Cas. 8[illegible]8; 30 M. L. T. 451; (1915) M. W. N. 968; 2 L. W. 1214; 19 M. L. T. 296.
(45) 14 Ind. Cas. 295; (1912) M. W. N. 532.
(46) 13 Ind Cas 458; 36 M. 161; (1912) M. W. N. 59; 11 M. L. T. 6[illegible]; 22 M. L. J. 231.
(47) 8 M. I. A 229; 6 W. R. P. C. 43; 1 Suth. P. C. J. 147; 1 Sar. P. C. J. 271; 18 E. R. 484.
(48) 6 M I. A. 393; 18 W. R. 8 *n*; Sevestre 253*n*; 2 Suth. P. C. J. 29; 1 Sar. P C. J. 552; 18 E R. 147.
(49) 15 I A. 195; 6 C. 40; 12 Ind. Jur. 373; 5 Sar. P. C. J. 198, 8 Ind. Dec. (N. S.) 27 (P. C.).

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 1105 OF 1918.
December 7, 1921.

Present :—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

TUNGABAI GOPAL DESAI—PLAINTIFF—APPELLANT

versus

KRISHNAJI RAMCHANDRA DESHPANDE—DEFENDANT—RESPONDENT.

Vatan—*Gudguli village—Deshpande's lands*—

TUNGABAI GOPAL DESAI v. KRISHNAJI RAMCHANDRA DESHPANDE.

Palkhi Inam *to* vatandar—*Appanage of* vatan—*Village grant—Presumption of occupancy right*—Inam *and other grants—Presumption*—Vatan Inam, *nature of, how determined.*

The lands in the village of Gudgudi held by the Deshpandes are *vatan* and not ordinary *inams.* [p. 217, cols. 1 & 2.]

Per *Macleod, J.*—A village granted by a Native Ruler before the British Rule to a *vatandar* to pay his *palkhi* expenses is an appanage of the *vatan.* [p. 217, col 1.]

A grant of a village by or on behalf of the Crown under the British rule is in law to be presumed to be subject to such rights of occupancy, if any, as the cultivators at the time of the grant may have had. [p. 217, col 2.]

Per *Shah J.—Inam* and other grants imply a grant of the royal share of the revenue and not necessarily the soil unless words suitable to indicate a grant of the soil are used in the document evidencing the grant. [p. 218, col. 2.]

In determining the nature of the Vatan *Inam* regard should be had to the terms of the Sanad and the nature of the settlement under which the Sanad was issued. [p. 218, col. 2.]

A Palkhi allowance, which is made in favour of the original grantee by a Native Ruler might not necessarily be part of the remuneration of the office held by the grantee. But it is also possible that it might be an appanage of the office and as such would go with the office. [p. 218, col. 1.]

Second appeal from the decision of the District Judge, Dharwar, in Appeal No. 126 of 1917, reversing the decree passed by the Subordinate Judge at Haveri, in Civil Suit No. 25 of 1921.

Mr. *K. H. Kelkar*, for the Appellant.

Mr. *Ogale* (with him Mr. *H. B. Gumaste*), for Respondent No. 1.

JUDGMENT.

MACLEOD, C. J.—The plaintiff sued to recover from defendants Nos. 1 to 5 and 9 and 10 by equitable partition her one third share in the properties mentioned in Schedules A, B and D of the plaint or one-third share in the lands in Schedule C even if the property in A was Deshpandegiri Vatan and for mesne profits. The properties in A, B and D originally belonged to one Gurnath Dattatraya Deshpande who died leaving three sons, Dattu, Shripad and Bhimappa. Shripad was the last owner as survivor and he died in January 19.3 without issue, but leaving three sisters who filed three suits for partition. It was further urged by the plaintiff that though the property in Schedule C was Vatan, the occupancy rights were not Vatan as they existed before the grant of the Inam. The defence was that the lands were Vatan and so the plaintiff was not entitled to succeed. One decree was passed in the three suits. The Trial Court held that the occupancy rights in the lands in Schedules C and D with certain exceptions were not Vatan. The plaintiff was also held entitled to certain sites in Schedule A. The lower Appellate Court held that the plaintiff was not the owner of the occupancy rights in the lands mentioned in Schedules C and D with the exceptions mentioned in the decree. The plaintiff has appealed and the only question argued in the appeal was whether the lands in the village of Gudgudi were ordinary Inam or Vatan.

The case has been unduly complicated by the view taken by the Trial Court that the rights of the plaintiff's ancestors in the village were partly Inam, partly Vatan, that the original grant was a grant of the royal share of the revenue, and any occupancy rights they possessed were acquired afterwards, so that they could not be considered as subject to the rules of succession to Vatan property. The learned Appellate Judge seemed to think that this was a possible inference, but came to the conclusion that the grant included extensive proprietary rights and was a grant of the soil in that sense subject to rights already existing. Now, if we concede that whatever rights the plaintiff's family now possess in the village arose from the original grant, it follows that those rights are either Inam or Vatan according to the purpose for which that grant was made. If, however, only the royal share of the revenue was granted for Vatan services it would not be impossible for the Vatan family to have acquired afterwards proprietary rights in the village lands which would be their personal property and would descend according to the rules of Hindu Law. But it has not been suggested in this case that the occupancy rights in the village have been acquired apart from the original grant or the *Sanad* issued in 1901.

Exhibit 112 contains a copy of the original grant, from which it appears that the village of Gudgudi was given as Palkhi Inam to the plaintiff's ancestors who were admittedly Deshpande Vatandars.

The village was described as having fallen fallow, the revenue being 150 Hons. Six-hundred Hons were to be paid as premium while the Vasul was to be paid at stated times.

Judged by the rules laid down by the decisions of the British Courts, it might be said that this was only a grant of the revenue, but I quite agree with the learned Appellate Judge that those rules have been laid down without considering from the lessons of history what were the actual conditions when grants going back 250 years, as this one does, were made. To quote from the judgment, they assume a stablised condition of the village granted where all cultivable land is occupied by cultivators who are entitled to remain on the soil so long as they pay a definite amount out of the produce or a definite share of the produce to Government. In such a case nothing would be left to Government to give away except what it received itself as revenue. But we cannot assume that those conditions existed in the seventeenth century. The grantee may or may not have recognized existing rights but what those rights may have been it is impossible for us to say. That occupancy rights were recognized by Governments previous to British Rule may be admitted, but I very much doubt whether those Governments in making grants considered that such grants were anything more than grants of the rights which existed in Government at the time they were made. However that may be, it is clear that the village was granted to the Vatandars to pay their Palkhi expenses and was, therefore, an appanage of the Vatan. Under the Gordon Settlement which dealt with service Inams, the village was classified as Deshpande Vatan and the Sanad, which was eventually issued in 1901 after reciting that certain lands and cash allowances were entered in the Government accounts for the years 1863 64 as held in service tenure, declared that the said lands and cash allowances should be continued hereditarily by the British Government on certain conditions, No distinction was made between the right to levy the assessment and the right to occupy the land so that it cannot be said that only the former was settled to be Vatan by the Sanad.

A very similar question arose in *Amrit Vaman* v. *Hari Govind* (1). The original grant was made in 1734 by a Maratha Ruler for maintenance in return for service. In 1884 the grantee accepted a settlement on the lines of the Gordon Settlement and the Sanad issued was in the same terms as the Sanad in this case. Shah, J. said (page 249*): "In the absence of any clear proof that the occupancy right in the Survey Number in suit was vested in the plaintiff's ancestor independently of the grant and that the land in suit was outside the lands dealt with in the Settlement of 1834, I think that it must be held to be Vatan property like the village itself...Thus where the whole village is mentioned in a Sanad evidencing a settlement under section 15 of the Hereditary Offices Act, it is for the party alleging that a particular Survey Number of that village is outside the scope of the settlement to prove it." Even in the case of Inams, the decisions of this Court that in the absence of evidence as to the terms of an Inam grant made by a Native Ruler before British Rule, there is a presumption of law that the grant was only of the royal revenue from the land and not of the soil may require to be re-considered since the decision of the Privy Council in *Suryanarayana* v. *Patanna*(2). Their Lordships said at page 218†: "In their Lordships' opinion there is no such presumption of law. But a grant of a village by or on behalf of the Crown under the British Rule is in law to be presumed to be subject to such rights of occupancy, if any, as the cultivators at the time of the grant may have had." This judgment was referred to with approval in *Upadrashta Venkata Sastrulu* v. *Divi Seetharamudu* (3).

I think the decision of the lower Court was right and all the appeals must be dismissed with costs.

SHAH, J.—The principal point argued in this appeal is whether the lands in the village of Gudgudi held by the Deshpandes is an ordinary Inam or part of their Vatan property. If it be an ordinary Inam, whatever the nature of the grant, whether the grant be of the soil or of the royal share of the revenue, it would go to the heirs of the last holder according to the Hindu Law. If it be

(1) 56 Ind. Cas. 411; 44 B. 237; 22 Bom. L. R. 275.

(2) 48 Ind. Cas. 689; 45 I. A. 209; 41 M. 1012; 25 M. L. T. 20; (1918) M. W. N. 859; 23 C. W. N. 273; 9 L. W. 126 29 C. L. J. 153; 1 U. P. L. R. (P. C.) 11; 36 M. L. J. 585; 21 Bom. L. R. 517; (1919) M. W. N. 463 (P. C.).

(3) 51 Ind. Cas. 304; 46 I. A. 123 at p. 128; 21 Bom. L. R. 925; 17 A. L. J. 725; 37 M. L. J. 42; 26 M. L. T. 175; 30 C. L. J. 441; 10 L. W. 633; 24 C. W. N. 129; 43 M. 166 (P. C.).

* Page of 44 B.—[*Ed.*]

† Page of 45 I. A.—[*Ed.*]

a part of the Vatan property the females would be postponed to the male members of the family under Bombay Act V of 1886.

It is urged on behalf of the original plaintiff that the original grant was made in favour of the defendants' ancestors, who were the Deshpandes, by the then King of Bijapur about the end of the seventeenth century, and that it was given in Inam for Palkhi allowance and not as part of the remuneration of the office which the Deshpandes held. On the other hand it is an admitted fact that the whole of this Deshpandegiri Vatan was settled on the lines of the Gordon Settlement and the usual Sanad was issued in 1901 in which the lands in question are referred to as part of the Deshpandegiri Vatan.

Both the lower Courts have found that it is part of the Vatan property and not an ordinary Inam. This finding is amply supported by the terms of Sanad and by the fact that at least under the British Rule the grant has been treated by the parties and the Government as part of the Vatan property and as a part of the remuneration for services. It is no doubt possible that a Palkhi allowance, which was made in favour of the original grantee by the Bijapur authorities, might not necessarily be part of the remuneration of the office held by the grantee. But it is also possible that it might be an appanage of the office and as such would go with the office. The terms of the original grant so far as they are available do not throw any light on the point and the way in which the parties and the Government had treated it is indicated by the Sanad. This contention of the plaintiff must be disallowed.

It is further urged that even in the case of Vatans the distinction must be made between the occupany rights and the Inam rights, which would be limited to the royal share of the revenue. In view of the observations relating to Vatan property in *Amrit Vaman* v. *Hari Govind* (1) Mr. Kelkar did not press this point seriously. It is clear on the terms of the Sanad that the grant must be taken to be a grant of the soil and not merely of the royal share of the revenue as was held in *Amrit Vaman* v. *Hari Govind* (1) on the terms of a similar Sanad. It is true that the terms of the original grant by the Bijapur Kings in this case do not clearly indicate a grant of the soil, but merely a grant of the royal share of the revenue. The usual expression (*jal, taru*, etc.,) indicating a grant of the soil is not to be found: and if the matter depended entirely upon the terms of that grant there would be some difficulty in holding that it was anything more than a grant of the royal share of the revenue. So far this case differs from the case of *Amrit Vaman* v. *Hari Govind* (1). But in determining the nature of the Vatan Inam I think that regard should be had to the terms of the Sanad and the nature of the settlement under which the Sanad was issued and on that point this case is similar to the case of *Amrit Vaman* v. *Hari Govind* (1). I do not think that any real basis is made out for making such a distinction in the case of this Vatan, and for holding that it is the royal share of the revenue and not the land or the occupancy right therein that forms part of the Vatan.

The result is that the appeal must be dismissed with costs. The other companion appeals also will be dismissed with costs.

I desire to make it clear that in taking this view as to the nature of the Vatan in this case, I do not mean to doubt in any sense the correctness of the view accepted in this Presidency as to the Inams and other similar grants being treated as implying a grant of the royal share of the revenue and not necessarily of the soil unless words suitable to indicate a grant of the soil are used in the document evidencing the grant. I have nothing to add to what I have stated in the last but one paragraph of my judgment in *Amrit Vaman* v. *Hari Govind* (1) as regards the effect of certain observations in *Suryanarayana* v. *Patanna* (2), on the view so far accepted in this Presidency beyond this that the *ratio decidendi* in the recent case of *Secretary of State for India* v. *Srinivasa Chariar* (4) appears to me to support that view.

N. H.

Appeal dismissed.

(4) 60 Ind. Cas. 270; 48 I. A. 56; 40 M. L. J. 262; (1921) M. W. N. 111; 29 M. L. T. 181; 19 A. L. J. 201; 33 C. L. J. 280; 13 L. W. 592; 44 M. 421; 25 C. W. N. 818; 3 U. P. L. R. (P. C.) 43 (P. C.).

ALLAHABAD HIGH COURT.

EXECUTION FIRST CIVIL APPEAL No. 194 OF 1921.

March 30, 1922.

Present:—Mr. Justice Walsh and Mr. Justice Stuart.

LALTA PRASAD—DECREE-HOLDER—APPELLANT

versus

SRI GANESHJI AND ANOTHER—JUDGMENT DEBTORS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 2, cl. (12)—Mesne profits—Decree allowing mesne profits silent about interest—Interest deemed to have been granted.

When a decree granting mesne profits is silent as to interest, it must be taken to carry interest on them in view of the definition of mesne profits in section 2, clause (12) of the Civil Procedure Code.

A Court has, however, the discretion to penalise a party by disallowing such interest

Grish Chunder Lahiri v *Shoshi Shikhareswar Roy*, 27 C. 951 at p. 967; 27 I. A. 110; 4 C. W. N. 631; 10 M. L. J. 356; 2 Bom. L. R. 709; 7 Sar. P. C. J. 687; 14 Ind. Dec. (N. S.) 622 (P. C.), followed.

Execution first appeal against the decree of the Additional Subordinate Judge of Cawnpore, dated the 8th February 1921.

Dr. *M. L. Agarwala* and Mr. *I. B. Banerjee*, for the Appellant.

Mr. *Gulzari Lal*, for the Respondents.

JUDGMENT.—The point raised by this appeal is covered by authority. The question is, what is meant by the expression "mesne profits" when the decree is silent as to interest. Section 2, clause (12) of the Code of Civil Procedure defines mesne profits as follows:—"Those profits which the person in wrongful possession of such property actually received or might with ordinary deligence have received therefrom, together with interest on such profits" If there had been any doubt as to the meaning of those words, it has been set at rest, and ought no longer to be a matter of controversy in India, by the decision of the Privy Council in the case of *Grish Chunder Lahiri* v. *Shoshi Shikhareswar Roy* (1), where the Privy Council pointed out, in construing section 211 of the old Code, which in this respect does not differ from the section quoted above of the present Code, that "its obvious effect was to provide that a simple decree for mesne profits shall carry interest on them." It is true that at the same time

(1) 27 C. 951 at p. 967; 27 I. A. 110; 4 C. W. N. 631; 10 M. L. J. 356; 2 Bom. L. R. 709; 7 Sar. P. C. J. 687; 14 Ind. Dec. (N. S.) 622 (P. C.).

there is discretion in the Court to penalize a party by disallowing such interest. Their Lordships explain this in the same judgment by saying:—"Mesne profits are in the nature of damages which the Court may mould according to the justice of the case." But the question in this appeal as in the case decided by the Privy Council is:—"What is the effect of a decree which grants mesne profits and says nothing about interest," which is what this decree does here. The Court below, possibly inadequately instructed, followed the Single Judge case of *Abdul Ghofur* v. *Raja Ram* (2) and appeared not to be aware of the two Judge case of *Narpat Singh* v *Har Gayan* (3), which would have drawn its attention to the Privy Council decision referred to. But having regard to the cases decided subsequently, the decision in the case of *Abdul Ghofur* v. *Raja Ram* (2) must be taken to have been overruled. The appeal must be allowed and execution directed to take place for the interest at 6 per cent. due by law. The case will go back to the lower Court with this direction. The appellant must have his costs with fees on the higher scale.

N. H. *Appeal allowed.*

(2) 22 A. 262; A. W. N. (1900) 57; 9 Ind. Dec. (N. S.) 1206.

(3) 25 A. 275; A. W. N. (1903) 42.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 289 OF 1920.

December 5, 1921.

Present:—Sir Norman Macleod, Kt., Chief Justice and Mr. Justice Shah.

IBHRAM GULAMHUSAIN MULNAJI—APPELLANT

versus

MOHIDDIN BALKU MODAK—RESPONDENT.

Adverse possession—Mortgagee acquiring rights of co-mortgagor—Knowledge of other co-mortgagor—Redemption, right of, extinguishment of.

If a mortgagee gets in the equity of redemption from one of two co-mortgagors and claims to be in possession as owner to the knowledge of the other co mortgagor, the right of the co-mortgagor to redeem his share will be extinguished after twelve years. But if the co-mortgagor is not acquainted with the purchase of the equity of redemption from the other co-mortgagor, time will not run against him in favour of the mortgagee who has purchased. [p. 220, cols. 1 & 2.]

Second appeal from the decision of the District Judge, Ratnagiri, in Appeal No.

IBHRAM GHULAMHUSAIN v. MOHIDDIN BALU.

293 of 1919, confirming a decree passed by the Subordinate Judge at Deorukh, in Civil Suit No. 26 of 1918.

Mr. *Coyajee* (with him Mr. *G. B. Chitale*), for the Appellant.

Mr. *G. S. Rao* for Mr. *B. V. Desai*, for Respondent No. 1.

JUDGMENT.—The suit property belonged to three persons, Gana, Tanu and Yesu. Whether they were joint owners or tenants-in-common does not appear. On 6th December 1884, Tanu mortgaged the property to Vithal Ganesh by Exhibit 54 and, on the 15th December 1884, all the three created a further charge in favour of Vithal, Exhibit 30. It was mentioned that all the three agreed to be bound by the previous mortgage of Tanu. On the 26th August 1889, one Chinto purchased at an auction sale in execution of a money-decree against Gana and others the equity of redemption of Gana in the suit property. In 1891 the sale-certificate, Exhibit 51, was issued. On the 27th September 1895, Vithal, the original mortgagee, and his son, Govind, sold their interest as mortgagees to the first defendant. On the 7th January 1905, a document was passed by Vithal, the son of Gana, and by Tanu to the first defendant. It purported to be a mortgage deed in substitution of Exhibits 54 and 30 and so creating a fresh mortgage for the previous amounts plus the amount admitted to have been spent by the mortgagees on improvements and further cash advance. On the 13th February 1906, the first defendant obtained a conveyance out and out from Vithal and Tanu.

On the 20th October 1895, Chinto, who purchased the interest of Gana and his right to redeem these properties, sold his right, title and interest to Vithal and his son Govind who had only recently, on the 27th September, sold their mortgagees' rights to the first defendant. On the 7th November 1908, the plaintiff purchased from Vithal's son Govind and another their interest in the property. He now resists the claim of the plaintiff to redeem on the ground that by the document of 7th January 1905 the previous mortgages were extinguished and he so held adversely to any one who claimed to have any right to redeem these mortgages.

The question is whether the plaintiff, after all these various transactions, has still retained a right to redeem the mortgaged property. If a mortgagee gets in the equity of redemption from one of two co-mortgagors and claims to be in possession as owner to the knowledge of the other co-mortgagor, then it may be said that the right of the co-mortgagor to redeem his share will be extinguished after twelve years. We have not been referred to any authority for the proposition that if a co-mortgagor is not acquainted with the purchase of the equity of redemption from the other co-mortgagor, still, time is running against him in favour of the mortgagee who has purchased.

The first defendant acquired nothing by the deed, dated 7th January 1905, from Gana's son Vithal, since Gana had no interest left in the property. If he is considered to have taken a fresh mortgage from Tanu, when, on the 13th February 1906, he obtained a conveyance out and out from Tanu, it might be said that, as far as that mortgage was concerned, the equity of redemption had gone, still the holder of Gana's equity of redemption would be entitled to fight out the question of redeeming Gana's share from the mortgagee who, he says, bought the equity of redemption from Gana's co mortgagor. In any event, limitation would not run until the 13th February 1906 in which case the suit would be in time. But, as far as we can see, Vithal and his son Govind were the owners of Gana's right on the 7th January 1905, and it could not be shown that there was anything which prevented them from suing out those rights against the first defendant. The plaintiff who purchased those rights on the 7th November 1908 is, therefore, able to sue. Although the transactions relating to the suit property were somewhat complicated, (and we are much indebted to Mr. Coyajee for his lucid exposition of them), we think they were made very much more complicated by the lower Courts not taking a clearer view of the issues involved when considering the facts of the case. No doubt, in the Trial Court the real issues were obscured by the various other issues raised which had no connection with the issue of limitation.

We think the decree dismissing the suit with costs was wrong, and the plaintiff should be held entitled to redeem one half of the suit,

property from the first defendant on payment of what will be found due on half the mortgage. We have heard nothing about the third mortgagor Yesa and this decree must be without prejudice to the rights of Yesa or his descendants who may be entitled to come in and ask for redemption with regard to one-third of the property.

The plaintiff must get his costs in this Court and in the lower Appellate Court and will have to pay costs in the Trial Court.

There will be an inquiry as to the amount payable by the plaintiff in order to redeem his share, and when that is ascertained, a preliminary decree for redemption will be passed.

Cross-objections are dismissed with costs.

N. K.

Decree reversed.

PATNA HIGH COURT.
FIRST CIVIL APPEAL No. 115 OF 1919.
January 17, 1922.
Present:—Mr. Justice Das and Mr. Justice Adami.

RAM NARAIN LAL AND ANOTHER—APPELLANTS

versus

BABU SAHADEO SINGH AND OTHERS—PLAINTIFFS

AND

SIDHESHWAR NATH AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage—Subrogation—Charge—Property mortgaged to have its sale by prior mortgagee set aside—Charge, keeping alive of—Priority.

Where a subsequent mortgagee takes his mortgage and advances mortgage-money in order to satisfy, and the money advanced by him does in fact go to satisfy, a prior mortgage, there is a clear intention to keep alive the charge, and to that extent he has priority over the mesne mortgagee. [p. 221, col. 2; p. 222, col. 2.]

An owner of the property who is in the rights of a first mortgagee and of the original mortgagor as acquired at a sale under the first mortgage is entitled at a suit of a subsequent mortgagee who is not bound by the sale of the decree on which it proceeded to set up the first mortgage as a shield. [p. 222, col. 2.]

Sukhi v. Ghulam Safdar Khan, 65 Ind. Cas. 151; 43 A. 469; (1921) M. W. N. 445; 14 L. W. 162; 26 C. W. N. 279; 42 M. L. J. 15; 30 M. L. T. 175; 24 Bom. L. R. 590 (P. C.), followed.

Appeal from the decision of the Subordinate Judge, Patna.

Messrs. *S. M. Mullick* and *Shiveshwar Dayal*, for the Appellants.

Messrs. *Kulwant Sahay* and *J. P. Singh*, for the Respondents.

JUDGMENT.

DAS, J.—The only question raised in this appeal is whether the defendants Nos. 3 and 4 who are the appellants before us are not entitled to priority in respect of 4 annas share in a property bearing *Tauzi* No. 126. The material facts are as follows :—

On the 22nd December 1905, one Bisheshwar, the father of defendants Nos. 1 and 2, borrowed a sum of money from one Ram Lagan and executed a mortgage in his favour in respect of 4 annas share in a property known as Mauza Parmanandpur bearing *Tauzi* No 126. Bisheshwar executed two further mortgages, one dated the 19th June 1911 and the other dated the 27th April 1913 in favour of the plaintiffs. In 1912 Ram Lagan brought a suit to enforce his mortgage and on the 24th September 1912 he recovered a decree as against Bisheshwar. Thereafter the mortgaged properties were put up for sale and were in fact purchased by Ram Lagan. On the 14th December 1914 Bisheshwar along with two other persons borrowed a sum of Rs. 4,935 from the appellants and executed a mortgage in favour of the appellants in respect of certain properties including 4 annas share in Mauza Parmanandpur bearing *Tauzi* No. 126. The mortgage in favour of the appellants recited that Ram Lagan had recovered a decree as against them and that it was absolutely necessary for them to deposit the decretal money in Court in order to have the sale in favour of Ram Lagan set aside. On the 15th December 1914, Rs. 4,192-11-9 was actually deposited by Bisheshwar in Court and a receipt was granted to the appellants by Bisheshwar in respect of the money which was advanced by the appellants to Bisheshwar in which it was distinctly stated by Bisheshwar that out of the money which was advanced by the appellants to Bisheshwar he had deposited the decretal money due to Ram Lagan Singh, decree-holder. There cannot be the slightest doubt that the

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money actually advanced by the appellants went to satisfy the mortgage-bond of Ram Lagan. The question, therefore, arises, was the charge in favour of Ram Lagan extinguished, or was it kept alive by the transaction which took place between the appellants and Bisheshwar. In my opinion, there cannot be the slightest doubt that the charge was kept alive. It was manifestly to the interest of the appellants that the charge should be kept alive and there is no reason at all to hold that they did not intend that which was manifestly to their advantage and for their benefit.

The learned Subordinate Judge has taken the view that the allegation that Ram Lagan's debt was satisfied out of the consideration money of the appellant's bond is not supported by any reliable evidence. In my opinion, it is supported by the recitals of the bond and also by the receipt Exhibit A, to which I have already referred. Then the learned Subordinate Judge says that there is no agreement in the appellants' bond that the debt of the appellants will have priority over the plaintiffs' mortgage. Of course there is no such agreement nor could there be any such agreement. The question that the learned Subordinate Judge should have considered was this: was the mortgage bond of Ram Lagan extinguished or kept alive; and had the learned Subordinate Judge referred to the numerous authorities on the point he would have had no sort of difficulty in coming to a proper conclusion on this point.

It was lastly argued by the learned Vakil for the respondents that the Judicial Committee in the case of *Het Ram* v *Shadi Ram* (1) has taken the view that upon an order absolute for sale being passed under section 89 of the Transfer of Property Act, the security is entirely extinguished and cannot be kept alive for any one's advantage. It is, of course, conceded in this case that an order absolute for sale was passed in Ram Lagan's suit, and that thereafter a sale of the property actually took place. If the decision of the Judicial Committee in *Het Ram* v. *Shadi Ram* (1) be the last word on the subject, then there can be very little doubt that the respondents will be entitled to succeed. But this case was considered by the Judicial Committee in the case of *Sukhi* v. *Ghulam Safdar Khan* (2). It was pointed out that various cases which have taken the opposite view were not brought to the notice of the Board in *Het Ram's case* (1), and that whatever the difficulty might have been under the Transfer of Property Act, the position is entirely different now that we are governed by the Civil Procedure Code and not by the Transfer of Property Act. Their Lordships in the course of their judgment said as follows:—

"Now the words being gone," namely, the concluding words in section 89 of the Transfer of Property Act, which gave rise to a conflict of authorities on the subject, "their Lordships feel no difficulty in holding that the law remains as it certainly was before the Transfer of Property Act, 1882, namely, that an owner of the property who is in the rights of a first mortgagee and of the original mortgagor as acquired at a sale under the first mortgage, is entitled at the suit of a subsequent mortgagee, who is not bound by the sale of the decree on which it proceeded, to set up the first mortgage as a shield".

In my opinion, this decision is conclusive on that point.

I hold that the decision of the learned Subordinate Judge on the question that has been argued before us cannot be supported. I must accordingly modify the decree which has been passed by the learned Subordinate Judge and direct that the sale of 4 annas share in Mauza Parmanandpur bearing *Tauzi* No. 126 must be subject to the prior mortgage lien of the appellants to the extent of Rs. 4,192 11-9.

The appellants will be entitled to their costs both in this Court and in the Court below from the plaintiffs.

ADAMI, J.—I agree.

S. D.

Appeal allowed.

(1) 45 Ind. Cas. 798; 40 A. 407; 5 P. L. W. 88; 16 A. L. J. 607; 35 M. L. J. 1; 24 M. L. T. 92; 28 C. L. J. 188; (1918) M. W. N. 518; 20 Bom. L. R. 798; 22 C. W. N. 1033; 9 L. W. 550; 12 Bur. L. T. 72; 45 I. A. 130 (P.C.).

(2) 65 Ind. Cas. 151; 43 A. 469; (1921) M. W. N. 445; 14 L. W. 162; 26 C. W. N. 279; 42 M. L. J. 15; 30 M. L. T. 175; 24 Bom. L. R. 590 (P. C.).

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 216 OF 1920.
December 21, 1921.
Present:—Sir Norman Macleod, KT., Chief Justice and Mr. Justice Shah.

CHUNILAL DAYABHAI & COMPANY —PLAINTIFFS—APPELLANTS

versus

THE AHMEDABAD FINE SPINNING & WEAVING CO.—DEFENDANTS —RESPONDENTS.

Construction of document—Contract—Provision not to claim damages in case of breach—Party committing wilful breach, whether protected.

A contract for sale of goods provided *inter alia* that "If you are not in a position to deliver the goods or if there be any dispute in respect of the goods or if the company do not give delivery for any reason the utmost that will be the result will be that the '*Soda*' will be cancelled but we shall not ask for damages arising from the same from you in any way" Defendant gave delivery of certain bales but refused to give delivery of the balance without giving any reason. Plaintiff sued for damages:

Held, that the defendant was not entitled merely to say that the contract was off because he did not wish to deliver any more goods under it, that the clause meant that some reason must be given by the defendant, and that, consequently, the plaintiff was entitled to damages. [p. 224, col. 1.]

First appeal from the decision of the Additional First Class, Subordinate Judge at Ahmedabad, in Suit No. 552 of 1918.

Mr. *B. J. Desai* (with him Mr. *G.N. Thakor*) for the Appellant.

Mr. *Ogyzee* (with him Messrs. *Ratanlal Ranchhoddas* and *H. J. Kania*), for the Respondents.

JUDGMENT.

MACLEOD, C. J.—The plaintiffs sued to recover damages in respect of non-delivery of certain goods by the defendants. Under the contract, which is dated the 17th June 1916, the plaintiffs agreed to purchase certain goods produced by the defendant mill. The contract states:—

"We have purchased goods that are in course of preparation so that we shall take delivery of the goods from time to time as we receive notice from the Company of their being ready. If we do not take delivery of the goods purchased within the period fixed for taking delivery as stated above, you are at liberty to keep the said goods on our account and risk or to sell them either by public auction or by private contract, and we shall make good to you the damage, if any, that you may have to suffer by reason of your having to re-sell the goods in that way. If we do not take delivery of goods which are purchassd under preparation on receiving notice from you or goods to be delivered at a particular period on the expiration of that period interest at the rate of six per cent. and expense of insurance etc., will run against us so long as the goods remain on our risk and account either in the godown of the mill or in the Company's godown in the market. If the Company's mill stop or if the mill meet with any accident or obstacle or if the mill stop by reason of some circumstance or on account of strike you are at liberty to cancel all the goods written in the contract or the portion that may have remained undelivered without giving us damages. If you are not in a position to deliver the goods or if there be any dispute in respect of the goods or if the Company do not give delivery for any reason the utmost that will be the result will be that the '*Soda*' will be cancelled but we shall not ask for damages arising from the same from you in any way."

The plaintiffs took delivery of 90 bales out of 151 mentioned in the contract. Then the defendants declined to give further delivery without giving any reason for such refusal. Accordingly the plaintiff filed this suit for damages. So far as I can see the defence was that the defendants were not obliged to give any reasons according to the terms of the contract for refusing to complete the delivery. The first issue raised was whether the plaintiffs have got a cause of action to sue for damages. The learned Judge held that the clause with regard to the avoidance of the contract of any reason should be read strictly, and, therefore, the defendants were justified in merely refusing to give delivery without assigning any reason, and the plaintiffs had no remedy. The suit was accordingly dismissed. I need not refer to the amendment which was allowed in the plaint so as to include a prayer for specific performance, beyond stating that it was obvious, from whatever point of view we look at the case, that the plaintiffs could not demand specific performance.

Now, I do not think that the learned Judge has construed the contract in the proper way,

I do not think that those particular words "If the Company do not give delivery for any reason the utmost that will be the result will be that the '*Soda*' will be cancelled, but we shall not ask for damage arising from the same" can be read as meaning that the parties agreed that if the defendants simply refused to give delivery, the plaintiffs were bound to accept such a refusal without being able to claim damages, if they wished to do so. It seems to me that the clause evidently means that some reason must be given by the defendants which would justify their refusing to give delivery, and that they were not entitled merely to say that the contract was off because they did not wish to deliver any more goods under it.

A reference has been made to *New Zealand Shipping Company* v. *Societe Des Ateliers Et. Chantiers De France* (1). The facts there were different, but the principles laid down by their Lordships would apply to a case of this kind. The terms of the contract in that case were—If the construction of the steamer contracted to be built was delayed by an unpreventable cause beyond the control of the builders, the time for the construction would be extended, and in case the builders should be unable to deliver the steamer within, in the event of France becoming engaged in a European war, 18 months from the date agreed by the contract for completion, thereupon this contract shall become void.

Lord Shaw said at page 12 :—

"The answer to the whole of this is clearly put by Bailhache, J.—that the stipulation as to the contract becoming 'void' is a stipulation in favour of both parties. This is subject only to this, that the conduct or situation of the party treating the contract as void shall not have been the means whereby the event which gives rise to the condition has been brought about. What I have ventured last to express appears to be sound in principle and to be a better and broader expression of the principle than a reference to either a party's own wrong or a party's own default, for without either definite wrong or default the action, or even the situation, of one the parties may be sufficient to produce the condition. I prefer more than any other as an expression of the principle that which occurs in Coke upon Littleton (206*b*), and is quoted with approval by Lord Ellenborough in *Rede* v. *Farr* (2), 'for that he himself is the mean that the condition could never be performed.'"

Therefore, if the parties agreed in certain events that the contract should become void, that would not mean that one of the parties could himself bring about the state of affairs which would avoid the contract. So that in this case it was not competent for the defendants merely to say that they did not wish to give any further delivery, and that, therefore, the contract should be cancelled without any claim for damages arising in favour of the plaintiffs. The decision of the lower Court was wrong. The case must go back to be tried on its merits. If the defendants are able to satisfy the Court that they had just cause for cancelling the contract, of course, it is open to them to do so. The plaintiffs must have the costs of the appeal. Costs in the Court below will be costs in the cause.

SHAH, J.—I agree.

J. P.

Appeal allowed.

(1) (1919) A. C. 1; 87 L. J. K. B. 746; 118 L. T. 31; 14 Asp. M. C. 291; 62 S. J. 519; 34 T. L. R. 400.

(2) (1817) 6 M. & S. 121 at p. 125; 105 E. R. 1188.

GABBA v. KANCHHEDILAL.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

APPEAL FROM APPELLATE DECREE No. 463 OF 1920.

July 27, 1921.

Present:—Sir Henry Drake-Brockman, KT., J. C.

GABBA—APPELLANT

versus

KANCHHEDILAL—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 144—Restitution—Application for compensation, order on—Appeal—Memorandum of appeal dismissed for deficiency of Court-fee—Appellate Court's order, if appealable—Court-fee payable on memorandum of first appeal—Appeal, memorandum of, registered—Rejection—Dismissal.

An appeal lies against an order of a lower Appellate Court dismissing an appeal on the ground of deficiency of Court-fee, the appellant having failed to make good the deficiency within the time allowed for the purpose. [p. 227, col. 1.]

(Case-Law considered.)

An application for compensation by a judgment-debtor under section 144, Civil Procedure Code, relates to the execution, discharge or satisfaction of the decree and the Court-fee payable on the memorandum of first appeal against an order on the the application is 8 annas [p. 228, col 1.]

(Case-Law considered.)

Once a memorandum of appeal has been registered it cannot merely be rejected, and even though an Appellate Court in terms does no more than reject the memorandum, the appeal must be deemed to have been dismissed. [p. 226, col. 2.]

Appeal against a decree of the District Judge, Hoshangabad, dated the 29th June 1920, confirming an order of the Second Subordinate Judge, Hoshangabad, dated the 12th November 1919

Mr. *Balwantrao Pendharkar*, for the Appellant.

JUDGMENT.—In this case the present respondent, Kanchhedilal, claimed a final decree for foreclosure on foot of a mortgage and under that decree remained in possession of the mortgaged fields between three and four months. In appeal the decree was set aside and the judgment-debtor after being restored to possession applied under section 144, Civil Procedure Code, for compensation alleging that some of the land was improperly left fallow and that crops which he had sown in the rest deteriorated owing to the decree-holder's neglect. On the application a Court fee of 8 annas was properly paid under Article 1, Schedule II, Court Fees Act. The Subordinate Judge who dealt with the application declined to hold the decree-holder responsible for leaving part of the land fallow and found that no damage had been caused to the crops actually raised. The application was, therefore, dismissed with costs and the judgment-debtor appealed to the District Court which, after admitting and registering the appeal, rejected the memorandum of appeal on the ground that an *ad valorem* Court fee was payable on it according to the amount claimed, under Article 1, Schedule I, Court Fees Act, whereas the judgment-debtor had paid 8 annas only, and on being given time to make good the deficiency had failed to do so. This decision was based on *Jaglip Narain Singh* v. *Mahant Keshogir* (1), a case decided by a Single Judge of the Allahabad High Court on the 13th August 1900, at which time the following order passed in exercise of the powers conferred by section 35 of the Court Fees Act was in force :—

"The Governor General in Council is pleased to direct that the fee chargeable on appeal from orders under clause (c) of section 244 of the Code of Civil Procedure (Act XIV of 1882) shall be limited to the amounts chargeable under Article 2 of the Second Schedule to the Court Fees Act, 1870."

It was held that where, on an application under section 583, Civil Procedure Code, 1882, compensation for the loss of possession of land in the shape of mesne profits was prayed for, the Court fee payable on the memorandum of appeal was an *ad valorem* fee. The decree of the Appellate Court contained no express order directing the plaintiff (appellant) to restore possession to the defendant (respondent) or to pay him the mesne profits, but the learned Judge held that mesne profits were granted by way of executing the decree passed in appeal and that the order for restitution amounted to a decree as defined in section 2 of the Civil Procedure Code, 1882.

The judgment-debtor has appealed to this Court and the decree-holder has raised a preliminary objection that no appeal lies.

It is contended for the respondent that, while section 2 (2) in the Civil Procedure Code of 1908 includes the rejection of a plaint in the definition of a decree, the rejec-

(1) A. W. N. (1901) 180.

tion of a memorandum of appeal is not so included and that a right of appeal is not a mere matter of procedure and cannot exist unless expressly conferred. In support of this view I am referred to the remarks of Bose, A. J. C., in *Onkar* v. *Lakmichand* (2) and to *Nur ud din Khan* v. *Pran Kishen* (3). In the latter case it was held that no appeal lies against the order of an Appellate Court returning a memorandum of appeal to be presented to the proper Court. It is also contended, on the strength of my own decision in *Faridbi* v. *Mohamad Amin* (4), that section 107 (2) read with section 141 of the present Civil Procedure Code does not suffice to place the rejection of a memorandum of appeal for the amount of Court-fee on the same footing as the rejection of a plaint.

For the appellant, on the other hand, it is urged that the memorandum of appeal having once been admitted could not thereafter be rejected and that the appeal should, therefore, be considered to have been dismissed under section 10 (*ii*) of the Court Fees Act. That provision, however, has plainly no application as appears on a perusal of section 9 of the Act. In *Trimbak Patil* v. *Madho Rao* (5) it was held by me in February 1905 that a plaint can be rejected after registration, but on this point there was then a conflict of authority and the point has not been made clear by the present Code.

The decision in *Rupsingh* v. *Mukhraj Singh* (6) favours the competency of the appeal, though there the real question decided was one of limitation, it being held that an order rejecting a memorandum of appeal must be regarded as equivalent to a decree for the purposes of Article 179, Schedule II, Limitation Act, 1877. Again, in *Gurga Dass* v. *Ramjoy* (7) the question was whether an order dismissing an appeal under section 4 of the Limitation Act, 1877, is a decree passed in appeal and section 582 of the Civil Procedure Code, 1882, was prayed in aid to establish that an order dismissing an appeal on the ground of limitation amounted to a decree just as an order rejecting a plaint was a decree according to the express terms of the definition in section 2 of the 1882 Code. The decision in *Gulab Rai* v. *Mangli Lal* (8) is to the same effect and was followed in *Ayyanna* v. *Nagabhooshanam* (9) and *Raghunath Goyal* v. *Nilu Nathaji* (10), of which the former was in turn followed in *Zamindar of Tuni* v. *Bennayya* (11). In the last mentioned case the memorandum of appeal was rejected by a District Court on the ground that it contained language disrespectful to the Court of first instance.

The present Civil Procedure Code, like that of 1882, admits of the rejection of a memorandum of appeal solely for defect in certain matters of pure form which do not include the amount of Court-fee and it would, therefore, seem that once a memorandum has been registered, it cannot merely be rejected. In this respect the memorandum of appeal differs from a plaint, for a plaint must be rejected in any of a number of specified cases, one of which is deficiency of stamp. For authority in favour of the view that a memorandum of appeal cannot be rejected after admission I may refer to *Gopee Ballub Roy* v. *Goluck Proshad* (12) and to *Ayyanna* v. *Nagabhooshanam* (8) (above cited). In this view I think the lower Appellate Court must be treated as having dismissed the appeal although in terms it did no more than reject the memorandum.

It is well-settled that section 12 (*i*) of the Court Fees Act does not make a decision final which fixes the category in which a document falls for the purposes of determining the Court-fee payable thereon. The question for decision, therefore, is solely whether the lower Appellate Court's order amounts to a decree or not. It is, of course, clear that no question within section 47 or section 144 of the Civil Procedure Code has been actually determined by the lower Appellate Court; indeed, the view taken as to the Court-fee payable

(2) 3 Ind. Cas. 920; 5 N. L. R. 130.
(3) 47 Ind. Cas. 16; 40 A. 659; 16 A. L. J. 630.
(4) 19 Ind. Cas. 97; 9 N. L. R. 33.
(5) 1 N. L. R. 103.
(6) 7 A. 887; A. W. N. (1885) 260; 4 Ind. Dec. (N. S.) 269.
(7) 12 C. 30; 6 Ind. Dec. (N. S.) 20.
(8) 7 A. 42; A. W. N. (1884) 223; 4 Ind. Dec. (N. S.) 274.
(9) 16 M. 285; 5 Ind. Dec. (N. S.) 905.
(10) 9 B. 452; 5 Ind. Dec. (N. S.) 300.
(11) 22 M. 155; 8 M. L. J. 304; 8 Ind. Dec. (N. S.) 110.
(12) W. R. 1864, 125.

has precluded the determining of any such question. On the whole, I think the authorities cited justify the conclusion that an order in effect dismissing an appeal for deficiency in Court-fee should be treated as on the same footing with the rejection of a plaint for the purposes of determining whether it amounts to a decree or not. In *Faridbai* v. *Mohamad Amin* (4) I pointed out that the appellant had a remedy by way of fresh suit. No corresponding remedy is available in the present case, nor would an application for revision of the lower Appellate Court's order have any chance of success, inasmuch as that order decides what is a mere question of law which may be classed with one of limitation or *res judicata*. I hold, then, that an appeal lies against the lower Appellate Court's decision.

With regard to the merits, the question for decision is, whether the reduction of Court-fee ordered by the Governor-General in Council under section 35, Court Fees Act applies to this case. Authority in favour of the appellant is to be found in *Madan Mohan* v. *Nogendra Nath* (13), the decision in which is based on the view that an order under section 144 of the present Civil Procedure Code comes under section 47 (1) of that Code. As to this I would remark, in the first place, that the reduction ordered under section 35, Court Fees Act, applies only to a certain class of appeals, namely, those from orders under clause (*c*) of section 244, Civil Procedure Code, 1882. Now those orders do not include any which decide questions falling under clause (*a*) or clause (*b*) of the same section and those clauses in terms relate only to mesne profits as to which the decree has directed inquiry or which it has made payable. In my opinion there is no decree at present in existence which can be said to meet either of those descriptions, and I, therefore, respectfully dissent from the view taken on this point in *Jagdip Narain Singh* v. *Mahant Keshogir* (1). The appellate decree which enabled the judgment-debtor to regain possession of the mortgaged land made no reference to any question regarding the compensation to which he might be entitled by reason of his temporary dispossession by the decree-holder. Moreover, the definition of the term "mesne profits" in section 2 (12) of the present Civil Procedure Code covers only profits received or obtainable by a person in wrongful possession of the property and the meaning of that term as laid down in the Explanation to section 211 of the 1882 Code was precisely the same. It seems to me clear, however, that this question of compensation does relate to the execution, discharge or satisfaction of the appellate decree and there is authority for this view in *Somasundaram Pillai* v. *Chokkalingam Pillai* (14) and *Kurgodigauda* v. *Ningangauda* (15). I do not feel at all pressed by my own decision in *Radha* v. *Sakhu* (16), where Article 181 of the Limitation Schedule was thought to be applicable to an application for restitution under section 144, Civil Procedure Code. It is true that section 144 omits all reference to execution and that the position of the section as compared with that of the corresponding one (No. 583) in the Code of 1882 has been changed, so that it seems no longer possible to hold that an application for restitution is one for execution of the appellate decree which forms its basis. Nonetheless, to use the language employed in the latest of the Madras cases cited, the party seeking the aid of the Court is agitating a question relating to the execution of the decree under which the other party deprived him of his property.

Whether Article 181 or Article 182 of the Limitation Schedule applies to an application for restitution under section 144, Civil Procedure Code, is not really material. In favour of applying Article 181 there is an addition to my own recent decision (above cited) in *Krupasindhu Roy* v. *Mahanta Balbhadra Das* (17). That conclusion, however, is not really inconsistent with one which treats an application under section 144 as raising a question which relates to the execution of a decree under which one party was deprived of property by another. Indeed *Somasundaram Pillai* v. *Chokkalingam Pillai* (14), was followed on the question whether the provisions of rule 2, Order II, First Schedule, to the Civil Procedure Code, apply to such an application.

For the appellant it was urged that it would be anomalous if the Court-fee of 8

(13) 39 Ind. Cas. 640; 21 C. W. N. 544.

(14) 38 Ind. Cas. 806; 40 M. 780; 5 L. W. 267.
(15) 41 Ind. Cas. 238; 19 Bom. L. R. 638; 41 B. 625.
(16) 54 Ind. Cas. 664; 17 N. L. R. 62 at p. 65.
(17) 47 Ind. Cas. 47; 3 P. L. J. 367.

annas only were payable on an application for restitution under section 144, while the Court fee on a memorandum of appeal from the order passed thereon is calculated *ad valorem* according to the relief sought by the appellant. I do not think there is much force in this contention. Other instances of similar anomalies are referred to in *Falmukund* v *Haji Hasan Ali* (18), and difficulties of this kind can be removed either by express legislation or by the issue of a suitable order under section 35 of the Court Fees Act. It is, however, worthy of mention that a draft notification recently received in this Court from the Government of India through the Local Government includes a clause directing that the fee chargeable on appeals from orders under section 47 of the Civil Procedure Code shall be limited to the amounts chargeable under Article 2 of the Second Schedule to the Court Fees Act, though the draft includes no specific provision regarding appeals from orders under section 144 of the Code.

The third ground of appeal is not and could not be pressed for, as already stated, the appellant was allowed time to make good the deficiency in Court-fee.

My conclusion is that the decision of the District Court as to the Court-fee payable on the memorandum of first appeal was incorrect and that the fee of 8 annas which was actually paid is sufficient. The appeal is, therefore, remanded to that Court with directions to re-admit it on its original number in the register and to decide it on the merits. A certificate for refund of the Court-fee paid on the memorandum of appeal to this Court will be granted. Other costs hitherto incurred will be costs in the cause.

N. H. *Case remanded.*

(18) 14 C. P. L. R. 100 at p. 103.

LAHORE HIGH COURT.

MISCELLANEOUS CIVIL PETITION No. 495 OF 1921.

December 3, 1921.

Present:—Mr. Justice Martineau.

THE FIRM OF JAI NARAIN-BABU LAL OF DELHI—DEFENDANT—PETITIONER

versus

THE FIRM OF JOHRI MAL CHUNNA MAL OF DELHI—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s 24—Transfer of suit—Judge having decided the same law point in another suit, whether good ground for transfer.

The fact that a Judge has decided a point of law arising in one case is not a good ground for transferring from his Court another case of the same party in which the same point arises.

Petition, under section 24 of the Civil Procedure Code, for transfer of the case—the Firm of Johri Mal-Chunna Mal *versus* the Firm of Jai Narain-Babu Lal—from the Court of the Subordinate Judge, First Class, Delhi, to some other Court at Delhi.

Pandit *Shea Narain*, R. B., for the Petitioner.

Lala *Moti Sagar*, R. B., for the Respondent.

ORDER.—It is contended for the petitioners that as *Bhwa a* Abdus Samad has decided eight of the ten suits filed by the respondents the other two suits, in which the same point for determination arises, should be transferred to another Court. The point for determination in all the cases is purely one of law, and Counsel for the petitioner has not cited any authority for the view that the fact that a Judge has decided a point of law arising in one case is a good ground for transferring from his Court another case in which the same point arises. There is, in my opinion, no sufficient ground for transferring the cases, and I accordingly dismiss the applications.

No order as to costs.

Z. K.

Application dismissed.

SAKHUBAI v. HARI.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 363 OF 1921.

June 16, 1922.

Present:—Mr. Hallifax, A. J. C.

SAKHUBAI—APPELLANT

versus

HARI—RESPONDENT.

C. P. Tenancy Act (XI of 1898), s. 46—Occupancy holding—Inheritance—Succession of females—"In the male line of descent," meaning of—Statutes, interpretation of.

Section 46 of Act (XI of 1898) does not disqualify a female from inheriting an occupancy holding if she is otherwise qualified to do so according to the personl law to which she is subject. The words "in the male line of descent" occurring in the section cannot be interpreted as meaning "a male in the male line of descent." [p. 229, col. 2; p. 230, col. 1.]

Where a new Act supersedes an old one, it is of no help in the interpretation of those portions of the old Act, the law in respect of which has been expressly altered by the Legislature. [p. 229, col 2]

Ghanya v. *Ukund Rao*, 4 N. L. R. 9 at p. 13; *Tek Chand* v. *Tulai*, 3 Ind Cas. 52; 5 N. L. R 103; *Bhura* v *Ramrao*, 17 Ind. Cas. 366; 8 N. L. R. 154 at p. 156 and *Kanhayalal* v. *Dularsingh*, 17 Ind. Cas. 606; 8 N. L. R. 163, *Thellusson* v. *Rendlesham*, (1859) 28 L. J. Ch. 948 at p. 953; 7 H. L. C. 429; 5 Jur. (N. S.) 1031; 7 W. R. 563; 11 E. R 172; 115 R. R. 229, distinguished from.

Appeal from a decree of the Additional District Judge, Nagpur, dated the 12th March 1921, in Civil Appeal No. 214 of 1920.

Mr. *V. D. Sathaye*, for the Appellant.

Mr. *A. C. Roy*, for the Respondent.

JUDGMENT.—The appellant is a Hindu woman of the Maratha caste. As the first defendant in this suit she resisted the claim of the plaintiff *malguzar* for possession of an occupancy holding which had once been occupied by her father on the ground that she was the next heir to the last tenant who was her brother's son and died in 1916. It has been found and is not now denied that she is a permanent resident of the village in which the holding is situated. A father's sister is no heir under the Hindu Law as it is interpreted in these Provinces, but Sakhu Bai pleaded that her family is governed by the Bombay School of Law under which she would be an heir to her brother's son. In the First Court it was held that she had failed to prove that she was governed by any system of personal law other than the *lex loci* and the other questions that arose in the case were left undecided.

Her appeal to the Court of the District Judge was dismissed for a reason which is stated as follows: "Assuming that the defendant is governed by Bombay School of Hindu Law and that a paternal aunt succeeds to the estate of her brother's son, the C. P. Tenancy Act, 1898, does not allow her to succeed to an occupancy holding. Section 46 of the C. P. Tenancy Act, 1898, which governs this case is a bar to her inheritance to the holding [*vide Ghanya* v. *Ukund Rao* (1), *Tek Chand* v. *Tulai* (2), *Bhura* v. *Ramrao* (3), *Kanhayalal* v. *Dularsingh* (4), *Atmaram* v. *Lala* (5)." The real meaning of this passage I am unable to discover. Of the five cases cited by the learned Additional District Judge four seem to have no bearing whatever on Sukhu Bai's claim and the last seems to support it. In this Court the learned Pleader for the respondent admitted that the judgment of the lower Appellate Court could not be supported, but he attempted to support the final decision by urging that in section 46 of Act XI of 1898 the words "in the male line of descent" mean "a male in the male line of descent."

Section 11 of the Tenancy Act which superseded the Act in force at the time of the death of the last tenant, that is, Act I of 1920, expressly limits the collaterals who can succeed to an occupancy holding to males in the male line of ascent or descent from the tenant. The learned Pleader urges that the framers of the new Act were only expressing more clearly the intention of the Legislature in 1898 without changing the law in any way. But section 11 of Act I of 1920 does make two very considerable changes in the law as expressed in section 46 of Act XI of 1898, in omitting both the qualification of residence or the holding of other land in the village and also the condition of descent from an ancestor who occupied the holding. The new Act is, therefore, of no help at all in interpreting the old on this point.

The learned Pleader further relied on the *dictum* of Baron Bramwell in

(1) 4 N. L. R. 9 at p. 13.
(2) 3 Ind. Cas. 52; 5 N. L. R. 103.
(3) 17 Ind. Cas. 366; 8 N. L. R. 154 at p. 156.
(4) 17 Ind. Cas. 606; 8 N. L. R. 163.
(5) 10 Ind. Cas. 739; 7 N. L. R. 36 at p. 37.

Thellusson v. *Rendlesham* (6) quoted in Stroud's Judicial Dictionary under the heading "Male Line: Male Lineal" that the expression means "male in a line of males." The meaning, however, is assigned to the expression "male lineal," not to "in the male line." The article in the Dictionary goes on to quote other English cases in which it was held that "in the male line" does not necessarily mean that the person at the lower end of the line, so to speak, must be a male, and in *Sayer* v. *Bradly* (7) it was held that "the nearest of kin in the male line in preference to the female line" was the testator's sister in preference to a more remote male relative connected with him through an unbroken line of males.

I hold that section 46 of Act XI of 1898 does not disqualify a female from inheriting an occupancy holding, if she is otherwise qualified to do so according to the personal law to which she is subject. Sakhu Bai is, therefore, heir to the holding in dispute in this case provided it is proved that she and her family are subject to the Hindu Law as it is interpreted in Bombay. The case must, therefore, be remanded for a finding on this question of fact and a fresh decision in accordance with that finding. Costs in this Court will follow the result.

N. H. *Case remanded.*

(6) (1859) 28 L. J. Ch. 948 at p. 953; 7 H. L. C. 429; 5 Jur. (N. S.) 1031; 7 W. R. 563; 11 E. R. 172; 115 R. R. 229.

(7) (1856) 5 H. L. C. 873; (25 L. J. Ch. 593; 2 Jur. (N. S.) 887; 4 W. R. 808; 10 E. R. 1146; 101 R. R. 427.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 74 OF 1921.

December 23, 1921.

Present:—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

CHANDMAL KESARMAL AND OTHERS—PLAINTIFFS—APPELLANTS

versus

VISHVANATH BALVANT SOHONI—DEFENDANT—RESPONDENT.

Lease, construction of—Lease granted for fixed term to lessee and his sons, grandsons and lineage—Lessee dying before fixed term—Collaterals, whether can succeed.

A lease was granted of certain premises for forty years to the lessee and his sons, grandsons and lineage. On the death of the lessee before the expiry of the period, the lessor sued to recover the premises. The lessee's sister's sons resisted the claim. The lessor contended that the lease was only to the lessee and his wife and his direct descendants and that the collaterals were excluded:

Held, on the construction of the lease, that it was a lease to the lessee for forty years without any limitation and that, therefore, the plaintiff was not entitled to possession. [p. 231, col. 1.]

Second appeal from the decision of the District Judge, Ahmednagar, in Appeal No. 166 of 19.8, confirming a decree passed by the Assistant Judge, Ahmednagar, in Civil Suit No. 59 of 1918.

Mr. *S. S. Patkar*, Government Pleader, for the Appellants.

Mr. *Coyajee* (with him Mr. *G. S. Mulgaonkar*), for the Respondent.

JUDGMENT.—The plaintiff Company sued to recover land which was originally leased to one Pemraj under a rent-note passed by him on the 1st October 1905. The defendants Nos. 3 and 4 who resist the plaintiff's claim are the sister's sons of Pemraj. The case for the plaintiff is that the lease was only to Pemraj and his wife and his direct descendants, thus excluding the collaterals. This construction of the document has found favour in both the lower Courts. But I do not think that that is the way to look at this particular document which amounts to a lease of particular premises for forty years to Pemraj, and if there had been no words of limitation the leasehold interest would pass to his heirs. The question is whether we can extract from the document any intention that the lease on the death of Pemraj and his wife should descend in a particular manner. The words are * * * * which are translated "sons and grandsons and our lineage." It is clear from the decision in *Ramlal Mookerjee* v. *Secretary of State* (1) that those words when found in a Will convey an estate of inheritance, and the same conclusion was arrived at in *Perkash Lal* v. *Rameshwar Nath Singh* (2), where their Lordships recognised that these words had been held to convey absolute estates of inheritance, alienable and never resumable, unless in a particular case some custom were proved which would exclude the ordinary law, for instance, if it were found that these words were applied to a device of an estate which by custom descended only in the male line, then they could not be held to convey an absolute estate

(1) 7 C. 304 8 I. A. 46; 10 C. L. R. 349; 4 Sar. P. C. J. 25 5 Ind. Jur. 327; 3 Ind. Dec. (N. S.) 744 (P. C.).

(2) 31 C. 561.

of inheritance. There is no difference whether such words be found in a Will or lease, and there is nothing in this particular document on the facts proved which would show that the period of forty years for which the rent note was to run, was to terminate before the expiry of forty years, in the event of the line of the direct descendants to Pemraj coming to an end. In my opinion this document should be construed as leasing the premises absolutely to Pemraj for a period of forty years, and the result would be that on the death of Pemraj it would go to his heirs. No doubt the fact that the wife is mentioned in the document might create a difficulty, since, in the event of Pemraj dying before his wife, she might claim a life estate in the lease to the exclusion of his heirs. However, that question need not be considered. Taking a general view of the lease, and in the absence of any claim by the wife, we are entitled to come to the conclusion that it was a lease to Pemraj for forty years without any limitation. Therefore, the appeal should be allowed and the plaintiff's suit dismissed with costs throughout. The direction that the plaintiff should get possession should be struck out. The direction with regard to payment of rent should stand.

J. P. *Appeal allowed.*

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 305 OF 1919.

(CONNECTED WITH FIRST CIVIL APPEAL No. 191 OF 1919)

January 16, 1922.

Present:—Mr Justice Piggott and Mr. Justice Walsh.

KISHORI LAL—APPELLANT

versus

JIWAN LAL AND ANOTHER—RESPONDENTS.

Agency, contract of—Custom turning agent into principal outrageous—Right of re-sale—Re-sale, when breach of contract—Custom, essentials of—Recent instances, whether sufficient proof.

The suggestion that an agent, being a medium of communication between two parties, without the consent of his principal or without a term in his contract authorising him to do so, which is the same thing, can turn himself into a principal and use his principal's money and the advantages which he has obtained from his position as agent, to make a profit for himself, is unheard of and outrageous Such a custom is unreasonable, even impossible as a matter of law in a contract of agency. [p. 234, col. 2.]

The vendor's right of re-sale does not arise until the date fixed by the contract has expired. If the property has undoubtedly passed and the real date for paying the balance of purchase-money and for delivery of the article has not arrived the re-sale is a breach of contract entitling the vendee to repudiate the transaction. [p. 234, col. 2.]

A custom should be universal, reasonable and, with some qualifications, immemorial. A number of instances which have recently occurred are not sufficient to create a custom in a trade: on the contrary, they show that it is entirely a modern idea. [p. 233, col. 2.]

Plaintiff employed the defendants who were grain agents at Hapur to purchase certain grain-pits for him and paid the advance money. The defendants purchased seven grain-pits but before the date of delivery to plaintiff sold four of them to another person When the date of delivery to plaintiff came, the defendants refused to give delivery even of the remaining three pits, (which the plaintiff was willing to accept) unless the latter also agreed to take delivery of another four grain-pits which were different from those originally purchased for him. Upon this the plaintiff repudiated the entire contract and sued for the return of the advance money. The defendants set up a trade custom in defence of their attitude:

Held, (1) on the evidence that no such custom was established [p. 233, col. 1.]

(2) that even if the custom be taken to be established it was unreasonable and immoral in the sense that it was likely to lead to gross fraud, as it put an agent into a double capacity where his duty and interest must necessarily conflict and as such was contrary to the general principles of agency and could not be given effect to in a Court of Law. [p. 233, col. 2.]

First appeal from the decision of the Subordinate Judge, Meerut, dated the 17th of April 1919.

Dr. *K. N. Katja* and Mr. *Saila Nath* for the Appellant.

Mr. *Panna Lal*, for the Respondents.

JUDGMENT.—In this case, two suits have been brought arising out of some transactions, which may or may not have been speculative in the real sense of the word, for the purchase and sale of grain-pits containing wheat in the town of Hapur. The period fixed for delivery and completion of the purchase-money was the month of March 1916, the contracts having been for the most part made in the previous October. It appears that there were at least two contracts, one for two grain pits and one for five but, although that might have been material in one aspect of the case, neither party has made anything of the point and the transaction has been treated as that of one contract only for the sale of seven grain pits. Where it does not otherwise appear in this

judgment, the purchaser, Kishori Lal, is called the plaintiff and Jiwan Lal, the agent, is called the defendant. It is admitted on both hands that the contract was not carried out. The purchasers who were plaintiffs in one of the suits paid a sum of Rs. 3,500 in advance as earnest money for the purchase of the pits, whereas, on the other hand, the defendants, before the time allowed by the contract for the purchaser to take delivery, re sold four of the pits to other purchasers, so that the sellers whether they were actually agents or principals in their dealings with Kishori Lal, the purchaser, were unable to deliver more than three and declined to deliver even these three, which the purchaser was willing to accept and pay for, unless he also took four other pits which the sellers undertook to deliver, and which were different from those which were originally purchased for the plaintiff-appellant. It should be noted that the price in March 1916 had fallen so that the plaintiff, if he had been compelled to take delivery, would have completed the contract at a loss. This may account for the advantage, which he has taken of the alleged breach of contract by the agents who bought for him, and this may also possibly have influenced the mind of the learned Judge against Kishori Lal's case though we are not prepared to agree if it did so, that there was not a legitimate reason for Kishori Lal repudiating the whole contract as will appear (*sic*). Under these circumstances, the defendants brought a suit for the loss which they had incurred by re-sale owing to the refusal of the plaintiffs to take delivery of the entire quantity tendered. They have recovered in that suit a sum of Rs. 5,757-4-0 with costs against Kishori Lal, the purchaser. In the other suit, Kishori Lal sued for the return of his principal and Rs. 339-8-0 interest from the 23rd of October 1915 which was presumably the date of payment, down to the 16th of February 1917 presumably the date of the institution of the suit. That suit was dismissed. The purchaser appeals against both the decrees. It would not be necessary to deal with the same care and detail with the matters raised by these appeals which are really perfectly simple and straightforward, if it were not for the public importance involved in the main contention of the respondents, the astounding proposition which they have had the courage to put forward in justification of their defense to the suit and the remarkable *dicta* contained in the judgment under review. Although a portion of the contract is in writing, namely, what is called the *langot* or *parcha* indicating the situation, quantity, price, rate and sale of the grain-pits and certain express stipulations as regards risk, the contracts are made up partly of letters and telegrams and partly of interviews which passed between the plaintiff Kishori Lal, the appellant, and Jiwan Lal, the respondent, his alleged agent. It is extremely difficult to give a clear definition of the capacity in which the defendants acted, for the purpose of reciting the allegations of the parties, as the defendants themselves do not know what they were, and they have shifted their ground in the First Court and in this Court, in defence of the attitude that they have adopted, but it is pretty clear from the evidence of Kishori Lal himself and of Pearey Lal, the son of Shib Ram, Munim of the defendants, that Kishori Lal employed the firm of Jiwan Lal, which is known by another name, as his agents to buy a quantity of grain in pits or *khattis*. In the English translation, it is true, that Kishori Lal used the expression "purchased from" but we think we are right in saying that there is no vernacular exactly corresponding to the English word "through" and the preposition "*se*" frequently stands in the vernacular both for "from" and "through" and the general tenour undoubtedly of his evidence conveys the impression that he purchased through the firm of Barsidhar Jiwan Lal. Pearey Lal, the other party to the contract, or rather the only witness who purported to represent the other party, is much more specific. He clearly entered into the contract as an agent. He explains that, in such cases, he purchases for his customers and asks them to deposit money and he makes it quite clear that this was an agency contract because he goes out of his way to explain the reason why his own firm's name was inserted in the *langot* which is done for obvious reasons, although his own firm are not, in fact, the purchasers at all, but merely the agents for the purchasers, and, in this case, were, in fact, agents for Kishori Lal. The *langots* make it clear that,

according to section 78 of the Indian Contract Act, the property passed at the time of the sale, or bargain for sale, not only was part of the purchase price paid by payment of the earnest money already referred to but payment of the interest for the balance of the purchase-money was provided for. Certain express responsibility for damage was laid upon the person in whose original ownership the grain was, and rent was payable by the purchaser for the use of the place where the grain was stored. All these things are inconsistent with the hypothesis that the property was not intended by both parties to pass as between Kishori Lal and the sellers at the time of the sale. It is quite immaterial that the sellers were unknown to Kishori Lal, the purchaser; indeed that is usually the case and explains the need for the employment of an agent or middle-man. Although the order and original proposal for the purchase made was, as we have said, for an indefinite quantity, the amount became eventually ascertained and identified as being of a particular weight and situated in particular grain pits which had been filled by a particular person who was named. They, therefore, when the bargain was eventually made a contract for the purchase of specific ascertained articles ear-marked to the contract by which the firm of Jiwan Lal Bansidhar, for commission which they were to receive, had undertaken as agents to purchase from the sellers for the purchasers.

They brought their suit for damages and resisted the plaintiff's claim for return of the earnest money, as principals, and set up a perfectly hopeless allegation of custom, (the learned Judge seems to have been persuaded that it was introduced from Bombay to Hapur though, for the sake of Bombay, we hope he is under some delusion upon this subject) which entitles the corn agents or brokers of Hapur to discard their capacity of agents and to assume that of principal, without either the knowledge or the consent of their own principal just when and how they please. The allegation is so unheard of and outrageous that it is really difficult to treat it as a serious matter requiring judicial determination, but inasmuch as it has succeeded in the First Court and Kishori Lal has been compelled to appeal to us, it is necessary shortly to point the overwhelming reasons which are almost as old as the common law itself, why such a custom cannot possibly exist. In the first place, a custom has to be universal. In the second place, it has to be reasonable. In the third place, according, we believe, to one decision, at any rate, in this Court, it has to be immemorial, though in the case of some commercial customs, that proposition requires to be stated with some qualification. The custom alleged in this case is not universal by any means. It is not necessary to review the evidence on this point but it was strenuously denied by, at any rate, one witness and many others could be cited from this and other cases to show that it is by no means universal. The right of sale possessed by the agent in whose name the *langot* happens to be drawn up (and to that extent the *langot* being a title deed enables him to obtain delivery to himself in his own name) was stated by one of the witnesses called by the plaintiff whose name is also Pearey Lal, son of Lala Khushi Ram, is really the only way in which a reasonable man could have stated it :—

"The practice is that when there is an apprehension of loss, *khattis* are sold after giving notice and that, if the goods are not weighed on the due date (we take that to mean delivery taken by the purchaser who would naturally weigh them), they are sold."

He thus makes it clear that the right of sale does not arise until the date fixed by the contract has expired ; in other words, he is stating the practice to be in accordance with the simple and fairly obvious proposition of law that, if a purchaser does not take delivery and pay the balance of the purchase money on the due date, the seller or his representative may sell the goods against him and charge him with the loss. There was abundant evidence before the learned Judge on which he could have dismissed this allegation of custom without more ado as having no foundation of fact. Secondly, the alleged custom is unreasonable: it is immoral in the sense that it is likely to lead to gross frauds and, in any event, puts an agent in a double capacity in which his duty and interest must necessarily,

conflict and is contrary to the general principles of agency and, therefore, needless to say, highly unreasonable. The learned Judge has cited a passage from Anson on Contracts which, even if separated from its context, does not appear to apply to this case at all, because the passage cited represents Jiwan Lal as selling to Kishori Lal at a price equal to the price that he has had to pay to the original owner *plus* his own commission and award, and if that were the real contract in this case and that had been the real position of Jiwan Lal-Bansidhar, as the learned Judge conceived it, there would have been no room and no necessity for any allegation of custom. The case, as put by the learned Judge, may be illustrated by a simple example. If a resident in the country applied to the Army and Navy Stores to obtain for him and send a box of Sunlight Soap, the Army and Navy Stores in such a case are a kind of agent whether working for a profit on a re sale, or working for a commission based upon a percentage of the value of the article it is selling, which again depends upon his contract with the proprietors of Sunlight Soap. In such a case, it is no business of the purchaser what arrangement the middle man, who is only a sort of agent, has with the vendor, and there is no privity between the purchaser and the owner of the proprietary article and, in effect, the Stores are selling the soap to the purchaser themselves although they are probably controlled by their contract with the proprietors of the soap as to the conditions and price at which they are to sell. The learned Judge has found nothing in this case and could have found nothing which corresponded in the slightest degree with that illustration, and if he had taken the trouble to study the three classes of contract with which the late Sir William Anson was dealing in the passage cited, he would have found it laid down in the most unequivocal language that, both with regard to the first and the third, (the one that the learned Judge selected was the second), it is said that, an agent, in the true sense of the word, is a medium of communication between the two contracting parties and it is imperative that he should not divest himself of his character as agent and become a principal to the transaction.

Thirdly, the learned Judge states that "only two or three years ago, commission agents at Hapur were not in the habit of selling grain-pits that they had once bought for their constituents without the latter's permission but recently a number of instances of this kind have occurred" which the learned Judge seems to think are sufficient to create a custom in a trade. In the face of this fact, he would have been justified in rejecting the custom on the ground that it was an entirely modern idea. To sum up, therefore, the suggestion that any agent, without the consent of his principal or without a term in his contract authorising him to do so, which is the same thing, can turn himself into a principal and use his own principal's money and the advantages which he has obtained from his position, as agent, to make a profit for himself, is unheard of in a Court of Law, and outrageous and ought to have been dismissed with contempt by the learned Judge. If the position of the defendant really is that he was the principal in the transaction, his position became almost equally hopeless. As we have already pointed out, the sale was for specific articles in an ascertained situation and indeed the defendant's Counsel actually asked the plaintiff whether he had been to the place to see them, a question impossible upon any other hypothesis, and inasmuch as the property undoubtedly had passed and the real date for paying the balance of the purchase money and for delivery of the wheat had not arrived, the re sale by the respondent, even in that view, was a breach of contract entitling the plaintiff to repudiate the transaction. It may be that the plaintiffs were glad to get out of this bargain on account of the drop in the price, although, according to their agent whom they employed to take delivery, they were always willing to take the three pits that were left. We do not think that any shabby or unfair conduct ought to be attributed to them in this respect. They had entered into a forward contract which always involves a risk of loss. They had chosen to do it through an agent and if the agent had conducted himself as an agent should, when the time came for the completion of the contract, the plaintiffs would have found themselves faced with a loss on their purchase, but,

when the time came, they found that their agent had committed a breach of contract and they were clearly entitled to take advantage of that and of any legal right which he had placed in their hands by his own folly, in order to escape from the loss which would otherwise have fallen upon them and there is nothing inequitable, in any point of view, in this result, inasmuch as, in any event, the seller gets his contract price, indeed must have received it long ago, if Jiwan Lal and Bansidhar had really re sold this grain, and the loss which would otherwise have fallen on the plaintiff, has fallen upon the agents who are alone responsible for what has happened and has, therefore, fallen on the right shoulders. In conclusion, it is impossible to pass the judgment by without inviting the learned Judge, in matters of this kind which are frequently matters of great importance and, in this case, we are told, affect a number of other disputes, to clear his mind as to the fundamental principles involved, and the real questions which he has to determine. The judgment in this case simply bristles with legal fallacies and contradictory views. The learned Judge has allowed himself to be persuaded to follow an authority in Bombay which has no more to do with the question in this case than the man in the moon and he has cited a passage from Anson on Contract which does not apply. He points out, with great care, that the relation of principal and agent did not exist between the parties in the Bombay case, and then he goes on to apply that principle to the case which he is deciding and, as a result of such application, to hold that no special usage in Hapur need be proved but that the right of the commission agent to sell away the pits follows as an incident of his contract; thus applying the decision which he himself said did not relate to principal and agent, to the duty of an agent. He seems to vacillate continually between the question whether Jiwan Lal Bansidhar were agents or not and, among other inconsistencies, he arrives at the extraordinary conclusion, (apparently in considering the question whether specific grain was dealt with by the contract or not) that so long as there was no difference in the capacity of the particular grain-pits at Hapur, it was immaterial whether the grain-pits which were subsequently tendered, were those which the plaintiff originally bought or not. If the learned Judge had stopped to consider what would have happened, if after the purchase and, as we have pointed out, the passing of the property, some fire or riot or inevitable accident had destroyed one of the grain-pits mentioned in the plaintiff's original *largot* and the question had arisen as between the plaintiffs and the owner of the grain pits as to whether they had intended to buy that one or any other and as to whether the loss should fall on the plaintiffs or the original vendor, he would have realised the fallacy of this view. The main ground on which we rest our decision in these two appeals is that this was a contract of agency, and that, as between principal and agent the custom alleged is unreasonable even impossible, as a matter of law. The result is that the two appeals are allowed. The defendant, Jiwan Lal's suit in appeal No. 191 of 1919 is dismissed with costs in all Courts. The plaintiff's appeal against Jiwan Lal (Appeal No. 305 of 1919) is allowed with costs and a decree must be granted to him for Rs. 3,500 *plus* interest thereon at 7 per cent. per annum from the 23rd of October 1915 to the institution of the suit and thereafter at the rate of 6 per cent. until payment with costs in the Court below, costs in this Court to include fees on the higher scale.

S. D. *Appeals allowed.*

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No 209 OF 1920.

December 7, 1921.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Shah.

MOHANSING UMED RAMOL—DEFENDANT—APPELLANT

versus

DALPATSING HANBAJI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Evidence Act (I of 1872), s. 32 (2) (6)—Family pedigree kept by family chronicler, admissibility of—Hindu law—Widow—Alienation—Legal necessity—Burden of proof.

A family pedigree kept in the ordinary course of business by a family chronicler prepared by the chronicler from time to time from the information supplied by the members of the family is admissible in evidence under section 32 (2) of the Evidence Act, and is also admissible under section 32 (6) as having been kept by a person engaged by the mem

bers of the family to keep a record of the family events before them. [p. 236, col. 2.]

A Hindu widow cannot sell more than her own interest unless there is legal necessity and in case of a sale by the widow the onus is on the purchaser to prove that the sale is for necessity.[p. 234, col. 2.]

First appeal from the decision of the First Class Subordinate Judge at Surat, in Suit No. 84 of 1918.

Mr. *Ocyajee* (with him Mr. *G. N. Thakor*), for the Appellant.

Mr. *B. J. Desai*, (with him Mr. *N. K. Mehta*), for the Respondents.

JUDGMENT.—This suit was filed by the plaintiff to recover the plaint property as a reversionary heir of one Daji Bhikha on the death of his widow from the defendant to whom the property had been sold by Bai Beni in 1889. The defendant disputed the claim of the plaintiff as being the nearest reversionary heir of Daji. But assuming that Kanbaji was a relation and agnate of Daji, the defendant could not point out the existence of any other agnate or relation except Daji's sister's daughter, Bai Hari. The defendant, therefore, attacked the pedigree on which the plaintiff relied. That pedigree had been deduced from the evidence of one Mohansing who produced his book which had been kept by himself, his father and his grandfather, recording the family events of various Rajput families of which the family in suit was one. With regard to this witness who was acquainted with this family and who kept the record of family events, the Judge said :—

"These entries are made in the course of the tour made by these chroniclers from the information given by the Yajmans, though the names of the informants are not given. Still admittedly all the Girasia Rajputs rely upon this book for correct information about their ancestors and I must accept their correctness and hold that it is admissible either under clause (2) or (6) of section 32 of the Indian Evidence Act. Kanbaji and Daji both being dead, the entries can be held to be relevant under clause 6."

We see no reason to differ form that opinion if the Court was satisfied that the witness in a sense was a professional man or a person whose business it was to keep a book of this kind for the advantage of these Rajput families. There is no reason why, if the book is shown to have been kept in the ordinary course of business, it should not be admitted as evidence. Even if that were incorrect, still, sub-section 6 of section 32 enables a family peidgree to be admitted in evidence, so long as the members of the family depend upon a particular person like the witness to keep a record of the family events before them. We think, therefore, the Judge was entitled to rely upon Mohansing's evidence fortified by his book. Once the book was proved, then it is clear that Kanbaji was the agnate of Daji and it is not suggested that there was any other agnate in existence at the present time. He would, therefore, be entitled to succeed as a reversioner on the death of Bai Beni unless the defendant can show that in 1889 the debt was for legal necessity. The Judge said :—

"In the deed the property is stated to be sold for debts. Particulars of debts are not given, but attempt is made to show that at least two creditors were satisfied. It is said that two creditors were paid Rs. 100 and Rs. 800 respectively. But the evidence is unsatisfactory and no reliance can be placed on it. There is no writing about the debts and such oral evidence can be prepared at any time."

On reading the evidence admittedly adduced to prove the payments, there can be no doubt that the learned Judge was right in his appreciation of it. Because the sale-deed passed thirty years ago by a Hindu widow to an outsider could not be attacked until the death of the widow, it may seem hard that the defendant-purchaser should be deprived of this property. But still the law in this country is perfectly well-known that a widow cannot sell more than her own interest unless there is legal necessity, and the onus has rightly been placed on the purchaser to prove that the sale was for necessity. Therefore, it was desirable that at any rate the debts which it was suggested were paid off out of the purchase price should have been recited in the deed and it was not sufficient that there should be merely a recital that the property had been sold for debts. The learned Judge pointed out :—

"There is absolutely nothing to show that Daji was really indebted. He possessed considerable land, both at Delada and Dholgam. It is probable that the suit lands were sold because the widow who resided at Dholgam could not manage them. On the

evidence I am not prepared to hold that the sale was for necessity."

In any event it is impossible to come to the conclusion that the learned Judge was wrong in his appreciation of the evidence. The defendant has also failed to prove that his father spent about a thousand rupees on improvements as alleged in this case, and as the revenue of the land is said to be Rs. 320 a year, we think the defendant must have recouped the money which his father spent in purchasing the property with interest thereon. The appeal fails and must be dismissed with costs.

J. P. *Appeal dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No 307 OF 1921.

April 22, 1922.

Present :—Mr. Batten, J. C.

Thakur BHAIRONSINGH AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

HINDUSINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 27—Fresh evidence, admission of, in a Court of Appeal—Exclusion of such evidence—Mortgage, suit on, if competent in the absence of the original deed.

Fresh evidence should not be admitted by an Appellate Court in order to enable it to decide the case in favour of a particular party. [p 238, col. 1.]

Kessowji Issur v. *Great Indian Peninsula Railway Company*, 31 B. 381; 9 Bom. L. R. 671; 11 C. W. N. 721; 6 C. L. J. 5; 4 A. L. J. 461; 17 M. L. J. 347; 34 I. A. 115; 2 M. L. T. 435 (P. C.), *Kalika Dutt Mandar* v. *Tulsi Mandar*, 37 Ind. Cas. 1008; 1 P. L. J. 435 and *Krishnama Chariar* v. *Narasimha Chariar*, 31 M. 114; 3 M. L. T. 208, relied upon.

But if a party is allowed to produce a document and also to adduce oral evidence to show how it fell into his hands, it is not open to the opposite party to have the existence of the document considered and the oral evidence excluded, for if the fresh evidence is to be excluded the whole of it must be excluded. [p. 238, col. 1.]

A mortgage suit based on a certified copy of the mortgage-deed is not competent without proving any ground for not producing the original. [p 238, col. 2.]

Appeal from a decree of the District Judge, Hoshangabad, dated the 14th of February 1921, in Civil Appeal No. 83 of 1921.

Mr. *S. B. Gokhale*, for the Appellants.

Mr. *M. Gupta*, for the Respondents.

JUDGMENT.—The facts of the case are fully given in the judgment of the lower Appellate Court. The plaintiffs (of whom the second plaintiff is a minor) sue in the suit out of which this appeal arises, and in the connected suit on which Second Appeal No. 308 of 1921, arises, on two mortgages, dated 2nd August 1907. It was stated by the plaintiffs that the original mortgage deeds had been lost, and the plaintiffs sued on certified copies obtained from the registration office claiming their right to do so under section 65 (*c*) of the Evidence Act. Among other contentions raised by the contending defendants, it was denied that the original deeds had been lost, and it was asserted that when the first plaintiff brought Suit No. 17 of 1907 on a prior mortgage, the claims on the mortgages now in suit which the plaintiff had just purchased, were included in the compromise by which that suit was settled and the mortgage-deeds were returned to the then defendants. I may say at once that the compromise judgment and decree in that suit which are on the record do not make it clear whether or not the compromise related only to the mortgage sued on.

The first issue was whether the original deeds were lost, and the 8th issue was whether the mortgage deeds were returned to the mortgagors and others in the circumstances stated by the contesting defendants. The learned Subordinate Judge held the evidence as to the alleged loss of the deeds to be untrue, and that though there was not any reliable direct evidence on the point it was extremely probable in the circumstances that the deeds were included in the compromise and returned to the mortgagors.

Gendaji, one of the original mortgagors, who had not appeared in the first Court, appeared in the lower Appellate Court and produced four pieces of paper, which he said were pieces of the original mortgage deeds torn up and returned at the time of the compromise. The learned District Judge admitted further evidence for the defendants to prove Gendaji's story. It has been proved beyond any possibility of doubt that two of the pieces of paper are parts of

one deed, and the other two are parts of the other. It has also been found on the fresh evidence admitted that these two mortgages were included in the compromise and the deeds torn and returned to the mortgagors. The main ground of appeal is that this fresh evidence should not have been admitted and that the case should have been decided by the lower Appellate Court on the original evidence; it is also urged that on the original evidence the suit should have been decided in favour of the plaintiffs.

I agree that the fresh evidence should not have been admitted in order to enable the Court to decide the case in favour of the defendants. This view finds ample justification in the cases reported as *Kessowji Issur* v. *Great Indian Peninsula Railway Company* (1), *Kalika Dutt Mandar* v. *Tulsi Mandar* (2) and *Krishnama Chariar* v. *Narasimha Chariar* (3).

Nevertheless the appellants themselves wish to take advantage of some of the evidence admitted in appeal; I called upon the appellants to elect whether they wish the existence of the documents in defendant Gendaji's hands to be taken into consideration or not. The learned Pleader for the appellants thereupon admitted the genuineness of the pieces of the documents, which was denied in the lower Courts. The object of this admission is to admit secondary evidence of the mortgages under section 65 (*a*) of the Evidence Act. Of course if the fresh evidence is excluded the whole of it should be excluded. But if, as is desired, the single fact that the deeds are in the hands of one of the mortgagors is admitted as evidence, then the presumption under illustration (*i*) to section 114 of the Evidence Act comes into play, and affords great support to the conclusions of the First Court arrived at before the reception of fresh evidence. It is quite impossible to reconcile the story of the loss as described in the plaintiffs' evidence with the fact that torn portions of the documents are in the hands of one of the mortgagors, and their being in his hands supports the conclusion on the 8th issue originally arrived at. If on the other hand we exclude the fresh evidence altogether, then after reading the evidence I agree with the finding of the First Court that the loss of the documents has not been proved, and secondary evidence cannot be given. It is complained that no clear history of the compromise has been given, but the plaintiff had the opportunity on the 8th issue to give a full account of the compromise, and as he has not done so the probabilities are in favour of the view taken by the Subordinate Judge. In any case the plaintiffs could not sue on the mortgages without proving any ground for not producing the originals.

The appeal is dismissed with costs.

N. H.

Appeal dismissed.

(1) 31 B. 381; 9 Bom. L. R. 671; 11 C. W. N. 721; 6 C. L. J. 5; 4 A. L. J. 461; 17 M. L. J. 347; 34 I. A. 115; 2 M. L. T. 435 (P.C.).
(2) 37 Ind. Cas. 1008; 1 P. L. J. 435.
(3) 31 M. 114; 3 M. L. T. 308.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 706 OF 1921.
December 21, 1921.

Present:—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

THE LAXMI BANK LTD.—CREDITOR—APPELLANT

versus

RAMCHANDRA NARAYAN APTE—RESPONDENT.

Provincial Insolvency Act (III of 1907), ss. 14, 15—Provincial Insolvency Act (V of 1920), ss. 10, 24—Application to be adjudged insolvent—True and full disclosure of property, inquiry as to, whether can be made at adjudication.

An issue whether a petitioner to be adjudged insolvent has made a true and full disclosure of his property is not pertinent at an inquiry under section 15 of the Provincial Insolvency Act (III of 1907) provided he has given the particulars required with regard to his property, as it is not until after the adjudication that it can be ascertained whether the petitioner has made a true and full disclosure. [p. 239, col. 1.]

Second appeal from the decision of the Joint Judge, Poona, in Miscellaneous Appeal No. 1 of 1921, reversing an order passed by the Additional First Class Subordinate Judge at Poona, Miscellaneous Application No. 13 of 1920.

Mr. S. Y. *Abhyankar*, for the Appellant.

JUDGMENT.—The petitioner filed a petition under the Provincial Insolvency Act (III of 1907) shortly before Act V of 1920 was passed. The petition, therefore, would have to be proceeded with under the provisions of Act III of 1907.

Under section 14 (1) of the Act, on the day fixed for the hearing of the petition, or on any subsequent day to which the hearing may be adjourned, the Court shall require proof that the creditor or the debtor, as the case may be, is entitled to present the petition. Under section 6 (3) the debtor shall not be entitled to present an insolvency petition unless (*a*) his debts amount to five hundred rupees; or (*b*) he has been arrested or imprisoned in execution of the decree of any Court for the payment of money. Under section 11 (1) every insolvency petition presented by a debtor shall contain a statement that the debtor is unable to pay his debts.

When the petition came on for hearing the following issues were raised : (1) whether the petitioner has made a true and full disclosure of his property, (2) whether his debts amount to Rs. 500, and (3) whether he is unable to pay them. Under section 15 (1) where the Court is not satisfied with the proof of the right to present the petition, or of the service of notice on the debtor, or of the alleged act of insolvency, or is satisfied by the debtor that he is able to pay his debts or that for any other sufficient cause no order ought to be made, the Court shall dismiss the petition. The issue whether the petitioner has made a true and full disclosure of his property would not be pertinent at the inquiry under section 15, provided the petitioner has given the particulars required with regard to his property, as it is not until after the adjudication that it can be ascertained whether the petitioner has made a true and full disclosure. The Trial Judge seems to have dismissed the petition on the very ground on which he ought to have entertained it, namely, the unsatisfactory conduct of the debtor with regard to his property, for it would only be by the administration of the estate in insolvency that the claims of the creditors could be properly protected. He also thought that the debtor had not satisfied the Court that he was unable to pay his debts, but we think that this finding was based on wrong grounds.

In appeal the Joint Judge dealt merely with the question whether the debtor was unable to pay his debts, and though it was rightly held that the insolvency should proceed under the provisions of Act III of 1907 he appears to have thought that the new Act had made a change with regard to what was required to be proved before it could be decided that the petitioner had a right to present his petition. As a matter of fact there is no material difference in this respect between the Act of 1907 and the Act of 1920. Under section 11 (1) of Act III of 1907 the debtor has to state in his petition that he is unable to pay his debts, and if either on the face of the proceedings or on a representation by the opposing creditor the Court is satisfied that this statement is not correct, it can dismiss the petition. But if the debtor has made a disposal of his property with a view to defraud his creditors who might otherwise have been paid, then the Court is not justified in holding that he is able to pay his debts, but should admit the petition, so that the interests of the creditors may be benefited by the special powers given to the Court while administering an insolvent's estate. The order of remand was rightly made though the reasons given for making it were not correct. Therefore, we dismiss the appeal. When the Trial Court takes up the petition again according to the order of remand made by the lower Appellate Court, the learned Judge will, no doubt, deal with the petition in the light of our remarks.

J. P.

Appeal rejected.

SINGH RAM v. DATA RAM.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 199 OF 1918.
November 18, 1921.

Present:—Mr. Justice Abdul Raoof and Mr. Justice Martineau.

SINGH RAM AND OTHERS—PLAINTIFFS—APPELLANTS

versus

DATA RAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Shamilat—*Partition—Suit by co-sharers for declaration that partition is against terms of* wajib-ul-arz—*Jurisdiction of Civil Court—Punjab Land Revenue Act (XVII of* 1887), *s.* 158 (2), (xvii).

A declaratory suit by certain co-sharers that a certain land is, according to the terms of the *wajib-ul-arz*, not subject to partition and that the partition directed by the Collector is, therefore, wrong, is according to the provisions of clause (xvii) of sub-section (2 of section 158 of the Punjab Land Revenue Act, not cognizable by a Civil Court, no question of title being involved therein.

Deva Singh v. *Musammat Jawali*, 39 P. R. 1892; *Sundar* v. *Wazira*, 144 P. R 1907; 188 P. W. R 1907 and *Rahmun* v. *Hasham*, 7 Ind. Cas. 717; 73 P. R. 1910; 103 P. W. R. 1910; 144 P. L. R. 1910, distinguished.

Second appeal from a decree of the District Judge, Delhi, dated the 25th October 1917, affirming that of the Senior Subordinate Judge, Rohtak, dated the 7th May 1917.

Mr. *Sham Lal*, for the Appellants.

Mr. *Shamair Chand*, for the Respondents.

JUDGMENT.—The suit out of which this second appeal has arisen related to a piece of common land in the village Nizampur, Tahsil Gohana. It consists of 56 *bighas* 18 *biswas* and is known as Bani Laiqawala. In the Settlement of 1879 the co-sharers entered into an agreement that this would continue to be joint and impartible. The terms of the agreement were entered in the *wajib-ul-arz* of that Settlement. In the subsequent Settlements, however, the entry was not repeated. The Collector has directed its partition by *pannas*, and his order has been upheld in appeal by the Commissioner. Fifty-five of the proprietors of *panna* Mehr Chand instituted this suit in a Civil Court for a declaration that the land was not subject to partition according to the terms of the *wajib ul-arz*. The defendants to this suit were 128 proprietors of the four other *pannas* of the village. One of the pleas raised in defence was that the suit was not cognizable by a Civil Court. Both the Courts below have accepted this plea with the result that the suit has been dismissed.

The plaintiffs have preferred this second appeal and it is urged on their behalf that the suit indirectly raised a question of title and has wrongly been thrown out on the ground that it is not cognizable by a Civil Court. Section 158, sub section (2) of the Land Revenue Act, provides that—

"A Civil Court shall not exercise jurisdiction over any of the following matters."

Among those matters is mentioned in clause (xvii).

"Any claim for partition of an estate, holding, or tenancy or any question connected with, or arising out of, proceedings for partition, not being a question as to title in any of the property of which partition is sought."

This provision is very comprehensive and certainly includes any claim of the nature put forward in the plaint. The present suit clearly comes within the exemption provided by section 158, clause (xvii) of the Land Revenue Act, no question of title being involved. The proposition is so clear that it is hardly necessary to cite any authority in support of it. This very question has clearly been decided in *Lakhi* v. *Malik Dost Mohammad Khan* (1). In this case with respect to a similar entry the Hon'ble Mr. A. H. Diack, Financial Commissioner, held—

"That an entry in the *wajib ul-arz* prohibiting the partition of the *shamilat* is not necessarily a bar to partition and the Revenue Officer dealing with the partition should himself decide whether, under the circumstances of the case, the prohibition should prevail or not."

Deva Singh v. *Musammat Jawali* (2), *Sundar* v. *Wazira* (3) and *Rahmun* v. *Hasham* (4), relied upon by the plaintiffs have no bearing on the facts of the case, and the learned Senior Subordinate Judge has given good reasons for holding that they are distinguishable and are inapplicable to the present case. We have not the least doubt as to the correctness of the view taken by the Courts below.

We accordingly dismiss the appeal with costs.

R. N. *Appeal dismissed.*

(1) 29 Ind. Cas. 498; 1 P. R. 1915 Rev.; 32 P. L. R. 1916.
(2) 39 P. R. 1892.
(3) 144 P. R. 1907; 188 P. W. R. 1907.
(4) 7 Ind. Cas. 717; 73 P. R. 1910; 103 P. W. R. 1910; 144 P. L. R. 1910.

JOY CHANDRA CHAKRABURTTY v. SRIJUT KUMAR ARUN CHANDRA SINHA.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 913 OF 1920.

November 5, 1921.

Present:—Mr. Justice Suhrawardy and Mr. Justice Cuming.

JOY CHANDRA CHAKRABURTTY—DEFENDANT—APPELLANT

versus

THE HON'BLE SRIJUT KUMAR ARUN CHANDRA SINHA—PLAINTIFF—RESPONDENT.

Bengal Tenancy Act (VIII of 1885), s. 106—Suit for enhancement of rent—Rent fixed per drone without reference to area—Vendee of tenancy rights, position of.

Where the rate of rent is not fixed at the inception of the tenancy with reference to any particular area but is fixed per *drone* of the arable land and the tenant agrees to pay this rent so long as the lands are not measured, the landlord is entitled to claim, according to the agreement, enhanced rent for the area which the tenant is found to possess, at the time of the suit. [p. 242, col. 1.]

Where a person purchases a tenancy, executes a *kabuliyat* in respect of it, which simply mentions the fact of the purchase, and prays that his name may be entered in the landlord's register in place of the last tenant, it does not amount to the creation of a new tenancy but is a mere recognition of the original tenancy, as held by the transferor. [p. 242, col. 1.]

Appeal against a decree of the District Judge, Noakhali, dated the 8th of December 1919, reversing a decree of the Assistant Settlement Officer, Noakhali, dated the 29th of July 1918.

FACTS appear from the judgment.

Babu *Surendra Chandra Sen* (with him Babu *Bhagirath Chandra Das*), for the Appellant.—This is a suit in a proceeding under section 105 of Bengal Tenancy Act for fair and equitable rent. The question of law is that according to section 52, Bengal Tenancy Act, the landlord will get additional rent for additional area. The last assessment was in 1249. There was no term as regards enhancement. The document is a contract between the landlord and the tenant. In determining the area for which rent has been previously paid, the Court shall have regard to the length of time during which the tenancy has lasted without dispute or to rent or area, see section 52 (2), clause (c), Bengal Tenancy Act. I submit that the document of 1249 creates a new tenancy. Refers to *Durga Priya Choudhury* v. *Hasra Bain* (1), *Akbar Ali Mian* v. *Musammat Hira Bibi* (2).

Babu *Girija Prosonna Ray Choudhury*, for the Respondent.—I claim settlement of rent under section 105, Bengal Tenancy Act, in respect of land held by the tenant. There has been no objection to the area in the written statement. So I say that no question of area arises upon the proceedings. Refers to *Jnanada Sundari* v. *Abdur Rahman Khaia* (3), and reads the concluding portion of the judgment of Mookerji, J. There is no decision of status, so there is no second appeal. And there is no decision on the question of area. I claim assessment on the basis of *kabuliyat*. Refers to *Bisseswar Roy Choudhury* v. *Rajendra Kumar Singha* (4), *Upendralal Gupta* v. *Jogesh Chandra Roy* (5). I submit that *Akbar Ali Mian* v. *Musammat Hira Bibi* (2) does not apply.

Babu *S. C. Sen*, in reply, referred to *Sarat Chandra Ghose* v. *Sham Chand Singh Roy* (6) and *Abhoy Sankar Mozumdar* v. *Rajani Mandal* (7).

JUDGMENT.—This appeal arises out of a decision of the Special Judge under section 105 of the Bengal Tenancy Act holding that the tenure in the occupation of the defendant is liable to enhancement of rent on the ground that when the tenure was first created rent was fixed at a certain amount per *drone* without any reference to the area let out. It appears that in 1323 B. S. one Baidya Nath Chakraburty executed a *kabuliyat* in favour of the then landlord in which he mentions that he has purchased a *taluk* standing in the name of Kamdeb Chakraburty and petitions the landlord to remove the name of Kamdeb from his *sherista* and to insert the name of the petitioner for which he executes a fresh *kabuliyat*. The terms of the *kabuliyat* are that the tenant agrees to pay to the landlord at a certain rate per *drone* of the arable land and so long as the lands are not measured the tenant will pay rent at

(1) 62 Ind Cas. 453; 25 C. W. N. 101.
(2) 15 Ind Cas. 332; 16 C. L. J. 182.
(3) 33 Ind Cas. 148; 23 C. L. J. 281 at p. 294; 20 C. W. N. 428; 43 C. 603.
(4) 25 Ind. Cas 278; 18 C. W. N. 949.
(5) 38 Ind. Cas 56; 22 C. W. N. 275.
(6) 14 Ind. Cas. 70; 16 C. L. J. 71; 39 C. 663.
(7) 47 Ind. Cas. 359; 29 C. L. J. 371 at p. 378; 22 C. W. N. 101.

the old rate which, however, is not mentioned in the document. In 1216 the widow of Badiya Nath files a petition to the landlords intimating that on account of her inability to pay the rent for the tenure regularly, she has transferred the tenancy to one Ram Das Chakraburtty and requests the landlords to enter the name of the said Ram Das as the tenant in her place and to accept in future the rent from the transferee. In 1259 B. S. the said Ram Das Chakraburtty executed a *kabuliyat* which is described as a *doul kabuliyat* in respect of the tenure mentioned as *mutafut* Baidya Nath Chakraburtty in which he mentions the fact of his purchase and prays that his name may be entered in the landlords' office in the place of the late tenant.

In the state of documentary evidence the Revenue Officer held that as the *kabuliyat* of 1223 did not mention the previous area with reference to which the rent was to be adjusted but only the rate of rent at which the rent payable was fixed the rent of the tenure cannot be enhanced. On appeal the Special Judge has held that as the rate of rent was not fixed at the inception of the tenancy with reference to any particular area the tenant is liable to pay enhanced rent for the area which he is now found to possess. Against this decree the tenant has appealed.

A preliminary objection has been taken by the respondent to the competency of this appeal inasmuch as the decision appealed against settles a fair rent within the meaning of section 109A of the Tenancy Act. It is, on the other hand, argued that the decision involves a further question as to whether the tenure is one of which the rent can be enhanced. It is not necessary for us to decide this question as the view we take of the evidence in this case coincides with that taken by the Special Judge.

It is evident that at the time, of which we have got any historical knowledge, this tenure was created, the lands were not all cultivable and had to be reclaimed. The rent was, therefore, fixed not on the quantity of the land let out but on the quantity of land that could be brought under cultivation by the *talukdar*. It is specifically mentioned in the *kabuliyat* of 1223 that the rent payable at that time was to be paid on the quantity of the land under cultivation until there was a measurement. We agree with the learned Special Judge in construing the document of 1249 and holding that it was a mere recognition of the original tenancy which was created in 1223.

It is argued by the learned Vakil for the appellant that the document should be treated as creating a new tenancy. But as we have said before the document makes no mention of the area let out nor of the rate but is simply a prayer by the tenant to substitute his name in respect of the holding known as *mutafut* Baidya Nath Chakrabutty. We are of opinion that the right of the landlord to claim enhancement is based upon contract as embodied in the *kabuliyat* of 1223 and that, according to its true construction, the rent is liable to enhancement.

The only point raised having failed the appeal is dismissed with costs.

N. H.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 304 OF 1920.

August 24, 1921.

Present :—Mr. Hallifax, A. J. C.

NARAYAN—JUDGMENT-DEBTOR—APPELLANT

versus

GANPATRAO AND ANOTHER—DECREE-HOLDERS—AUCTION PURCHASER—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 1 (1) (a)—Deposit of decretal amount in Court by judgment-debtor—Notice of payment to decree-holder—Duty of Court.

In all cases of suits, appeals and applications, when decretal amount is deposited in Court by the judgment-debtor, and when this fact is brought to its notice by permission being asked to deposit the money, it is the duty of the Court to give notice to the decree-holder The judgment-debtor should, however, pay the necessary process fee. But even if he does not pay the Court is bound to inform the decree-holder of the payment when he appears to ask for sale of the property [p. 243, col. 1.]

Appeal from an order of the Additional District Judge, Nagpur, dated the 20th March 1920, in Civil Appeal No. 196 of 1919.

NARAYAN v. GANPATRAO.

Sir *B. K. Rose*, Messrs. *A. Bhagwant* and *P. N. Rudra*, for the Appellant.

JUDGMENT.—All the trouble in this case arises out of the slovenly and prohibited practice of scribbling orders on the backs of petitions. The first respondent obtained a decree for Rs. 420-12-3 against the appellant on the 12th February 1919 for the arrears of revenue and cesses of a *malik makbuza* holding and costs. On the 1st of March 1919 he applied for execution of that decree by attachment of a house and on the 5th of March 1919 the Court ordered a warrant to issue. This warrant was issued on the 10th of March 1919 and the attachment was effected on the 18th of March 1919 but in the meantime on the 12th of March 1919 the judgment-debtor had deposited Rs. 420-12-3, the amount payable under the decree, in Court. This payment seems to have escaped the notice of the Court which went on with the execution and eventually sold the house. The payment by the judgment-debtor has been held to be incomplete and of no avail in the lower Appellate Court because he failed to give the notice required by rule 1 (2) of Order XXI to the decree holder. But it seems to me beyond question that it was the duty of the Court to give that notice. As is done in all cases of suits and appeals and applications, when the payment under rule 1 (1) (*a*), of Order XXI was brought to the notice of the Court by permission being asked to accept the money, the Judge should have ordered that notice should be given to the decree holder. It would then have been for the judgment-debtor to pay the necessary process-fee. But even if he did not pay them the Court was surely bound to inform the decree-holder of the payment when next he appeared to ask for sale of the property.

In complete oblivion of the payment that had been made the learned Munsif went on to fix a date for the sale of the house and to issue a proclamation. The date fixed was the 4th of August 1919, the case being ordered to be put up four days later on the 8th of August 1919. But a month before that on the 2nd of July 1919 the judgment debtor, doubtless astonished that a sale-proclamation should have been issued, put in an application stating that he knew nothing about the proceedings and had paid the full amount of the decree into Court on the 12th of March 1919 as was proved by the receipt accompanying the application, and praying that the sale might be stayed, enquiry made into his allegations and the execution proceedings dismissed, the decree being fully satisfied. On this the learned Munsif endorsed the following undated order "Put up on the date of hearing". The sale was held in what must here be called undue course on the 4th of August 1919 and when the proceedings came before the Court on the 8th of August 1919 the order passed was this: "Parties absent. House sold for Rs 760. Quarter amount deposited. Judgment-debtor has deposited Rs. 420 annas 12 pies 3. There is still balance of Rs. 4. For confirmation of sale on 8th September 1919." On the 8th of September 1919 we find the following record of orders and proceedings: "Decree holder by agent Bala. Judgment debtor absent. Full amount deposited. The judgment-debtor has not deposited the balance. No objection filed. Sale confirmed. Case struck off as fully satisfied. Balance be refunded to judgment-debtor."

Apart from the minor mistake of saying that costs which really amounted to Rs. 4 8 0. were only Rs. 4, the errors committed were many and various. If the application had received a moment's consideration when it was filed it would have been seen that it contained an allegation that the money had been paid into Court even before the execution of the warrant of attachment and a prayer that the sale should be stayed and it would have been noticed that the sale had not then taken place. But no more care was expended over it even when it was formally placed before the Court at the two subsequent hearings. The application with the deposit was treated as an application to set aside the sale made under rule 89 of Order XXI which it would not possibly be, having been made before the sale took place. Still less could the deposit have been under rule 89, having been made before even the property was attached. A fairly casual perusal of the application would have made this clear as it gives dates and expressly asks not for a cancellation but for a stay of the sale, of which it mentions the date as in the

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future. But even greater carelessness was displayed in the Appellate Court, where the dates and the sequence of events were prominently brought to the notice of the learned Additional District Judge who still treated the application as one to set aside a sale that he knew had not taken place when it was made, and held that the payment into Court could not help the judgment-debtor because he had not given the decree holder a notice which it is clearly the duty of the Court to give him, secondly because he had not paid costs which had not been incurred when he made the deposit and would never have been incurred if the First Court had done its duty and thirdly because he failed to pay the five per cent. commission on the amount bid at a sale held very nearly five months later, which also never ought to have been held.

The orders of both the Courts below are set aside. The First Court will now take up the proceedings again as they stood on the 11th of April 1919, and will issue notice to the decree-holder to show cause why he should not accept the amount of Rs. 420-12-3 in full satisfaction of his decree. That costs incurred by him up to the date of the deposit have not been paid with it is of course no reason for refusal provided the judgment debtor is now willing to pay them or has already paid them. As far as I can make out they amount to Rs. 2-8 0 only. All the costs incurred by any party after the date of the deposit are due to the initial default of the First Court in not informing the decree-holder of it at least on his next appearance in the Court. I do not go so far as to suggest, as was done in somewhat similar circumstances in the Allahabad High Court, that learned Munsif should compensate the parties to the decree and also the auction-purchaser out of his own pocket, but only for the reason that he has been transferred long ago. Costs in this and in the lower Appellate Court will be paid by the respondents, the decree holder and auction purchaser. The Pleader's fee in this Court will be Rs.15.

N. H.

Orders set aside.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1262 OF 1920.

February 9, 1922.

Present:—Mr. Justice Greaves and Mr. Justice Panton.

GURU PROSANNA ROY AND OTHERS—DEFENDANTS—APPELLANTS

versus

FUL CHAND MONDAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Easement—Right to take water from tank—Claim based upon lost grant—Interruption of right for more than two years from date of suit—Limitation Act (IX of 1908), s. 26.

The provisions of section 26 of the Limitation Act are applicable where plaintiff sues for a declaration of a right of easement on the basis of prescription but it has no application where the claim is based upon a lost grant. [p. 245. cal 1.]

Appeal against a decree of the District Judge, Birbhum, dated the 23rd of December 1919, affirming a decree of the Officiating First Munsif at Bolpur, dated the 12th of September 1918.

FACTS appear from the judgment.

Babu *Nakuleswar Mukerjee* for Babu *Kali Das Sirkar*, for the Appellants.—Both the Courts below have wrongly thrown the burden of proof upon the defendants. My next contention is that the case should have been remanded by the lower Appellate Court for a consideration of the question of drawing water by two pits. My last and strongest point is that the suit should have been dismissed on the ground of limitation by reason of its not having been instituted within two years of the interruption of the plaintiffs' alleged right. See section 26 of the Limitation Act. Refers to *Janhari Chowdhurani* v. *Bindu Bashini* (1) and *Achul Mahta* v. *Rajun Mahta* (2). Even if section 26 of the Limitation Act is not applicable, then Article 37 of the Schedule to the present Limitation Act corresponding to Article 31 of the old Act applies.

Babu *Surendra Nath Ghosal*, for the Respondents, was not called upon to reply.

(1) 3 C. W. N. 610; 26 C. 593; 13 Ind. Dec. (N. S.) 981.

(2) 6 C. 812; 3 Ind. Dec. (N. S.) 525.

HOOKAMCHAND v. NIDHANSING.

JUDGMENT.—This appeal is preferred against a decision of the District Judge of Birbhum affirming a decision of the Munsif of Bolpur.

The suit was one for a declaration of the plaintiffs' right to take water from a tank belonging to the defendants. Both the lower Courts have decreed the suit and the defendants now appeal.

On their behalf the main contention is that the suit was barred by limitation by reason of its not having been instituted within two years of the last interruption of the alleged exercise of this right to take water. Now, if the success of the plaintiff's claim had depended only on section 26 of the Limitation Act there would have been force in this contention. But as the learned District Judge has pointed out, the plaintiffs in their plaint set out an alternate claim based upon a lost grant. The learned Munsif expressly found that it is "quite clear that the plaintiffs are using the water of the tank for irrigation purposes for a long time and from time immemorial." With this finding the learned District Judge evidently concurred. We think, therefore, that there is no force in the contention which is founded on section 26 of the Limitation Act.

The only other point taken is that the question as to whether the water should be taken from the tank by means of two pits should have been remanded for a further decision to the Court of first instance. That, however, was a matter which was within the discretion of the learned District Judge and on a consideration of the facts we are not prepared to interfere with the exercise of his discretion.

The appeal accordingly fails and is dismissed with costs.

N. H.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 70 OF 1921.

April 11, 1922.

Present:—Mr. Batten, J. C.

HOOKAMCHAND—PLAINTIFF—APPELLANT

versus

NIDHANSING AND ANOTHER—DEFENDANTS—RESPONDENTS.

Interest—Penal character—Competency of a Court to grant relief.

A Court is competent to grant relief whenever the rate of interest appears to be of a penal character, *i. e.*, so unconscionable and extravagant that no Court shall allow it. [p. 246, col. 2.]

Aziz Khan v. *Duni Chand*, 48 Ind. Cas. 933; 23 C. W. N. 130; 101 P. R. 1918; 165 P. W. R 1918 (P. C.); *Balla Mal* v. *Ahad Shah*, 48 Ind Cas. 1; 23 C. W. N. 233; 35 M. L. J. 614; 16 A. L. J. 905; 124 P. R. 1918; 25 M. L. T. 55; 180 P. W. R. 1918; 29 C. L. J. 165; 1 U. P. L. R. (P. C.) 25; 21 Bom. L. R. 553 (P. C.), distinguished.

Gopeswar Saha v. *Jadab Chandra*, 32 Ind. Cas. 537; 43 C. 632; 22 C. L J. 352; 20 C. W. N. 689; *Khagaram Das* v. *Ram Sankar Das*, 27 Ind. Cas. 815; 42 C. 652; 21 C. L. J. 79; 19 C. W. N. 775; *Abdul Majid* v. *Ksherode Chandra Pal*, 29 Ind. Cas. 843; 42 C. 690; 19 C. W. N. 809; *Challaphroo* v. *Banga Behary Sen*, 31 Ind. Cas. 394; 20 C. W. N. 408; 22 C. L. J. 311, approved.

In this case a stipulation of 25 per cent. compound interest on a seed-grain debt, which was to run for 16 years, was considered unconscionable and 33 per cent. simple interest was allowed instead. [p. 246, cols. 1 & 2]

Appeal from a decree of the Sub-Judge, Damoh, dated the 5th May 1921, in Civil Suit No. 32 of 1920.

Messrs. *G. L. Subhedar* and *J. C. Ghosh*, for the Appellant.

JUDGMENT.—The grounds of appeal relate solely to interest. It is contended that the lower Court erred in law in holding that the stipulation of compound *sawai* was penal, and that in any case some compound interest, even at a low rate, should have been allowed. The actual amount of further interest asked for is Rs 2,000. According to the mortgage deed 4 Manis of seed wheat and 2 Manis of linseed were borrowed by the mortgagors on the 20th January 1901. The value of the grain borrowed was stated to be Rs. 99. We may call it Rs. 100, for convenience of calculation. As in the plaint linseed is valued twice as high as wheat, the price of the wheat advanced was on the date of the mortgage Rs. 50, at Rs. 12-8-0 a Mani and of the linseed Rs. 50 at Rs. 25 a Mani. It was stipulated that this grain was to be re-paid in 16 years, a most unusual

stipulation in the case of seed grain, which is usually to be re-paid at the next harvest. The interest in kind was to be at the rate of 25 per cent. compound interest. It is perfectly certain that the mortgagors would not realize what compound interest at 25 per cent. would amount to, if payment were not regularly made. The suit was brought on the 16th of November 1920, and the amount claimed was Rs. 9,729-6-0, being the current value of 349 odd Manis of grain, after allowing for a re-payment of 9 odd Manis of wheat. The current price is given as Rs. 20 a Mani for wheat and Rs. 40 a Mani for linseed. Thus a grain debt of 6 Manis has swoollen to nearly 350 Manis and a cash debt of Rs. 99, to Rs. 9,729 The lower Court has allowed 24 per cent. simple interest on the grain giving the plaintiff the benefit of the rise in price of the grain. The decree is for Rs. 755-11-6. This amounts to about 33 per cent. simple interest on the original Rs. 99, even not taking re-payments into account.

In appeal reliance is placed on *Aziz Khan* v. *Duni Chand* (1) and *Balla Mal* v. *Ahad Shah* (2) in which the terms of the actual contract were held binding on the debtors. But their Lordships were deciding the actual cases before them. In the first case, which was not one of a grain debt, the interest was 25 per cent. compound, and the amount claimed was over a lakh of rupees. The First Court gave a decree for Rs. 4,301. In first appeal the plaintiff claimed only Rs. 10,000 more, and the decree with which their Lordships refused to interfere on the appeal of the defendant was one for Rs. 14,301 as against over a lakh claimed. In the second case the circumstances were peculiar. The rate of interest was 30 per cent. simple, but from time to time the interest was capitalised and fresh bonds given for the sum of principal and interest. This is very different from 25 per cent. compound interest on a grain debt which was to run for the abnormally long period of 16 years. In *Gopeswar Saha* v. *Jadab Chandra* (3) Mookerjee and Newbould, JJ. referred to *Khagiran Das* v. *Ram Sankar Das* (4), *Abdul Majid* v. *Kheroda Chandra Pal* (5) and *Challaphroo* v. *Bangi Behary Sen* (6), as showing that a Court is competent to grant relief whenever the rate of interest appears to the Court to be of a penal character, that is, so unconscionable and extravagant that no Court shall allow it. In this case I am convinced that the terms of the contract were unconscionable and extravagant, and that the mortgagors could not possibly have realized the real effect of the stipulations as to interest.

As the appellant has got 33 per cent. on the Rs. 99 I see no reason to interfere in appeal and dismiss the appeal. As the respondents have not appeared there will be no order as to costs.

N. H.

Appeal dismissed.

(1) 48 Ind. Cas. 933; 23 C. W. N. 180; 101 P. R. 1918; 165 P. W. R. 1918 (P. C.).

(2) 48 Ind. Cas. 1; 23 C. W. N. 233; 35 M. L. J. 614; 16 A. L. J. 905; 124 P. R. 1918; 25 M. L. T. 55; 180 P. W. R. 1918; 29 C. L. J. 165; 1 U. P. L. R. (P. C.) 25; 21 Bom. L. R. 558 (P. C.).

(3) 32 Ind. Cas 537; 43 C. 632; 22 C. L. J. 352; 20 C. W. N. 684.

(4) 27 Ind Cas. 815; 42 C. 652; 21 C. L. J. 70; 19 C. W. N. 775.

(5) 29 Ind. Cas. 843; 42 C. 690; 19 C. W. N. 809.

(6) 31 Ind. Cas. 394; 20 C. W. N. 403; 22 C. L. J. 311.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1606 OF 1920.

December 22, 1921.

Present:—Mr Justice Kumaraswami Sastri and Mr. Justice Devadoss.

VENNAM RAMAYYA—PLAINTIFF—APPELLANT

versus

KUSURU KOTAMMA AND OTHERS—DEFENDANTS—RESPONDENTS

Limitation Act (IX of 1908), Sch. I Art 142—"Abandonment or 'discontinuance' of possession," meaning of—Adverse possession by successive trespassers—Continuous trespasses, without privity of title or devolution of interest—Suit for possession by persons claiming under real owner—Cause of action

'Discontinuance' of possession within the meaning of Article 142 of the Limitation Act takes place when the person in possession goes out and is followed into possession by another person. [p. 248, col. 1.]

In all cases where the person who was in possession at one time and discontinued possession or was dispossessed seeks to eject a person in possession. he must show that he was in possession within 12 years before the suit. [p. 249, col. 1.]

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Time commences to run against the last full owner of property from the date when he was dispossessed and the operation of the law of limitation would not be arrested by the fact that, on his death, he was succeeded by his widow, daughter or mother or any other heir, as the cause of action cannot be prolonged by the mere transfer of title. [p. 248, col. 1.]

In order that the title of the true owner may be barred by the adverse possession of a trespasser or a series of trespassers the possession by them must be continuous, and so long as it is continuous it is immaterial whether they claim through one another or independently; but if a period of time should elapse, however short, after the abandonment of one trespasser who has not been in for the full statutory period and the entry of another the title of the true owner is, as from the time of such abandonment, restored to him without any entry or act done on his part, for the Statute does not apply to a case of a want of actual possession by the true owner, but only to cases where the owner is out of possession and another is in possession for the prescribed time. [p. 249, col. 2.]

Obiter:—Article 141 of the Limitation Act applies to cases where the last full owner was in possession at the time of his death. [p. 249, col. 2.]

Trustees and Agency Company v *Short*, (1888) 13 App. Cas. 793; 58 L. J. P. C. 4; 59 L. T. 677; 37 W. R. 433; 53 J. P. 132, explained and distinguished.

Second appeal against a decree of the District Court, Guntur, in Appeal Suit No. 40 of 1918, preferred against a decree of the Court of the Additional Temporary Subordinate Judge, Guntur, in Original Suit No. 6 of 1917.

FACTS appear from the judgment.

Mr. *P. Narayanamurthi* (with him Mr. *K. Kamanna*), for the Appellant.—Here is a case of independent trespasses. The gift to Pannaya by the last owner Mallabattudu was invalid, being oral. As the heir to Pannaya was his mother and his brother Subrayudu continued in possession after Pannaya's death, the trespasses were independent of each other and Subrayudu could not tack on Puttaya's possession to his own. As there was a break and 12 years had not elapsed since Subrayudu entered in possession the suit by plaintiff is not barred. See *Trustees and Agency Company* v. *Short* ( ).

Mr. *T. V. Venkataramana Aiyar* (with him Mr. *T. V. Ramanatha Aiyar*), for the Respondents.—The principle underlying the statutory bar is that the last owner should have been dispossessed and should not have re-gained possession. Here there has been no break in the possession of the trespasses and the property did not re-vest in the true owner. There are not successive trespasses by Pannaya and Subrayudu but only a continuous trespass for over 12 years. The suit is barred. See *Mohendra Nath Biswas* v. *Shamsunnissa Khatun* (2) and *Secretary of State for India* v. *Krishnamoni Gupta* (3).

JUDGMENT.—This appeal arises out of a suit filed by the plaintiff as purchaser from the reversionary heirs of one Mallabattudu to recover possession of the properties specified in the plaint and the question is whether the suit is barred by limitation.

Mallabattudu, the last male holder of the properties, died in 1889 leaving two daughters, Ramamma and Govindamma. Ramamma died in 1914 and Govindamma who is the fifth defendant surrendered her estate to her sons who are the sixth and seventh defendants. They sold their rights to the plaintiff in this suit. The findings are that Mallabattudu, about two years before his death, made an oral gift of the suit properties to his grandson Pannayya, the son of his daughter Ramamma, that the properties were managed by Subbarayudu the elder brother of Pannayya, as Pannayya was a minor, that Pannayya died in 1894 during minority, that the properties were thereafter enjoyed by Pannayya's brothers Subbarayudu and two others, that Subbarayudu was the last surviving member of Pannayya's family and that on Subbarayudu's death the properties were sold by Subbarayudu's daughters to the third defendant. It is argued for the appellant that, as the gift to Pannayya was oral, it was invalid, that consequently Pannayya was in possession as trespasser, that on Pannayya's death his heir would be his mother, that, as Subbarayudu continued in possession, Subbarayudu's possession was also that of a trespasser, that, as neither Subbarayudu nor Pannayya completed adverse possession of 12 years, they could not tack on the possession of one to

(1) (1888) 13 App. Cas. 793; 53 L. J. P. C. 4, 59 L. T. 677; 37 W. R. 433; 53 J. P. 132.

(2) 27 Ind Cas. 954; 21 C. L. J. 157 at p. 164; 19 C. W. N. 1280.

(3) 29 C. 518; 29 I. A. 104; 6 C. W. N. 617; 4 Bom. L. R. 537; 6 Sar. P. C. J. 269 (P. C.).

the other and that the plaintiff claiming through the nearest reversioner is not barred. The contention for the respondents is that there was no break in the possession so as to re-vest the properties in the rightful owner, that Punnayya and Subbarayudu cannot be treated as successive trespassers and that, in any event, the real owner having been out of possession for over 12 years the suit is barred by limitation.

It is clear in the present case that as Mallabattudu himself gave up possession, the case would not fall under Article 141 of the Limitation Act as that Article applies to cases where the last full owner was in possession at the time of his death. As pointed out by Mookerjee, J., in *Mohendra Nath Biswas* v. *Shamsunnissa Khatun* (2) time begins to run against the last full owner if he himself was dispossessed and the operation of the Law of Limitation would not be arrested by the fact that, on his death, he was succeeded by his widow, daughter or mother as the cause of action cannot be prolonged by the mere transfer of title. We are of opinion that Article 142 of the Limitation Act applies to the facts of the present case. It is clear from the findings that Mallabattudu, when he made a gift of the properties to his grandson and transferred the *patta* in his name, discontinued his possession. Discontinuance of possession has been explained by Fry, J., in *Rains* v. *Buxton* (4) as taking place where the person in possession goes out and is followed into possession by another person. In all cases where the person who was in possession at one time and discontinued possession or was dispossessed seeks to eject a person in possession he has to show that he was in possession within 12 years before the suit. We need only refer to *Secretary of State for India* v. *Krishnamoni Gupta* (3). We do not think that, on the facts of the present case it can be said that there has been independent trespasses by successive persons so as to give the plaintiff 12 years against each successive trespasser. Mr. Narayanamoorthi has referred us to *Trustees and Agency Company* v. *Short* (1) as authority for the proposition that in cases of successive trespassers the limitation ceases to run against the lawful owner of land after an intruder has relinquished his possession. Lord Macnaughten, after dealing with the contention that, if the Statute once commenced to run, it would not stop except by the owner going into possession and so getting, as it were, a new departure, observes: "Their Lordships are unable to concur in this view. They are of opinion that if a person enters upon the land of another and holds possession for a time, and then, without having acquired title under the Statute, abandons possession, the rightful owner, on the abandonment, is in the same position in all respects as he was before the intrusion took place. There is no one against whom he can bring an action. He cannot make any entry upon himself. There is no positive enactment, nor is there any principle of law, which requires him to do any act, to issue any notice, or to perform any ceremony in order to rehabilitate himself. No new departure is necessary. The possession of the intruder, ineffectual for the purpose of transferring title, ceases upon its abandonment to be effectual for any purpose. It does not leave behind it any cloud on the title of the rightful owner, or any secret process at work for the possible benefit in time to come of some casual interloper or lucky vagrant. There is not, in their Lordships' opinion, any analogy between the case supposed and the case of successive disabilities mentioned in the Statute. There the Statute 'continues to run' because there is a person in possession in whose favour it is running." This case does not help him as it is not shown in the present case that anybody gave up possession which was taken up by a fresh trespasser. It is argued by Mr. Narayanamoorthi that, on the death of Punnayya, it must be taken that there was an interruption in the possession and that there was an interval between Punnayya's death and Subbarayudu's taking possession in his own right, however minute the interval may be, and that except in the case of succession or devolution all other cases would fall within the principle enunciated in *Trustees, and Agency Company* v. *Short* (1). We do not think that there is anything in the case to support this extreme contention. In *Willis*

(4) (1880) 14 Ch. D. 537; 49 L. J. Ch. 473; 42 L. T. 88; 28 W. R. 954.

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v. *Howe* (*Earl*) (5) a person trespassed upon property of another alleging himself to be his brother when he was not his brother and continued the trespass. It was argued that they must be treated as separate trespassers as they were not brothers. Kay, L. J, observed: "It was suggested in reply that, as the alleged brother was not really the brother of George, his taking possession formed a new departure, and that the Statute would begin to run from that entry, and that the previous possession of George was not material. The effect of that would be that if a series of occupiers, not claiming under one another, kept out the real owner for 100 years, time would only run against him from the moment when the last of such occupiers entered into possession. I am of opinion that this is not the law. A continuous adverse possession for the statutory period, though by a succession of persons not claiming under one another, does, in my opinion, bar the true owner. I desired to consider the case to which I referred during this part of the argument but which was not then before the Court; *Trustees and Agency Company* v. *Short* (1). In that case there had been an adverse possession of land for some time short of the statutory period, which was then abandoned, and the land left vacant, and after the statutory period had elapsed, but within 20 years before the plaintiff's action, the defendant, or his predecessor in-title, took possession. The law is thus stated in the language of Lord Macnaughten (already set out above). These observations were made in a case in which, as I have already noticed, the defendant or his predecessors had not been in possession for the statutory period. If his defence could prevail, it would be enough for a man who entered the day before the action brought to say that the true owner had left the possession vacant for more than 12 years. But it was not meant that if the possession had not been vacant, but some one or other had been in adverse possession during the 12 years such possession would not bar the true owner, unless all such occupants could show a title derived from one another." The law is thus stated in Dart on Vendors and Purchasers, Volume I, 7th Edition, page 474: "In order that the title of the true owner may be barred by the adverse possession of a trespasser or a series of trespassers the possession by them must be continuous, and so long as it is continuous it is immaterial whether they claim through one another or independently; but if a period of time should elapse, however short, after the abandonment of one trespasser who has not been in for the full statutory period and the entry of another the title of the true owner is, as from the time of such abandonment, restored to him without any entry or act done on his part, for the Statute does not apply to a case of a want of actual possession by the true owner, but only to cases where the owner is out of possession and another is in possession for the prescribed time" It is, no doubt, true that on the death of Punnayya during minority his mother would be his heir. But it appears from the facts of the present case that Punnayya and his brother Subbarayudu and the other brothers were undivided and that their mother was living with them. Subbarayudu would, therefore, be the presumptive reversioner on the death of the mother and it is clear from the documents filed that Punnayya's mother was a consenting party to Subbarayudu enjoying the properties after Punnayya's death. She was living with them and raised no objection. Under these circumstances we find it difficult to hold that there was a fresh trespass by Subbarayudu after the death of Punnayya. There was continuity of possession, the person holding possession being the next presumptive heir of the deceased. As the plaintiff has not proved that he or his predecessor-in-title was in possession of the properties within 12 years before the date of the suit, we are of opinion that the suit is barred and was rightly dismissed.

The second appeal fails and is dismissed with costs.

M. C. P.

N. H. *Appeal dismissed.*

(5) (1893) 2 Ch. 545; 62 L. J. Ch. 690; 2 R. 427; 69 L. T. 353; 41 W. R. 433.

BOMBAY HIGH COURT.
SECOND CIVIL APPEAL No. 256 OF 1921.
September 27, 1921.
Present:—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.
RATANLAL BHOLARAM AND OTHERS —DEFENDANTS—APPELLANTS
versus
GULAMHUSEN ABDULALI—PLAINTIFF —RESPONDENT.

Easements Act (V of 1882), s. 15, Expl. 2—"Interruption," meaning of—Acquisition of easement of light and air—Interruption.

Where in the course of acquiring by prescription an easement of light and air for certain windows of a building, the building is burnt down, but the owner begins immediately to re-build it and places windows exactly in the same position as the old ones, he will be regarded as having enjoyed the access of light and air continuously, and will be entitled to protection after twenty years from the first building. Any delay in re-building, however, might be evidence of an intention not to resume the user. [p. 251, col. 2.]

An interruption in user owing to a building being burnt down and having to be re-built is not an interruption within the meaning of Explanation (2) to section 15 of the Easements Act as the interruption in such a case is not owing to the act of some person other than the claimant. [p. 250, col. 2.]

Second appeal from the decision of the District Judge, Khandesh, in Appeal No. 256 of 1921, confirming a decree passed by the Second Class, Subordinate Judge at Bhusaval, in Civil Suit No 193 of 1915

Mr. *P. V. Kane*, for the Appellants.
Mr. *M. V. Bhat*, for the Respondent.

JUDGMENT.

MACLEOD, C. J.—The plaintiff sued to restrain the defendants from blocking up certain windows of his house.

The defendants replied that the plaintiff had not acquired a complete prescriptive right to the light and air of the windows mentioned in the plaint so that they were entitled to block up these windows.

The Trial Court granted an injunction with regard to the windows of the western wall in the second storey of the plaintiff's house. An appeal from this decision was dismissed

In the lower Appellate Court the only question argued was whether the windows on the second storey of the plaintiff's house were built more than twenty years before August 1918 when the plaint was filed. Apparently the question whether the enjoyment of light and air had been continuous since the building of the second storey was not argued.

In second appeal the appellants contend that the plaintiff had not peaceable enjoyment of the light and air which he claimed as an easement for twenty years, on the ground that the building was burnt down in 1905 and re built, so that during the period of re building there were no windows with regard to which the use of light and air could be enjoyed. There does not appear to be any authority, strange to say, on this question. Admittedly, if the plaintiff had already acquired an easement of light and air for certain windows in the building before it was burnt down in 1905, and had re-built his house with windows corresponding with the old windows, he would be entitled to the same access of light and air as that enjoyed by the old windows But in 1905 the plaintiff was in the process of acquiring an easement of light and air for these windows, and since peaceable enjoyment for twenty years is necessary, it is contended that during the period of re-building he could not have enjoyed the access or use of light and air to these windows. Section 15 of the Indian Easements Act says that the user must be peaceably enjoyed without interruption. But 'interruption' is defined in Explanation 2 and it is conceded by the appellants that the interruption in the user, owing to the building having been burnt down and having to be re-built, was not an interruption within the meaning of the Explanation, because the interruption to the user was not owing to the act of some person other than the claimant. The appellants' argument seems to be that the period of re-building ought to have been deducted from the period of user. But I do not think that this is correct. Either the period of re-building must be included in the twenty years, or the interruption in the user would stop time running in favour of the owner of the building, so that he would have to start afresh acquiring a right by prescription to an easement of light and air for the windows of the new house. Therefore this is a case, where, owing to an accident, the person who was endeavouring to acquire a right by prescription to an

easement of light and air for the windows of his house was prevented during a short period from enjoying any light and air as there were no windows through which he could enjoy them.

The case of *Andrews* v. *Waite* (1), may help us to decide this question, although the question there was whether the right to the access of light to a building which had been enjoyed through one window was preserved upon an alteration of the building. It was decided that the answer to that question depended on the identity of light, not on the identity of aperture. The Judge after setting out the facts said:

"Has there been such an alteration of his (the plaintiff's) premises, both in 1888 and again still more conspicuously in 1895, as to prevent his acquisition of any right to light over the defendant's premises at all. That, I think, must depend upon the proper construction to be put upon section 3 of the Prescription Act, which refers to acquisition of rights of light, taken in connection with the decisions of the Courts in respect of the matter. It is said that, except with regard to the term necessary for the acquisition of the right, the Prescription Act did not alter the law as it existed at the time the Act was passed. I think that is probably true, but if so, the Act shows what the law at that time was, so far as the Act purports to state anything in connection with it."

Then this is the important passage:—

"I do not think that any distinction can be drawn between what, in the way of alteration, involves the loss of the right to light when once indefeasibly acquired, and what is sufficient to prevent the acquisition of the right during the twenty years."

Therefore paraphrasing these words, non-user during the twenty years must be such non user as would involve the loss of the right to light if it had been indefeasibly acquired. I may now refer to Goddard's Law of Easements (7th Edition) at page 269:—

"Mere non-user will not, in every case, prevent acquisition of an easement; but, to have that effect, it must be coupled with some act indicative of an intention to abandon the claim, or it must be of such long continuance, and so constant, as to indicate an intention not to resume the user. Non-user, however, which would not prevent acquisition of an easement at common law, may often be sufficient to do so under the Prescription Act, which requires *actual* enjoyment for the full period."

I do not think that the last sentence in any way weakens the effect of the last passage of the judgment in *Andrews* v. *Waite* (1), to which I have referred, because it is not necessary that there should be actual enjoyment of the right every moment of each twenty-four hours during the twenty years. I do not suppose that if the owner of a building, who was seeking to acquire a right by prescription to an easement of light and air for his windows, went away for six months, and during that time the shutters of the windows of his house were closed, such non-user would stop time from running in his favour. It seems to me, therefore, that the question must depend very much on the facts of each case, and that if the owner of a building, who, in the course of acquiring a right of easement by prescription is so unfortunate as to have his house burnt down, begins immediately to re build his house and places the windows exactly in the same position as the old ones, it may be said that he has been enjoying the access and use of light and air continuously, and he will be entitled to protection after twenty years from the first building. If, however, there is any delay in re-building, then that might be evidence of an intention not to resume the user.

The appeal, therefore, must be dismissed with costs.

SHAH, J.—I agree.

W. C. A. *Appeal dismissed.*

(1) (1907) 2 Ch. 500 at pp. 508, 509; 76 L. J. Ch. 676; 97 L. T. 428.

HARI CHARAN KARANJAI v. BAHAR SHEIKH.

CALCUTTA HIGH COURT.

CIVIL REVISION CASE No. 563 OF 1921.

December 19, 1921.

Present:—Mr. Justice Suhrawardy and Mr. Justice Cuming.

HARI CHARAN KARANJAI—PLAINTIFF—PETITIONER

versus

BAHAR SHEIKH—DEFENDANT—OPPOSITE PARTY

Civil Procedure Code (Act V of 1908), O. XLI, r. 27—Additional evidence, admission of, in appeal—Appellate Court, discretion of—High Court, interference by.

The power vested by rule 27 of Order XLI of the Civil Procedure Code in an Appellate Court to admit additional evidence is purely discretionary, and where, in exercise of that discretion, an Appellate Court declines to allow the production of additional evidence, the High Court will not interfere on the ground that the Appellate Court has acted with material irregularity in the exercise of its jurisdiction.

Rule against an order of the Court of the Sub-Judge, Rangpur.

FACTS appear from the judgment.

Babu *Atul Chandra Gupta*, for the Petitioner.—I beg to submit that the case clearly comes under section 115, Civil Procedure Code, as the learned Judge has acted with material irregularity in the exercise of his jurisdiction in refusing to take in evidence the petitioner's *pucca* account-books. I contend that that was an illegal exercise of jurisdiction. The petitioner had no opportunity to show that his accounts are not worthless. The petitioner wanted to produce his *pucca* account-books to clear up certain discrepancies in the *kucha* account-books. Your Lordships can interfere under the provision of clause (*c*) of section 115, Civil Procedure Code. The learned Judge should have admitted and considered the additional evidence the petitioner wanted to put in.

Babu *Hemendra Chandra Sen*, for the Opposite Party.—I submit that your Lordships cannot interfere under section 115, Civil Procedure Code. Where is the illegal exercise of jurisdiction, or has there been any material irregularity? Refers to Order XLI, rule 27. This rule shows that the Appellate Court, to which application for production of additional evidence is made, is to be the sole and final judge. It is a matter of discretion which is vested in the Court. Refers to *Upendra Mohan Ghose* v. *Gopal Chandra* (1).

(1) 21 C. 484 at p. 486; 10 Ind. Dec. (N. S.) 952.

Babu *Atul Chandra Gupta*, replied briefly.

JUDGMENT.—The facts of this Rule are as follows:—The plaintiff brought a suit for recovery of Rs. 145 alleged to be due on two unregistered bonds. The Court of first instance decreed the suit. On appeal the learned Subordinate Judge dismissed the suit holding that certain account-books which were produced by the plaintiff were not reliable.

The plaintiff has now moved this Court on the ground that the Judge in the lower Appellate Court acted with material irregularity in the exercise of his jurisdiction in refusing to take in evidence the plaintiff's *pucca* account-books to clear a misapprehension which was occasioned for the first time during the hearing of the appeal which the plaintiff had no previous opportunity of explaining.

The facts would appear to be these: the appeal was heard on the 20th May and judgment was reserved. Then on the 23rd May the respondent apparently for the first time asked to put in certain account-books which, he alleged, would clear up the discrepancies in the account-books which he had already filed.

The learned Vakil who urged this Rule states that the accounts actually produced were *kucha* accounts and the books which he then wanted to produce were *pucca* accounts. The learned Judge refused to allow these books to be put in in evidence. We are of opinion that in doing so it cannot be said that he acted with material irregularity in the exercise of his jurisdiction. Order XLI, rule 27, is the rule which deals with admission of additional evidence in the Appellate Court and the rule runs as follows: "The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if (*a*) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or (*b*) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the Appellate Court may allow such evidence or document to be produced or witness to be examined." Clearly, therefore, admission of additional evidence in appeal is a matter

within the discretion of the Appellate Court; and there is further provision that where additional evidence is allowed to be produced the Court shall record the reason for its admission. It is impossible to say that the learned Judge acted with material irregularity in exercising his discretion under the section in refusing to admit additional evidence three days after the argument had been heard and the appeal was reserved for judgment.

The Rule is, therefore, discharged with costs. Hearing fee one gold mohur.

W. C. A.

Rule discharged.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1334 OF 1918.

November 28, 1921.

Present:—Mr. Justice Abdul Raoof and Mr. Justice Martineau.

Musammat JIWANI AND OTHERS—DEFENDANTS—APPELLANTS

versus

MULA RAM AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Hindu Law—Minor girl—Guardian for marriage—Paternal uncle—Mother.

Under the Hindu Law, the mother is, after the father, the guardian of her minor daughter and her right to select a bridegroom for the girl is prior to that of the paternal kindred.

Second appeal from a decree of the District Judge, Jhang, at Sargodha, dated the 2nd February 1918, reversing that of the Junior Subordinate Judge, Second Class, Jhang, dated the 2nd June 1917, and decreeing the claim.

Mr. *Fakir Chand*, for the Appellants.

Mr. *Nanak Chand*, for the Respondents.

JUDGMENT.—The plaintiffs, who are the uncles of a minor Hindu girl, sue for an injunction to restrain her mother Bhirawan and the latter's father Wazir Chand from giving the girl in marriage without the consent of the plaintiffs and defendants Nos. 4 to 10. The First Court dismissed the suit, but the District Judge on appeal granted the

injunction asked for. The defendants have filed a second appeal in this Court.

The lower Appellate Court's decision cannot be sustained. Under the Hindu Law, the mother is, after the father, the guardian of her minor daughter, and her right to select a bridegroom for the girl is prior to that of the paternal kindred—see Rama Krishna's Hindu Law, Volume II, page 416, and *Acha Ranaganaikammal* v. *Acha Ramanuja Aiyangar* (1). She is not required to consult or obtain the consent of the girl's uncles in this matter.

We accept the appeal, reverse the decree of the lower Appellate Court, and restore the decree of the Trial Court dismissing the suit. The plaintiffs will pay the appellants' costs throughout.

R. N.

Appeal accepted.

(1) 11 Ind. Cas. 570; 35 M. 728; 21 M. L. J. 600; 10 M. L. T. 57; (1911) 2 M. W. N. 285.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 215 OF 1921.

September 30, 1921.

Present:—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

GOTURAM RADHAKISAN—PLAINTIFF APPELLANT

versus

BARKU DODHU—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXIII, r. 2—Dekkhan Agriculturists' Relief Act (XVII of 1879), s 12—Suit on pro-note against agriculturist—Admission by defendant—Court, jurisdiction of, to inquire into nature of admission.

Where in a suit to recover upon a promissory note against an agriculturist, to whom the provisions of the Dekkhan Agriculturists' Relief Act apply, the defendant admits the whole of the plaintiff's claim and asks the Court to pass a decree in accordance with such admission, rule 3 of Order XXIII of the Civil Procedure Code does not oust the Court of its jurisdiction from going behind the transaction and inquiring into the nature of the admission so as to satisfy itself whether the admission is true and made by the debtor with a full knowledge of his legal rights as against the creditor. [p. 255, col. 2.]

GOTURAM RADHAKISAN v. BAPKU DODHU.

Per Shah, J.—The provisions of Order XXIII, rule 3 of the Civil Procedure Code, wherever they are applicable, must be given effect to even in cases which are governed by the Dekkhan Agriculturists' Relief Act. [p 255, col. 2; p. 256, col. 1.]

Second appeal from the decision of the Assistant Judge, Khandesh, in Appeal No. 407 of 1919, confirming the decree passed by the Subordinate Judge at Erandol, in Civil Suit No. 884 of 1911.

Mr. *B. G. Rao*, for the Appellant.

Mr. *W. B. Pradhan*, for the Respondent.

JUDGMENT.

MACLEOD, C. J.—The plaintiff sued to recover on a promissory note, dated 29th December 1915, Rs. 450 principal, and Rs. 139 8-0 for interest. The defendant admitted the promissory note but denied consideration and prayed for an account and instalments. The defendant is an agriculturist. When the suit came on for hearing what was represented as a compromise was presented to the Court, under which the defendant agreed that he should pay the amount demanded, Rs. 589 8 0, and the costs by instalments of Rs. 100 each. In default of paying any two instalments the whole amount was to be recovered at once; interest at four annas per mensem was to run on the principal amount from that date until all the instalments had been paid off.

The defendant was examined by the Court and said:—

"I have made the settlement, which I have understood, (and which) I admit. A decree may be passed according to it. At first I received Rs. 200 (two hundred), thirteen years ago. No receipt is passed showing what amount is paid. I do not remember. I do not understand accounts, therefore, I have agreed to this settlement."

The Court passed the following order:—

"Defendant is not able to say how much is due to plaintiff. He has no precise knowledge as to the *wasul* paid. The transaction is very old. I cannot in these circumstances allow the compromise as I do not believe that defendant has entered into it after fully understanding his rights."

The learned Judge then went into the merits of the case and came to the conclusion that no consideration had been paid to the defendant for the promissory note in suit.

That decision on appeal was confirmed. The learned Judge said:

"I think that the lower Court was perfectly justified in this case in disallowing the compromise (Exhibit 18) as it was no compromise in fact at all; the defendant had disputed the amount of the claim in this case (Exhibit 11). When he was examined by the Court he distinctly stated that he had received no cash consideration at all under the pro-note in suit, whereas plaintiff's case was that he had paid a cash consideration of Rs. 450 at the time of the execution of the pro-note by the defendant in the presence of the writer Damoo. In spite of this position of things we find defendant entering into a compromise admitting the whole of the plaintiff's claim and agreeing to pay the whole amount with all costs, and I fail to see how this can be called a compromise at all which on the very face of it is conspicuous for total absence of any mutual concessions in the matter."

He agreed with the finding of fact that no consideration had been paid.

We have been referred to four decisions of this Court on the question whether the Court can go behind a compromise entered into between the parties when one of them is an agriculturist, and whether the Court is bound to pass a decree under what is now Order XXIII, rule 3, provided the provisions of the rule have been complied with. In *Gangadhar Sakharam* v. *Mahadu Santaji* (1) it was held that where a matter had been referred to arbitration, without the intervention of a Court of Justice, by parties, one of whom was an agriculturist, and an award had been made thereon, any person interested in the award might, without obtaining the conciliator's certificate, apply for the filing of the award under section 525 of the Code of Civil Procedure of 1882, the provisions of which were not superseded by section 47 of the Dekkhan Agriculturists' Relief Act. Mr. Justice West said:—

"The Code of Civil Procedure and the Dekkhan Act being within the territorial

(1) 8 B. 20; 8 Ind. Jur. 201; 4 Ind. Dec. (N. s.) 388.

GOTURAM RADHAKISAN v. BARKU DODHU.

range of the latter Statutes in *pari materia* must be construed together so as to give effect so far as possible to the provisions of each. Another general principle is that exceptional provisions are not to receive a development to all their logical consequences contrary to the general principle of the law. When these principles are applied, there is nothing to be found which prevents parties from resorting to friendly arbitration instead of to the Court, or to prevent the filing and, if need be, the enforcement of an award thus obtained." In *Piraji* v. *Ganpati* (2) a decree had been passed by the lower Court in terms of the compromise. On appeal to the High Court the decree was confirmed. But Mr. Justice Chandavarkar said:—

"What the Court was asked to do was not indeed to pass a decree on any admission of the defendant but to make one in terms of the compromise which, after trial commenced, had been deliberately entered into by the parties. A compromise means the settlement of a disputed claim"

In *Kisandas Shivram Marwadi* v. *Nama Rama Vir* (3) the parties proposed certain terms to the Court and asked for a decree but the terms were at variance with section 15 B of the Dekkhan Agriculturists' Relief Act and the Subordinate Judge referred the question to the High Court whether he could pass a decree in such terms although the parties asked him to do so, and it was held that it was not competent to the Court to pass a decree in terms which were at variance with section 15 B.

In *Shivayagappa* v. *Govindappa* (4) a question arose with regard to the execution of a decree passed in accordance with the terms of a compromise, and as it appeared to the Bench before whom the question came for decision that the decisions in *Piraji* v. *Ganpati* (2) and *Kisandas Shivram Marwadi* v. *Nama Rama Vir* (3) were conflicting, the question was referred to a Full Bench, and the question which had been referred was construed by the Full Bench as referring to the special provisions of section 15 B, which were the only special provisions referred to in the statement of the case. The effect of the decision was that if there was a compromise made by parties who were *sui juris* it should be given effect to, and that the fact that the decree was not in accordance with the provisions of section 15-B did not make it unlawful.

It will be seen, therefore, that none of these decisions touch the question whether the provisions of Order XXIII, rule 3, prevent the Court from going behind the transaction when the defendant admits the whole of the plaintiff's claim and asks the Court to pass a decree in accordance with that admission. I do not think myself it can be said that Order XXIII, rule 3, ousts the jurisdiction of the Court in this class of cases from inquiring into the nature of the admission so as to satisfy itself whether the admission is true and made by the debtor with a full knowledge of his legal rights as against the creditor. If, when the case had been called on, the defendant said "I admit the claim and am willing that a decree should be passed against me accordingly" it is perfectly obvious that under section 12 of the Dekkhan Agriculturists' Relief Act the Court would be bound to record in writing its conclusions as to whether the admission was true and made by the debtor with a full knowledge of his legal rights, and it seems to me to make no difference that before he came to Court the defendant has written down a paper to that effect and produces it in Court when the case is called on. I think myself, therefore, that provided it is perfectly clear that the whole of the plaintiff's claim is admitted, the Court can go behind the transaction even though an application is made to record an agreement under Orde XXIII, rule 3. In this case the evidence shows that the defendant signed a promissory note without receiving any cash so as to admit his liability for a certain old transaction the nature of which he seems to have been entirely ignorant of. I consider, therefore, that the decree dismissing the suit was right and the appeal should be dismissed with costs.

SHAH, J.—I concur in the order proposed. I have felt some difficulty in coming to this conclusion because it seems to me that according to the decisions of this Court the provisions

(2) 6 Ind. Cas. 527, 34 B. 502 at p. 505; 12 Bom. L. R. 378.

(3) 8 Ind Cas. 651; 35 B. 190; 12 Bom. L. R. 1024 at p. 10 5.

(4) 20 Ind. Cas. 969; 37 B. 614 at p 620; 15 Bom. L. R. 768.

of Order XXIII, rule 3, wherever they are applicable, must be given effect to even in cases which are governed by the Dekkhan Agriculturists' Relief Act. The principle has been sufficiently recognised in *Gangadhar Sakharam* v. *Makadu Santaji* (1), *Piraji* v. *Ganpati* (2) and *Shivayagappa* v. *Govindappa* (4). In spite of the observations in *Kisandas Shivram Marwadi* v. *Nama Rama Vir* (3), which conflict with that view, I think that the Court would be bound even in cases governed by the Dekkhan Agriculturists' Relief Act to give effect to the provisions of Order XXIII, rule 3. Thus in any suit where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by a lawful agreement or compromise, the Court shall order such agreement or compromise to be recorded and pass a decree in accordance therewith so far as it relates to the suit.

The question, however, that arises on the special facts of this case is whether the nature of the agreement between the parties is within the scope of rule 3 of Order XXIII. In substance the defendant in the present case, who is an agriculturist, has admitted the whole of the claim by the agreement in question. I say this in spite of the fact that there is a provision in the agreement as to the payment of the amount by way of instalments. I do not desire to lay down any general proposition that such an agreement would never fall within the scope of rule 3 in cases governed by the Dekkhan Agriculturists' Relief Act. But having regard to the facts of this case, and the view taken by the lower Courts that substantially the defendant admitted the whole of the claim, it seems to me that it was an admission of the claim within the meaning of section 12 of the Dekkhan Agriculturists' Relief Act. The application of that section is not necessarily excluded in such a case. If in spite of the provisions of Order XXIII, rule 3, the application of section 12 is not excluded, it would be open to the Court under the provisions of that section to consider whether the debtor has made the admission with a full knowledge of his legal rights as against the creditor, and unless the Court is satisfied on that point, the Court would not be bound to accept the admission of the debtor, but would be at liberty to inquire into the case as required by that section.

In the present case on the evidence the Courts have found that the debtor admitted the claim without full knowledge of his legal rights, and that finding must be accepted in second appeal as a finding of fact. The whole question which has presented difficulty to my mind is whether in view of the adjustment of the claim between the parties the application of section 12 of the Dekkhan Agriculturists' Relief Act was not excluded in virtue of the provisions of Order XXIII, rule 3. But on the special facts of this case, as I have said, it does not seem to me that the application of that section was necessarily excluded. If that section applies it is clear that the conclusion reached by the lower Courts is really a conclusion based on the circumstances and the evidence in the case which must be accepted.

W. C. A.

Appeal dismissed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2447 OF 1917.

December 13, 1921.

Present:—Mr. Justice Chevis and Mr. Justice Campbell.

NAZIM AND OTHERS—DEFENDANTS—APPELLANTS

versus

ABDUL HAMID AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 10—Order rejecting appeal for failure to furnish security for costs, if appealable—Pauper appeals—Application of O. XLI, r. 10 to such appeals.

No appeal is competent from an order, under rule 10 of Order XLI, Civil Procedure Code, rejecting an appeal for failure to furnish security for costs. [p. 257, col. 1.]

Order XLI, rule 10 is, however, not applicable to pauper appeals and an Appellate Court exercising powers under the rule in case of pauper appeals acts illegally and with material irregularity. [p. 257, col. 2.]

Nusseerooddeen Biswas v. *Ujjul Biswas*, 17 W. R. 68, approved.

Seshayyangar v. *Jainulavadin*, 3 M. 66; 4 Ind. Jur. 507; 1 Ind. Dec. (N. S.) 603 and *Srinivasa Sastrial* v. *Subramania Aiyar*, 17 M. L. J. 583, dissented from.

NAZIM v. ABDUL HAMID.

Hafizan v. *Abdul Karim*, 12 C. W. N. 163; 7 C. L. J. 312, *Khemraj* v. *Kisanlala Surajmal*, 42 Ind. Cas. 67; 42 B. 5; 19 Bom. L. R 771, *Lekha* v. *Bhauna*, 18 A. 101 (F. B.); A. W. N. (1895) 238; 8 Ind Dec. (N. S.) 773 and *Firozi Begam* v. *Abdul Latif Khan*, 30 A. 143; 5 A. L. J. 109; A. W. N. (1908) 53; 3 M. L. T. 221, followed.

Second appeal from the decree of the District Judge, Delhi, dated the 31st January 1917, affirming that of the Subordinate Judge, Second Class, Delhi, dated the 22nd July 1916, decreeing the claim.

Mr. *Rup Ram*, for the Appellants.

Lala *Moti Sagar*, R S, for the Respondents.

JUDGMENT.—Three minors, children of Muhammad Umar, were permitted by the District Judge of Delhi to appeal against a decree of the Subordinate Judge *in-forma pauperis*. Subsequently, the successor of the Judge who gave this permission ordered the appellants to give security for costs and on their failure to do so dismissed the appeal (he should have said *rejected*) under Order XLI, rule 10 (2). The appellants filed a petition for revision in this Court on 30th April 1917, within thirty days of the District Judge's order, and were granted time for putting in an appeal, which is now before us together with the revision petition.

Counsel on both sides are agreed that no appeal lies from an order rejecting an appeal for failure to furnish security for costs and *Lekha* v. *Bhauna* (1) and *Ferozi Begam* v. *Abdul Latif Khan* (2) are clear authorities to this effect. We accordingly dismiss the appeal and proceed to take up on revision the question whether Order XLI, rule 10 is applicable to pauper appeals. *Prima facie* it is anomalous for a Court, having held that an appellant is too poor to afford the Court fee payable on his appeal, to expect him to be able to find security for the costs of the suit.

The earliest authority is a case of 1871 reported as *Nusseercoddeen Biswas* v. *Ujul Biswas* (3). It was laid down that the provisions of the Code then in force relating to the power of an Appellate Court to demand security for costs were inconsistent with and, therefore, did not apply to those relating to appeal *in forma pauperis*.

This judgment was dissented from in *Seshayyangar* v. *Jainulavadin* (4) afterwards followed in *Srinivasa Sastrial* v. *Subramania Aiyar* (5) where it was held that Appellate Courts have power to require security for costs from pauper appellants but should use it only on very special grounds.

To the contrary was a decision by the Calcutta High Court in a case very similar to the one before us, *Hafizan* v. *Abdul Karim* (6) that in making an order under section 380 of the old Code for a pauper appellant to furnish security for costs the Court below had acted in the exercise of its jurisdiction illegally and with material irregularity. Finally the Bombay High Court has held that Order XLI, rule 10 does not apply to pauper appeals in *Khemraj* v. *Kisanlala Surajmal* (7) citing in support of that view an English case *Wills* v. *St. John* (8) in which the Master of the Rolls had ruled that the grant of permission to appeal *in forma pauperis* rendered a previous order to give security for costs no longer operative.

We have no hesitation in following the two authorities last quoted and hold that the order under consideration was illegal. It is accordingly set aside. We make no order as to costs of either the appeal or the revision.

R. N.

Appeal dismissed;
Revision accepted.

(1) 18 A. 101 (F. B.); A. W. N. (1895) 238; 8 Ind. Dec (N. S.) 773.

(2) 30 A. 143; 5 A. L. J. 109; A. W. N. (1908) 53; 3 M. L. T. 221.

(3) 17 W. R. 69.

(4) 3 M. 66; 4 Ind. Jur. 507; 1 Ind. Dec. (N. S.) 603.

(5) 17 M. L. J. 583.

(6) 12 C. W. N. 163; 7 C. L. J. 312.

(7) 42 Ind. Cas. 67; 42 B. 5; 19 Bom. L. R. 771.

(8) (1910) 1 Ch. 701 at p. 704; 79 L. J. Ch. 409; 102 L. T. 6 7; 54 S. J. 457; 26 T. L. R 405.

MUKUNDSINGH v. PREMDAS.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 400 OF 1921.

April 28, 1922.

Present:—Mr. Batten, J. C.

Thakur MUKUNDSINGH AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

Mahant PREMDAS—DEFENDANT—RESPONDENT.

Hindu Law—Endowment—Income of village credited to temple for 60 years but not regularly—Debutter *property.*

The fact that for the last 60 years credits, varying in amounts, have been made, not regularly every year but only in certain years, from the income of a village to a temple, is insufficient to prove that the village is *debutter* property. [p. 259, col .]

Konwar Doorganath Roy v. *Ram Chunder Sen*, 2 C. 341; 4 I. A. 2; 1 Ind Dec (N. s 508 (P. C.), *Muddun Lal* v *Sreemutty Komul Bibee*, 8 W. R. 42, *Ram Pershad Doss* v. *Sreehuree Doss*, 18 W. R. 399, referred to.

Abhiram Goswami v. *Shyama Charan Nandi*, 4 Ind; Cas. 449; 36 C. 100; 10 C. L. J. 281; 6 A. L. J. 857; 1 Bom. L R. 1234; 19 M. L J. 5 0; 14 C. W. N. 1; 36 I. A. 148 (P. C.), distinguished

Appeal from the decree of the District Judge, Saugor, dated the 18th April 1921, in Civil Appeal No. 16 of 1921.

Mr. *M. Gupta*, for the Appellants.

Mr. *G. L. Subhedar*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit brought on a mortgage, dated the 21st November 1914, executed in favour of the plaintiffs by *Mahant* Bindrabandas, *chela* of *Mahant* Raghubarsaran, resident of Bindrabanbagh, Saugor. The consideration for the mortgage was Rs. 3,999 and the purpose of the loan was said to be for certain works and repairs to the temple in the Bindrabanbagh. The property mortgaged was an 8 annas *patti* of Mauza Uldan.

The facts of the case are given fully in the judgments of the two lower Courts. The main issue with which we are concerned in appeal is Issue No. 2 which is to the effect: "Whether the village Uldan (8 annas *patti*) belonged to the idol established in the Bindrabanbagh or to the deceased Bindrabandas, *chela* of Raghubarsarandas?" The question embodied in the other issues was, whether the loan was justified by legal necessity if the village Uldan was the property of the idol. The learned Subordinate Judge held that the village mortgaged was the private property of the mortgagor and was not the *debuttar* property of the temple. This finding was upset by the District Judge in appeal, and there is a concurrent finding of both the Courts that the loan was not for legal necessity.

The main question argued in appeal is, whether the village is the property of the temple or the private property of the mortgagor. The history of the village is given in the judgments of the two lower Courts. It became the property of *Mahant* Janki Sewak in 1844 A. D; it had previously been held by members of other families. In 1855 A. D. *Mahant* Janki Sewak was succeeded by *Mahant* Mohandas who in his turn was succeeded in 1860 by *Mahant* Raghubarsaran. At the first Settlement in 1861 the proprietary rights in the village were conferred on *Mahant* Raghubarsaran who was succeeded in 1893 A. D. by the mortgagor, *Mahant* Bindrabandass; he died in August 1918 and was succeeded by the present defendant, Premdass.

Admittedly, the several *Mahants* abovenamed have also been the managers of the temple, and, besides the village in suit, there are other villages held by the successive *Mahants*; as the District Judge says: "*Mahant* Bindrabandass held the entire villages of Tilli and Belai in *muafi* right, the entire villages of Uldar, Chandrapur and Salaya and shares in Bahera, Bijapur and Padwa in *malguzari* rights."

Admittedly, there is nothing in the first Settlement papers to show that the proprietary rights were conferred on *Mahant* Raghubarsaran as representing the temple. The question which was decided at the Settlement was whether the proprietary rights should be conferred on the line of *Mahants* who held the village since 1844 or on other claimants. Both the lower Courts are right in holding that the conferral of proprietary rights would not affect the nature of the terms on which the village was previously held by Raghubarsaran. The subsequent mutation proceedings are also in the name of the *Mahant* for the time being and do not show that the village was held on behalf of the temple.

Both the Settlement record and mutation proceedings are consistent with the case of either side. The District Judge says: "There is nothing to show why *malguzari*

rights were conferred on the *Mahant* personally and not on the temple of which he was a *Mahant* and, in the absence of such evidence, one must turn to the conduct of the *Mahants* and see whether Ragubarsaran and his successors used the profits of the village for their own purposes or for the benefit of the temple of which they were the *Mahants*" There is, admittedly, no evidence on the part of the defendant to show that the village was originally acquired as *debuttar* property. The first Court rejected, as not being regularly kept in the course of business, the accounts of the temple produced to prove that the profits of the village used to be paid to the temple. The District Judge has, however, admitted these accounts in evidence, and very rightly so, and the learned Counsel for the appellants does not dispute their admissibility. The District Judge says, as regards these accounts: "They show beyond doubt that the *Mahants* of Bindraban temple have for the last 60 years looked on Mauza Uldan as belonging not to themselves but to the temple of which they have been the *Mahants*. Respondent himself as a witness has deposed that he looked on the village Uldan as the property of the temple when he made the loan on the mortgage sued upon."

The learned Counsel for the respondent also relies on the above admission of the plaintiffs, but this opinion previously held by the plaintiffs does not in any way preclude them from pleading and establishing their legal rights. It is urged for the appellants that the accounts, so far from showing that the whole income of Uldan has always been set apart for the purposes of the temple, do no more than show that some credits have been made from the village in some years to the temple. This contention is undoubtedly correct. The accounts were begun in *Sambat* 1916-17, corresponding to 1859-60 A. D. Then, there is a gap and the next account is for *Sambat* 1925 (1868 A. D.). The accounts for *Sambat* years 1954 to 1960 are not forthcoming and there is a gap between the accounts of *Sambat* 1933 (Exhibit D 25) to those of *Sambat* 1938 (Exhibit D 26). The accounts of the village itself have not been produced and there is certainly nothing to show that the whole profits of the village were credited to the temple. There is no repetition of the same figures from year to year and there is nothing to show the ratio of the amounts received by the temple to the profits of Uldan. There is a surprising variation in the amounts received in different years; for instance, in 1953 (Exhibit D 30) the only receipt is for Rs. 55. In *Sambat* 1954 (Exhibit D 31) the credit to the temple is Rs. 267, and in 1960 (Exhibit D 32) Rs. 29 only. The District Judge is, therefore, overstating the case when he says that the accounts establish that the profits of the village have for the last 60 years been credited to the temple.

In *Konwar Doorganath Roy* v. *Ram Chunder Sen* (1) their Lordships of the Privy Council observed: "But supposing it to be taken that the rents of this *mahal* were applied during the period that the witnesses speak of to the worship of the idol Radha Mohun, that fact is by no means sufficient to establish the onus which lies upon a party who sets up the case that property has been inalienably conferred upon an idol to sustain its worship." In *Muddun Lal* v. *Sreemutty Komul Bibee* (2), it is observed: "We do not say that the mere fact of the proceeds of any land being used for the support of an idol is proof that those lands formed an endowment for the purpose; but where there is apparently good evidence going back for more than half a century that the land was given for the support of an idol, proof that from that time the proceeds had been so expended would be strong corroboration." In the present case there is no other evidence of the endowment at all and the evidence does not show that the whole proceeds of the land were given for the support of the idol. The same principle was recognised by the Privy Council in *Abhiram Goswami* v. *Shyama Charan Nandi* (3) where it is was said: "The mere fact of the proceeds of any land being used for the support of an idol may not be proof that those lands formed an endowment for the purpose, but it is a fact that may well be taken into consideration when, as

(1) 2 C. 341; 4 I. A. 52; 1 Ind. Dec. (N. S.) 503 (P. C.).
(2) 8 W. R 42.
(3) 4 Ind. Cas. 442; 36 C. 1003; 10 C. L. J. 284; 6 A. L. J. 857; 11 Bom. L. R. 1234; 19 M. L. J. 530 14 C. W. N. 1; 36 I. A. 148 (P. C.).

in this case, the intention of the founder has to be gathered from an ancient document expressed, to say the least, in ambiguous language." Here there is no ancient document. In *Ram Pershad Doss* v. *Sreehuree Doss* (4) it was observed: "It may be that a portion of the profits of the lands in the possession of the defendant had been for some time used for the worship of the idol; but that circumstance cannot impose on the respondent the liabilities attaching to the office of a *shebait*."

Having regard to the view of the law expressed in the above rulings, the evidence embodied in the accounts is legally insufficient to prove that the village of Uldan is *debuttar* property. In this view, it is unnecessary for me to discuss the question of legal necessity. For these reasons, I set aside the decree of the District Judge and restore the decree of the Subordinate Judge. The date for payment will be altered to the 22nd of August 1922 and interest up to that date should be added to the decretal amount. The defendant must pay the plaintiffs' costs in all Courts and pay his own costs.

S. D.

Decree set aside.

(4) 18 W. R. 399.

LAHORE HIGH COURT.
CIVIL REVISION No. 693 OF 1919.
June 9, 1920.
Present:—Mr. Justice Wilberforce.
THE FIRM KESAR MAL-SHANKAR DAS, THROUGH CHUNI LAL—PLAINTIFFS—PETITIONERS
versus
THE FIRM HUKAM CHAND-BADRI NATH, THROUGH BADRI NATH—DEFENDANTS—RESPONDENTS.

Appellate Court, judgment of, based on inaccuracies—High Court, power of, to set aside—Arbitration—Revision—High Court, when, will interfere.

The judgment of an Appellate Court which is based entirely upon inaccuracies or misunderstandings is vitiated thereby, and cannot be upheld by the High Court; and although the High Court is reluctant to interfere on revision in arbitration cases, it will nevertheless do so in the event of such gross and material irregularities.

Petition, under section 44 of Act III of 1914, for revision of the order of the District Judge, Amritsar, dated the 22nd August 1919, affirming that of the Subordinate Judge, First Class, Amritsar, dated the 14th March 1919.

Dr. *Gokal Chand Narang*, for the Petitioners.

Dr. *Nand Lal* and Lala *Arjan Das*, for the Respondents.

JUDGMENT.—In this case the parties referred the dispute to the arbitration of a single arbitrator who gave an award in favour of the firm Kesar Mal-Shankar Das, for Rs. 3,350 and this firm filed the award in Court. The defendant-firm, represented by Badri Nath, made many objections to the award all of which have been decided in favour of the other party except that the lower Appellate Court has held that the arbitrator was guilty of misconduct and that his award was bad, incomplete and based on hasty conclusions. The lower Appellate Court, therefore, refused to file the award and the firm Kesar Mal Shankar Das has applied for revision on the ground that the finding of the lower Appellate Court is based merely on conjecture and not on any materials on the record.

The lower Appellate Court has stated that the defendant-firm claimed Rs. 8,143, but the arbitrator cut down this claim to Rs. 3,350 without any rhyme or reason. It also noticed that in another suit on the same subject matter a local Commissioner had determined a much higher figure. The learned Judge further stated that the arbitrator does not appear to have examined the witnesses of the parties nor their account-books and that he did not even rely on the account-books of the parties. Further, that he had no business to make a private enquiry and did not refer to documents. The only witness who made any statement on the question dealt with by the lower Court was the arbitrator himself. He shows,—

(1) that he examined the account-books of the parties for four days;

(2) that he did not examine the witnesses for the parties because none were produced;

(3) he assigns good reasons for cutting down the defendant's claim, namely, that

there were many over charges which the defendant himself admitted, and that a sum of money alleged to have been sent by the defendant had not been sent;

(4) the arbitrator, it is true, did not rely on the account-books of the defendant which he considered did not represent the true facts, but he was perfectly entitled to do so;

(5) there is nothing whatever to show that the arbitrator made any private enquiry;

(6) the learned District Judge states that the arbitrator did not refer to documents in his award, but an arbitrator's award is not a judgment and this also was totally unnecessary.

From the above description of facts it appears that the District Judge based his finding on an inaccurate account of the arbitrator's statement made by some Counsel, or that he entirely misread or misunderstood the arbitrator's statement.

In the above circumstances, it is obvious that the judgment of the lower Appellate Court, being entirely based on inaccuracies or misunderstandings, is vitiated thereby and cannot be upheld. Much as this Court is reluctant to interfere on revision in arbitration cases it is compelled to do so in circumstances of gross and material irregularities. I, therefore, accept this application for revision and set aside the decision of the lower Appellate Court and order the award to be filed and a decree be passed thereon. The plaintiff will obtain his costs in all Courts.

S. D. *Revision accepted.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 57 OF 1921.
June 16, 1922.
Present:—Mr. Hallifax, A. J. C.

BIHARIDAS—DEFENDANT NO 1—APPELLANT
versus
BAJRANGDAS AND OTHERS—PLAINTIFFS—DEFENDANTS NOS. 2 - 4—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 97—Preliminary and final decrees—Appeal from preliminary decree alone, when maintainable

Where there are preliminary and final decrees in the same suit, an appeal against the preliminary decree alone cannot be maintained, unless it is instituted before the passing of the final decree. [p. 262, col. 1.]

Appeal from an order of the First Sub-Judge, Bilaspur, dated the 28th June 1921, in Civil Suit No. 50 of 1921.

Mr. *M. Gupta*, for the Appellant.

Messrs. *M. R. Bobde* and *B. R. Agarwala*, for the Respondents.

ORDER.—In this case a preliminary decree for partition was passed on the 11th of April 1921 The first defendant, who alone contested the suit, filed the present appeal against that decree on the 18th of July 1921, having in strict accordance with the incomprehensible custom of the Indian litigants, waited till the very last possible day, although, in the meantime, the partition had been made and a final decree had been passed on the 28th of June 1921. He has not appealed against that final decree and the learned Pleaders for the respondents raised the objection that no appeal will lie against a preliminary decree after a final decree has been passed. Put a great deal more precisely, the contention is, that an appeal against a preliminary decree cannot succeed, or its success would at the best be meaningless, if a final decree had been passed before it was filed and no appeal had been filed against it within the time allowed; it is conceded that if the final decree is passed after the appeal against the preliminary decree is filed no appeal would be required against the final decree, as the matter would already have passed wholly into the jurisdiction of the Appellate Court. The position taken is, in short, that, by reason of section 97 of the Civil Procedure Code, there must be an appeal against both decrees unless the appeal against the preliminary decree is filed before the final decree is passed.

The view of the Calcutta High Court, stated in *Mackenzie* v. *Narsingh Sahai* (1) is, that the success of an appeal against the preliminary decree like that now under consideration would be meaningless, for the final decree would still stand good as it could not be upset in any such indirect way as the reversal of the preliminary decree on which it is based. The judgment took no account of section 97 of the present Code of Civil

(1) 1 Ind. Cas. 413; 36 C. 762; 10 C. L. J. 113.

Procedure as it dealt with the state of things existing before that Code came into force, when it was the practice of that High Court to allow a preliminary decree to be attacked in an appeal against the final decree. That, however, does not affect the main reasoning of the judgment leading to the conclusion that an appeal against the preliminary decree alone is not sufficient.

The High Courts of Allahabad and Madras have laid it down in *Uman Kunwari* v. *Jarbandhan* (2) and *Ramien* v. *Veerappudian* (3), that in a case like the present it is not necessary to file two appeals as the final decree could not possibly be regarded as still standing after the removal of the whole of the basis on which it stood, the preliminary decree. The reasoning itself seems unimpeachable, but it proceeds on the assumption that the preliminary decree is always the basis of the final decree. This also would seem a perfectly justifiable assumption, but the Calcutta case of *Khirodamoyi Dasi* v. *Adhar Chandra Ghose* (4) shows that it is not. There the plaintiff sued for partition of certain property which he alleged was joint; the more valuable part of it had been transferred by the first defendant to another defendant, who pleaded that it was the separate property of the first defendant; this was held proved, and the plaintiff was given a preliminary decree for partition of the less valuable part of the property only; he allowed a final decree to be passed dismissing the suit for default and then lodged an appeal against the preliminary decree, claiming that it should have ordered the partition of the whole property. In that case no alteration of the preliminary decree could possibly have affected the final decree dismissing the suit.

I hold, therefore, that where there are preliminary and final decrees in the same suit an appeal against the preliminary decree alone cannot be maintained unless it is instituted before the passing of the final decree. That, however, does not necessarily mean the dismissal of the present appeal. The learned Counsel for the appellant stated that, if his contention that he is not bound to appeal against the final decree should not prevail, he is prepared to file that appeal now, with an application for its admission under section 5 of the Limitation Act, and I cannot at present see how, in the circumstances of the present case that application could be refused. I, therefore, allow the appellant a period of thirty days, *plus* the time necessary to obtain copies of the final decree and the judgment on which it is based, within which to file an appeal against the final decree. If it is duly filed and admitted, this appeal will then be further considered along with it.

N. K. *Order accordingly.*

(2) 30 A. 479; 5 A. L. J. 447; A. W. N. (1908) 195; 4 M. L. T. 162 F B.).

(3) 14 Ind. Cas 394; 37 M. 455; 11 M. L. T. 69; 22 M. L. J. 217; (1912) M W. N. 117 & 530.

(4) 21 Ind. Cas. 516; 18 C. L. J. 321.

PATNA HIGH COURT.

LETTERS PATENT APPEAL No. 95 OF 1921.

April 27, 1922.

Present:—Sir Dawson Miller, Kt., Chief Justice, and Mr. Justice Adami.

CHAMAN LAL AND OTHERS—APPELLANTS

versus

KAMARUDDIN MIAN—RESPONDENT.

Mortgage-decree obtained before *but executed* after *money-decree—Property sold in execution of both decrees—Priority.*

After a mortgage-decree was obtained but before it was executed, a money-decree was obtained and executed and the mortgaged property was purchased in execution sale by the holder of the money decree. Then the holder of the mortgage-decree executed his decree and purchased the same property himself;

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Held, that the later sale, which was in execution of the mortgage-decree must prevail, inasmuch as the holder of the money-decree, having purchased the property when the mortgage-decree was in existence, must be taken to have purchased it subject to the mortgage charge. [p. 263, col. 2.]

Messrs. *Naresh Ch. Sinha* and *G. C. Pal*, for the Appellants.

Syed *Mohamed Tahir*, for the Respondent.

JUDGMENT.

MILLER, C. J.—In this case the plaintiff was the mortgagee of a certain holding occupied by one Ramlal Chamar, a tenant, and in August 1911 the plaintiff sued on his mortgage-bond and obtained a decree against Ramlal Chamar and his two minor sons. Whilst that decree was in existence and before it was executed, a fractional landlord of the mortgaged property sued for rent, obtained a decree and brought the holding to sale, and in August 1914 in execution of the decree the defendant purchased the property. The decree under which the defendant purchased was that of a co sharer landlord suing for his share of the rent and presumably would be treated as a money-decree. Subsequently on the 10th November 19 5 the plaintiff, in pursuance of his mortgage decree, which was in existence before the defendant purchased, put up the property to sale again in execution and purchased it himself and got delivery of possession. When the execution proceedings were pending, the two sons of Ramlal Chamar, who had been made defendants in the plaintiff's mortgage suit, objected that notwithstanding the decree obtained against them, which I may mention was obtained on a compromise to which they were apparently parties, they were not at the time the decree was obtained of majority but were and had been throughout minors, and that, therefore, as against them the decree could not be executed; and it appears that an order was made striking out their names in the execution proceedings. However this may be, it also appears that their names were not in fact struck out and in due course the property was put up to sale and purchased by the plaintiff in execution of his mortgage-decree. I have no doubt that what was sold in execution of the mortgage-decree was the whole holding and not merely the interest of Ramlal Chamar. That was one of the issues in the case and the learned Munsif, who had to decide that issue, came to the conclusion of fact upon it and he said, "considering all the circumstances and the fact that the purchase by the plaintiff of the disputed land was for Rs. 379 and odd, whereas the purchase by the defendant of the disputed land and other lands was for Rs. 45 only, I hold that the entire property in suit is passed by the sale to the plaintiff." The learned Subordinate Judge agreed with the findings of the Munsif and dismissed the appeal which was preferred to him. It seems to me, therefore, that it cannot now be questioned that rightly or wrongly what passed at the sale in execution of the mortgage-decree was the whole property in suit in that case.

The question which now arises is whether the sale to the defendant in execution of his money-decree or the later sale to the plaintiff in execution of his mortgage-decree, the mortgage decree being in existence at the time of the defendant's purchase, is to prevail. Both the Trial Court and the first Appellate Court found in favour of the plaintiff, and broadly speaking the ground upon which their decisions were based was that where a sale had been made in execution of a mortgage decree, even if the sons of Ramlal Chamar were not bound necessarily by the mortgage decree, the sale was not void but voidable. In the present case, assuming that the defendant had purchased the whole property in execution of his decree, what he really purchased was the property subject to the mortgage charge and, therefore, the mortgage charge must take priority over his interest. It may be that having purchased the property he stepped into the shoes both of Ramlal Chamar and his sons, but it seems to me that even the sons of Ramlal Chamar could not have this mortgage and the decree resulting therefrom and the sale resulting from the decree set aside until they had shown that the sale was the result of a mortgage which was not either justified by legal necessity or was invalid for some other reason.

The result, therefore, is that, in my opinion, the decree of the learned Subordinate Judge affirming that of the Munsif was right and

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the decision of the learned Judge who took a different view as to the rights of the parties cannot be supported. In my opinion this appeal should be allowed, the decree of the learned Judge set aside and that of the Subordinate Judge restored.

ADAMI, J.—I agree.

F. D. *Appeal allowed.*

PRIVY COUNCIL.

APPEAL FROM THE PUNJAB CHIEF COURT.

January 17, 1922.

Present:—Lord Buckmaster, Lord Carson, Sir John Edge, Mr. Ameer Ali and Sir Lawrence Jenkins.

SABZ ALI KHAN—APPELLANT

versus

KHAIR MUHAMMAD KHAN AND OTHERS—RESPONDENTS.

Pre-emption—Agricultural land—Punjab Pre-emption Acts (II of 1905) and (I of 1913)—Right to pre-empt—Relationship, question of—Evidence—Tradition—Oral tradition, value of.

On a sale of agricultural land in the Punjab, the right to pre-empt is open to every one of the vendor's heirs, the preferential right among them being determined according to the order of succession. [p. 265, col. 1.]

Jang Bahadar Khan v. *Karam Khan*, 21 P. R. 1908; 46 P. W. R. 1908; 144 P. L. R. 1908, followed.

When the question of relationship arises between people among whom accessible records of births and deaths are not maintained, nor are such events preserved in written family memorials, the question must depend for its decision on oral tradition, and though this requires close scrutiny, the tradition ought not to be regarded as weak and unsatisfactory merely because it may in one or two respects fail to satisfy the strict conditions that would be necessary for proving a pedigree where records and documents could be used. [p. 266, col. 1.]

Appeal from a judgment of the Chief Court, Punjab, dated April 25, 1918, reported as 49 Ind. Cas. 275, reversing that of the District Judge, Dera Ghazi Khan.

FACTS.—The suit is one for pre-emption of agricultural lands in the Punjab. The parties belong to the agricultural tribe of Bugti Biloches. The facts are fully set out in their Lordships' judgment.

The only question in the case was, whether the appellant's relationship to the vendor, Khair Muhammad Khan, was established. The District Judge held it proved and decreed the appellant's suit. The Chief Court came to the conclusion that the evidence, not being supported by documents, was not sufficient to establish the relationship and dismissed the appellant's suit.

Hence the present appeal.

Mr. *DeGruyther, K. C.*, and Mr. *Kishen Narain*, for the Appellant.—Every heir of the vendor Khair Muhammad is entitled to pre-empt, though the nearer heir may have a preferential right: *Jang Bahadar Khan* v. *Karam Khan* (1). In this case, there is no contest as between the appellant and others, who might be nearer in point of relationship to the vendor, no records of births and deaths are available in the district to which the parties belong. We have established the relationship by the testimony of several witnesses. The District Judge who heard the witnesses held that it was sufficient to establish the relationship. The Chief Court was wrong in holding otherwise. (Evidence of the appellant and his witnesses read out).

JUDGMENT.

LORD BUCKMASTER.—The question raised upon this appeal is, whether the appellant has proved his right to exercise the privilege of pre-emption conferred by section 12 of the Punjab Pre-emption Act, 1905. The material part of that section is in these terms:—

"12. Subject to the provisions of section 11, the right of pre-emption in respect of agricultural land and village immoveable property shall vest—

(*a*) In the case of the sale of such land or property by a sole owner or occupancy tenant, or, when such land or property is held jointly, by the co-sharers, in the persons who but for such sale would be entitled to inherit the property in the event of his or their decease, in order of succession;"

It is important to notice that the section

(1) 21 P. R. 1908; 46 P. W. R. 1908; 144 P. L. R. 1908.

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does not contemplate merely inheritance by one person or even by a group of people who at the critical moment would be together equally entitled to inherit the property sold, if the vendor were dead but it assumes that there will be different priorities as between the different claimants, and that such priorities shall be determined in due order of succession. The meaning of the rather obscurely worded section 12 (*a*) is made clear by section 25 of the Act, which is as follows:—

"25. When more suits than one arising out of the same sale are pending, the plaintiff in each suit shall be joined as defendant in each of the other suits, and in deciding the suits the Court shall in each decree state the order in which each claimant is entitled to exercise his right."

There may be several claimants for pre emption in respect of the same sale, those with inferior rights to pre-empt trusting that those whose rights are superior to theirs may be unwilling or unable to pay the pre-emption price decreed.

To be in a position to enforce by suit a claim to pre-empt under the Act the claimant must, under section 17 of the Act, have given a notice within a limited time of his intention to enforce his right of pre emption. It is obvious that a claimant to be successful need not have been at the date of the sale or at any time the heir presumptive of the vendor. The heir presumptive may not have the means to purchase, or for any reason may not be desirous to purchase, and may have omitted to give within the time limited a notice of his intention to pre empt.

In *Jang Bahadar Khan* v. *Karam Khan* (1), which was a suit to enforce a right of pre-emption on a sale of agricultural land, the vendor had sons and brothers, who had not claimed to pre-empt, and who were admittedly nearer in succession to the vendor than the plaintiff was, the Chief Court of the Punjab (Rattigan and Lal Chand, JJ.) held "that clause (*a*), section 12 (of the Punjab Pre emption Act, 1905) is applicable to the case, though the nearer heirs have not sued for pre emption.' The Punjab Pre emption Act, 1905, was repealed by the Punjab Pre emption Act, 1913, which received the assent of the Governor-General on the 1st March 1913, and in section 15 (*a*) of the latter Act, section 12 (*a*) of the former Act is re enacted in clearer language and in conformity with the decision of the Chief Court above referred to.

It is now necessary to consider what were the facts in the suit in which this appeal has arisen and upon which it depends. The transaction which has been rightly held by each of the Courts below to have been a sale of agricultural land to which the Punjab Pre emption Act, 1905, applied, took place on the 19th January 1912 and this suit was brought on the 13th January 1913. The suit was brought within the period allowed for bringing a suit for pre-emption. It it probable that the plaintiff had delayed to bring his suit in order to see whether any person with a preferential right would bring a suit for pre-emption. The vendors of the land in question were Khair Muhammad Khan, who is a respondent to this appeal, and his nephew, Haidar Khan, who died before suit and is represented in the suit by his minor son, Manj Ali Khan, under the guardianship of the respondent, Khair Muhammad Khan. At the date of the sale the respondent Manj Ali Khan was about seven years of age. The vendors were members of an agricultural tribal family and were Bagti Bilochis. The plaintiff alleged that he was a member of that family. The vendee was not a member of that tribal family. The plaintiff, who is the appellant here, duly made his claim to pre-empt. The only other claimant to pre empt was *Musammat* Izzat Khatun, who was a daughter of Piran Khan, deceased, who had been a brother of Khair Muhammad Khan and an uncle of Haidar Khan. She had made her claim to pre-empt, and she brought her suit to enforce that claim, and was joined as a defendant in this plaintiff's suit. By agreement it was arranged that the evidence recorded in either suit should be treated as evidence in the other. Evidence was recorded which strongly went to prove in the tribal family of which *Musammat* Izzat Khatun was a member that there was a custom by which females were excluded from inheriting so long as there was a male member living. *Musammat* Izzat Khatun abandoned her suit, as the Trial Judge believed, because she knew that she

could not prove that she as a female was an heir entitled to inherit, and her suit was dismissed.

When *Musammat* Izzat Khatun's suit was dismissed, Sabz Ali, the plaintiff, became the only person claiming the right to pre-emot. His case was and is that he and the vendors were descended in the male line from one Mirza Khan, and consequently that he was a person in whom was vested by section 12 (*a*) of the Act a right of pre emption in the property which had been sold on the 19th January 1912. There is no contest as between Sabz Ali Khan and others who might be nearer in point of relationship. The sole question is, whether he has proved his position of male relationship to the vendors. The learned District Judge before whom the case was tried thought that he had; but the Chief Court thought otherwise, and from their decree the present appeal proceeds.

The point thus raised is difficult for determination, because it must be remembered that the persons in relation to whom this question arises are not people among whom there are accessible records of births and deaths, nor with whom these events are preserved in written family memorials. It is, therefore, necessary to depend upon oral tradition, and this requires close scrutiny, but their Lordships see no reason why, in such circumstances, this tradition should be regarded as weak and unsatisfactory merely because it may in one or two respects fail to satisfy the strict conditions that would be necessary for proving a pedigree where records and documents could be used. A pedigree was in fact prepared, and it purported to show that the appellant, Sabz Ali Khan, was a descendant equally with the vendors from Mirza Khan. As to it Sabz Ali, the plaintiff, who was called as a witness for the defendants, stated: "The pedigree-table which has been filed along with the petition of plaint has been prepared by me. It was dictated to me by the (my) father. He had dictated it from his memory. We, Biloches, commit to memory the names of our ancestors . . . names of ancestors are recited on the occasions of marriages. Those names are made mention of at the time of betrothal." The first witness was one of the vendors, who said in general words that Sabz Ali Khan was a *yakjaddi*, which means that they were both descended from one ancestor, and he specified the two sons of Mirza Khan through whom the descent took place. It is true that he interposed a generation in his own branch of the family, which found no place in the pedigree prepared by the plaintiff; but beyond that his statement of his descent agreed with the pedigree, but he did not prove the exact descent and relationship of Sabz Ali Khan. The next witness, Mehran Khan, who is also a relation of the vendor, again declared that the appellant was their agnatic relation, and he knew the name of Sabz Ali Khan's grandfather, but he appeared to know no more. Jia Khan, who was also descended from the same stock, again referred in general terms to the relationship, and gave some more specific evidence. He spoke as to two sons of Mirza Khan, and traced down the descent to the vendor, Khair Muhammad, but he also introduced a further generation beyond that shown in the pedigree. He asserted in general terms that Mirza Khan's son, Mehran Ali, was the ancestor of Sabz Ali Khan and himself. Muhammad Bakhsh gave definite evidence to the same effect, but he traced Sabz Ali Khan back to Mirza Khan in accordance with the pedigree put forward. Pir Bakhsh, who was a relation, gave detailed evidence to the same effect, and traced the appellant's descent in exact agreement with the pedigree; but he again introduced a further generation in the vendor's descent, and it is probable that the pedigree needs to be amended in this respect. The learned Judges of the Chief Court disregarded the evidence of this witness on the ground that he had stayed with an interested party, and this is doubtless a matter for consideration, but they also regarded his pedigree as inexact, and this is only accurate so far as the omission of the one step is concerned.

Two Sardars, Sardar Bahadur Mahrab Khan and Khan Bahadur Sardar Gauhar Khan, whose authority and credibility no one has ventured to question, both said that Sabz Ali Khan belonged to their family, although they were not personally acquainted with him, and his degree of relationship was remote. This evidence satisfied the District Judge, but in the Chief Court of the Punjab the evidence was considered insufficient, because a part of it does not agree in detail,

as has already been pointed out, with the pedigree-table propounded by the plaintiff.

With regard to some of the witnesses, the learned Judges of the Chief Court say that the knowledge of details is unreliable, and they comment upon the fact that the relationship is supported by no documentary evidence at all, the relationship between the defendants and the plaintiff being, in their opinion, too visionary to support the claim. Their Lordships are much impressed with the importance of showing that claims of this character which disturb a *bona fide* purchaser in the quiet possession of his property should not be based on untrustworthy evidence; but it must be remembered that the Legislature has conferred these rights, and that if they are to be enjoyed by people where formal records cannot be expected to exist, reliance can only be placed upon memory and tradition, and in this case they think the evidence satisfies the necessary test. Their Lordships, therefore, think that the plaintiff has established his relationship, and that, accordingly, this appeal ought to be allowed, the decree of the Chief Court set aside with costs, and the decree of the District Court restored, with this variation, that the date when payment into Court of the sum decreed should be made shall be extended to the 1st July 1922 or to such later date as the District Judge of Dera Ghazi Khan may fix. The appellant will have his costs of this appeal.

Their Lordships will humbly advise His Majesty accordingly.

W. C. A.

Appeal allowed.

Solicitors for the Appellant.—Messrs. *Ranken, Ford and Chester.*

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION

APPEAL No. 47 OF 1921.

December 16, 1921.

Present:—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

THE VACCUM OIL CO.—PLAINTIFFS—APPELLANTS

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—DEFENDANT—RESPONDENT.

Sea Customs Act (VIII of 1878), s. 30 cl. (a)—"Wholesale cash price," meaning of—Cl. (b) of section, applicability of—"Real value," test for determining.

The expression "wholesale cash price" in clause (*a*) of section 30 of the Sea Customs Act, means the price realized on the wholesale disposal of goods at the place and time of importation, and not the price paid by the importer. [p. 269, col. 1.]

The object of clause (*b*) of the section is to provide a test for calculating the real value of goods imported where the wholesale cash price is not ascertainable, where such price can be easily ascertained, the test for determining the real value is provided in clause (*a*) of the section. [p. 269, col. 1.]

Appeal from the decision of Mr. Justice Kajiji.

Messrs. *Desai, Coltman* and *Campbell*, for the Appellants.

Sir *Thomas Strangman*, Advocate General and Mr. *O Gorman*, for the Respondent.

JUDGMENT.

MACLEOD, C. J.—This is a suit filed by the plaintiffs against the Secretary of State praying (1) for a declaration that the method of valuation adopted by the Collector of Customs at Bombay in respect of the plaintiffs' Mobil oils imported into India was perverse, wrongful, invalid, illegal and *ultra vires*; (2) that it might be declared that the sum of Rs. 3,391-2-0 had been perversely, wrongfully and illegally exacted from the plaintiffs by way of customs duty in respect of their said oils and contrary to the provisions of the Sea Customs Act; (3) that it might be declared that in the circumstances of this case there was no wholesale cash price ascertainable for which the plaintiffs' Mobil oils were sold or were capable of being sold at the time and place of importation thereof within the meaning and principle of section 30 (*a*) of the said Sea Customs Act; (4) that it might be declared that in any event in the circumstances of the case the

invoice price returned by the plaintiffs in the bills of entry in respect of the plaintiffs' sail oils was the correct basis on which to assess the customs duty on the plaintiffs' oils under the Sea Customs Act.

The suit was dismissed by Mr. Justice Kajiji.

The question in appeal is, what is the proper construction of section 30 of the Sea Customs Act (VIII of 1878).

Under section 29 of the Act:—

"On the importation into, or exportation from, any customs-port of any goods, whether liable to duty or not, the owner of such goods shall, in his bill of entry or shipping bill, as the case may be, state the real value, quantity and description of such goods to the best of his knowledge and belief, and shall subscribe a declaration of the truth of such statement at the foot of such bill.

In case of doubt, the Customs Collector may require any such owner or any other person in possession of any invoice, broker's note, policy of insurance or other document, whereby the real value, quantity or description of any such goods can be ascertained, to produce the same, and to furnish any information relating to such value, quantity or description which it is in his power to furnish. And thereupon such person shall produce such document and furnish such information..."

Then under section 30 :—

"For the purposes of this Act the real value shall be deemed to be—

(*a*) the wholesale cash price, less trade discount, for which goods of the like kind and quality are sold, or are capable of being sold, at the time and place of importation or exportation, as the case may be, without any abatement or deduction whatever, except (in the case of goods imported) of the amount of the duties payable on the importation thereof: or

(*b*) where such price is not ascertainable, the cost at which goods of the like kind and quality could be delivered at such place, without any abatement or deduction except as aforesaid."

No doubt, from the prayers of the plaint, it would seem that the first argument of the plaintiffs was that there was no wholesale cash price which could be ascertained under section 30 (*a*) of the Act; but from the evidence in the case it is perfectly clear that it would be possible to ascertain the wholesale cash price at which Mobil oil could be sold in Bombay, the place of importation, at or about the time of importation. And since the wholesale cash price could be ascertained, it seems perfectly clear that the wholesale cash price was then the real value of the goods.

But there is the second argument that the term "wholesale cash price" has another meaning, not the popular meaning; but this meaning, as far as I can gather from the arguments advanced, is the same as "the cost of the goods to the importer" on the basis that the goods should be taken as being sold to the importer at the price which it cost him to lay them down in Bombay. If that is the case, as pointed out by the learned Judge, there would be no necessity for sub clause (*a*) of section 30 of the Act, as in every case the importer would be entitled to have it decided that the real value of the goods imported was the cost of the importation to him.

It has been pointed out by the learned Advocate-General that it is not always possible to ascertain the wholesale cash price of goods imported, and it is, therefore, necessary in such a case that some provision should be made for ascertaining the real value; and so sub clause (*b*) was added in order that the real value might be ascertained where there is no wholesale cash price. In this case, as I have already pointed out, there is no difficulty whatever in ascertaining the wholesale cash price of Mobil oil sold in Bombay; and, therefore, that is the only test to be adopted for ascertaining the real value of the goods. That is the plain meaning of the section. It is difficult to my mind to see how it can have any other possible meaning, or how the words "wholesale cash price" can possibly be said, as argued by the appellants, to be the equivalent of "the cost to the importer."

The judgment of the Court below was right, and the appeal must be dismissed with costs.

ALLAH BAKHSH v. LAL KHAN.

SHAH, J.—I concur. I desire to deal briefly with the two arguments which have been urged on behalf of the appellants, *viz.*, that under clause (*a*) of section 30 of the Sea Customs Act the wholesale cash price is not the price which the importer realises on a wholesale disposal of the goods by him but the price which is actually paid by him for importing the goods in Bombay. It is further urged that under clause (*b*), where such price is not ascertainable, the real value is the cost at which the goods of the like kind and quality could be delivered at such place, without abatement or deduction except as aforesaid, for the purposes of taxation; and that no different standard could have been intended to be adopted for the purpose of taxing the goods under clause (*a*). It is also urged that as a provision for taxing the subject, it must be strictly construed.

As regards this last general consideration, there can be no question. No doubt section 30 must be construed strictly, and if the words are ambiguous or admit of any doubt the construction in favour of the subject may be adopted. But having regards to the terms of section 30, both the contentions urged on their behalf must be disallowed.

As regards the contention that the wholesale cash price within the meaning of clause (*a*) must be the price paid by the importer and not the price realised on the wholesale disposal of the goods at the place and time of importation, I think the expression used clearly indicates that it must mean the wholesale cash price for which the goods of like kind and quality are sold, or are capable of being sold, at the time and place of importation. Those words clearly indicate that it must be the price which the importers here would be able to realise on a wholesale disposal of the goods by them to any person in Bombay. The expression could not be construed as meaning the price which they may have paid for the purpose of importing goods to Bombay.

As regards clause (*b*), in terms it applies where the wholesale cash price is not ascertainable. Here the wholesale cash price being ascertainable, the clause cannot apply. There is no reason to suppose that the standard adopted under clause (*b*) for taxation would be necessarily adopted as a standard under clause (*a*). It may well be, as it appears to be the case on the language of the section, that the Legislature has adopted one test for cases covered by clause (*a*) and is satisfied with the next best test in other cases, to which the first test cannot be applied. The argumet is based on the assumption that the test in both cases must be the same, for which the language used does not afford any warrant.

Lastly, it is urged that the Legislature could not have intended to tax the profits, which the importer would make at the time and place of importation; and that the construction adopted by the lower Court involves that result. Here again the answer is that we can only decide on the language used by the Legislature and not upon such *a priori* considerations as the argument suggests.

I think, therefore, that the decision of the Trial Court is perfectly right.

W. C. A. *Appeal dismissed.*

LAHORE HIGH COURT.

CIVIL REVISION No. 882 OF 1919.

June 10, 1920.

Present:—Mr. Justice Broadway

ALLAH BAKHSH—PLAINTIFF—PETITIONER

versus

LAL KHAN—DEFENDANT—RESPONDENT.

Landlord and tenant—Denial of landlord's title—Surrender of tenancy essential—Interlocutory order—Interference exceptional—Civil Procedure Code (Act V of 1908), O. XLI, r. 25, order under, if interlocutory—Interference by High Court, if competent.

Once the relationship of landlord and tenant has been established, the tenant must surrender possession before he can set up a claim to be the real owner. [p. 270, col. 2.]

Makhan Singh v. *Baisakhi Ram Shah*, 50 Ind. Cas. 591; 123 P. R. 1919, followed.

It is only in very exceptional cases that the High Court should exercise its revisional powers of interference with interlocutory orders. An order under Order XLI, rule 25, Civil Procedure Code, is not, strictly speaking, an interlocutory order but it should be interfered with only in exceptional cases, as it is not a final order. Where, however, the order is unnecessary, it should be interfered with. [p. 270, col. 2.]

ALLAH BAKHSH v. LAL KHAN.

Petition, under section 44 of Act VI of 1918, for revision of the order of the Senior Subordinate Judge, Amitsar, dated the 12th November 1919, reversing that of the Munsif, First Class, Amritsar, dated the 21st July 1919.

Dr. *Nand Lal* and Lala *Ganga Ram*, for the Petitioner.

Mr. *Badr-ud Din Kureshi*, for the Respondent.

JUDGMENT.—Allah Bakhsh instituted a suit against Lal Khan, alleging that Lal Khan was his tenant and had executed a rent deed in his favour on the 19th July 1916 and praying for his ejectment from the leased property. Lal Khan raised various objections, pleading that he was not a tenant, that he was a minor at the time when he executed the deed, (the execution of which he admitted), and also averred that the house occupied by him belonged to his mother who had permitted him to occupy it and that he was now the owner of the said premises as his mother had died leaving a Will in his favour. The learned Munsif who tried the case held that Lal Khan was a major when he executed the deed of rent and that he was a tenant of the plaintiff, and accordingly decreed the plaintiff's claim for ejectment together with a sum of Rs. 22 as arrears of rent. Lal Khan then appealed to the Senior Subordinate Judge, Lala Ganga Ram Wadhwa, who, in a very brief order, came to the conclusion that the Court of first instance ought to have framed an issue with regard to the plea raised by Lal Khan as to his being the heir of his mother and his mother being the owner of the premises. He accordingly drew up the following issues :—

"Whether defendant was living in the house on behalf of or with the permission of *Musammat* Umri and was not, therefore, liable to ejectment by plaintiff?" and remanded the case under Order XLI, rule 25, Civil Procedure Code. Against this order, Allah Bakhsh has preferred this petition for revision which was admitted to a hearing by Bevan-Petman, J., on the 8th January 1920. I have to-day heard Mr. Nand Lal on behalf of the petitioner while Mr. Badr ud-Din Kureshi has addressed me on behalf of Lal Khan.

Mr. Badr ud-Din Kureshi contended that the order was really an interlocutory one which should not be interfered with in revision. In my opinion it is only in very exceptional cases indeed that this Court should exercise its revisional powers of interfering with an order of interlocutory nature, and although I am not prepared to hold that an order passed under Order XLI, rule 25, Civil Procedure Code, is, strictly speaking, an interlocutory order, I consider that this Court should only interfere in an order passed under that rule in exceptional cases, my reason being that an order under this rule is not a final one.

In the present instance, however, I am of opinion that the order complained of is so obviously unnecessary that it should be interfered with. The plaintiff came into Court alleging that the defendant was his tenant and as such liable to eviction and to pay arrears of rent. It is true that in the statement made by him prior to the settlement of issues, he admitted that he had made a gift of this house to his wife by way of dower, but at the same time he alleged that his wife had executed a Will in his favour. Lal Khan, defendant, is the son of that wife by a former husband. The lady being dead, in the event of no Will being proved, both plaintiff and defendant would take a share of the property left by her. Further, it has been definitely held that the defendant is the tenant of the plaintiff and that he has executed a rent-deed evidencing the tenancy. In *Makhan Singh* v. *Baisakhi Ram Shah* (1) it was held that a tenant in possession cannot, even after the expiration of his lease, deny his landlord's title without actually and openly surrending possession to him. The issue framed, therefore, does not really arise in this case. Once the relationship of landlord and tenant has been established, the tenant must surrender possession before he can set up a claim to be the real owner.

I, therefore, accept this petition for revision and, setting aside the order of the 12th November 1919, direct that the appeal be heard on the merits.

Costs in this Court will follow the event.

S. D. *Petition accepted.*

(1) 50 Ind. Cas. 591; 123 P. R. 1919.

RAJENDRA KISHORE v. KUMUD BAN MAHATA.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2622 OF 1919.

January 16, 1922.

Present:—Justice Sir N. R. Chatterjee, Kt., and Mr. Justice Pearson.

RAJENDRA KISHORE CHOUDHURY —DEFENDANT—APPELLANT

versus

KUMUD BAN MAHATA PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 11—Res judicata—*Decree in previous ejectment suit in favour of tenant in spite of adverse finding as to nature of tenancy—Adverse finding, if* res judicata.

In a suit for ejectment by a landlord the tenant pleaded want of notice to quit and that he was a permanent tenant: the suit was dismissed on the ground of absence of notice but the Court recorded a finding that the defendant had failed to prove that he had a permanent tenancy. The decree being in favour of the defendant, he could not appeal from the adverse finding:

Held, that under the circumstances the decree could not operate as *res judicata* on the question whether the defendant had a permanent tenancy or not. [p. 271, col. 2.]

Run Bahadur Singh v. *Lucho Koer*, 11 C. 301 (P.C.); 12 I. A. 23; 4 Sar P. C. J. 602; 9 Ind. Jur. 202; 5 Ind. Dec (N. S.) 960; *Nundo Lall Bhuttacharjee* v. *Bidhoo Mookhy Debee*, 13 C. 17 (6 Ind. Dec. (N. S.) 508; *Thakur Magundeo* v. *Thakur Mahadeo Singh*, 18 C. 647; 9 Ind. Dec. (N. S.) 432; *Parbaty Debya* v. *Mathura Nath Banerjee*, 15 Ind. Cas. 453; 16 C. W. N. 877 at p. 879; 40 C. 29; 16 C. L. J. 9, referred to.

Appeal against the decree of the Additional Subordinate Judge, Chittagong, dated the 1st of September 1919, affirming that of the Munsif, Second Court at that place, dated the 31st of July 1918.

FACTS appear from the judgment.

Babu *Narendra Kumar Das*, for the Appellant.—A previous suit for ejectment was dismissed on the ground of non-service of notice. It was also decided that I was not a permanent tenant. The decision on the question of my status cannot operate as *res judicata*. Refers to *Thakur Magundeo* v. *Thakur Mahadeo Singh* (1).

[PEARSON, J.—Do you contend that the question of permanency or non-permanency was unnecessary for the purpose of that decision?]

It was unnecessary.

[PEARSON, J.—It could not be unnecessary because if you were a permanent tenant, the question of notice would not arise.]

The decree in the previous suit in spite of the adverse finding against me on the question of my status, was in my favour. So that I could not have appealed against that decree and rectify the adverse finding. See *Run Bahadur Singh* v. *Lucho Koer* (2), *Nundo Lall Bhuttacharjee* v. *Bidhoo Mookhy Debee* (3) and *Thakur Magundeo* v. *Thakur Mahadeo Singh* (1).

Babu *Chundra Sekhar Sen*, for the Respondent.—It cannot be argued that the decision in the previous suit on the question of the status of the defendant was unnecessary. If the finding as to the permanency or otherwise of the defendant's tenancy was essential for the purpose of that decision, it ought to operate as *res judicata*. See *Niamut Khan* v. *Phadu Buldia* (4) and *Peary Mohun Mukerjee* v. *Ambica Churn Bandopadhya* (5). Refers also to *Fazil* v. *Hari Kishore Chakrabarti* (6).

Babu *Narendra Kumar Das* replied.

JUDGMENT.—We think that the Courts below were wrong in holding that the decision in the previous suit operated as *res judicata* upon the question whether the defendant had a permanent tenancy or not.

In the previous suit for ejectment the defendant pleaded that he was a permanent tenant and that the suit must fail as no notice to quit was served upon him.

The Court in that suit held that the suit must fail for want of notice to quit. It also came to the finding that the defendant had failed to prove that he had a permanent tenancy. The decree was one of dismissal and was in favour of the defendant in spite of the adverse finding against him with regard to the question of his status. The defendant, therefore, could not appeal against that finding.

In these circumstances, the decree could not operate as *res judicata* on the question whether the defendant had a permanent tenancy or not [see the cases of *Run Bahadur Singh* v. *Lucho Koer* (2), *Nundo Lall Bhuttacharjee* v. *Bidhoo Mookhy Debee* (3), *Thakur Magundeo* v. *Thakur Mahadeo Singh* (1) and *Parbaty Debya* v. *Mathura Nath Banerjee* (7).]

This is not a case where the decision is based on two grounds either of which is sufficient to support the decree, in which case

(1) 18 C. 647; 9 Ind. Dec. (N. S.) 432.

(2) 11 C. 301 (P.C.); 12 I. A. 23; 4 Sar. P. C. J. 602; 9 Ind. Jur. 202; 5 Ind. Dec. (N. S.) 960.

(3) 13 C. 17; 6 Ind. Dec. (N. S.) 508.

(4) 6 C. 819 (F. B.); 7 C. L. R. 227; 3 Ind. Dec. (N. S.) 209.

(5) 24 C. 900; 12 Ind. Dec. (N. S.) 1269.

(6) 33 Ind. Cas. 620.

(7) 15 Ind. Cas. 453; 16 C. W. N. 877 at p. 879; 40 C. 29; 16 C. L. J. 9.

the question would arise whether the decision upon each of the grounds is conclusive between the parties [see *Peary Mohun Mukerjee* v. *Ambica Churan Bandopadhya* (5)].

It appears that the Court of first instance, before the trial came on, recorded an order that the judgment and decree in the suit were binding upon the parties and that it would consider only the question of notice and compensation. That being so, the question as to the nature of the defendant's tenancy must be decided on the merits.

The question of service of notice and compensation has been gone into. All other questions in the suit including the question as to the sufficiency of the notice will be decided by the Court. It will be open to both parties to adduce further evidence in the case.

The case will accordingly be sent back to the Court of first instance to be dealt with in accordance with the observations made above.

Costs to abide the result.

N. K. & W. C. A. *Case sent back.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1599 OF 1916.

July 5, 1919.

Present:—Mr. Justice Shadi Lal and Mr. Justice Martineau.

ANWAR KHAN AND ANOTHER—DEFENDANTS—APPELLANTS

versus

NUR KHAN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Custom—Alienation—Will in favour of daughter—Will upheld on suit of testator's brother but daughter's power of alienation declared as restricted by first Court—Appellate Court declaring full powers of alienation—Res judicata—*Unnecessary finding—Evidence—Will lost—Property alienated by daughter—Suit by collaterals.*

In 1880 a Will was made in favour of a daughter. In 1881 it was contested by the testator's brother and upheld by the Trial Court as valid with the further finding that the daughter would not be competent to alienate the property. On appeal by the daughter the lower Appellate Court held that she had full powers of alienation. No appeal was preferred against this decision. The daughter gave away the property and on her death her father's collaterals sued for its possession. The Will in her favour was not forthcoming:

Held, that the decision in the previous suit, although it did not operate as *res judicata*, was an important piece of evidence, that in the circumstances the validity of the Will could not be questioned and that the daughter took an absolute estate, [p. 272, col. 1.]

Second appeal from the decree of the District Judge, Jhelum, dated the 25th January 1916, affirming that of the Munsif, First Class, Jhelum, dated the 22nd November 1915.

Dr. *Nand Lal*, for the Appellants.

Mr. *M. Elsem*, for the Respondents.

JUDGMENT.—The land and house in suit belonged to Wali, who made a Will bequeathing them to his daughter Bhagbhari. The latter in 1880 made a Will leaving the property to the defendants, her sister's son and son-in law. Bhagbhari has died, and the plaintiffs, who are collaterals of Wali, sue for possession of the property, contending that it reverts to them and that Bhagbhari had no power to make a Will in favour of the defendants.

Wali's son Ghazan was murdered by the first plaintiff Nur Khan and by Ghulam Muhammad, father of the other two plaintiffs, and Nur Khan and Ghulam Muhammad were convicted of the murder and sentenced to transportation for life in 1872. The defendants contend that by reason of that murder the plaintiffs have no right of succession to Wali's property, and they also contend that Bhagbhari was absolute owner of the property under her father's Will and was competent to alienate it.

The Courts below have concurred in overruling these contentions and in giving the plaintiffs a decree. The defendants have appealed to this Court.

The Will executed by Wali is not forthcoming. Its validity was contested in a suit brought in the Tahsildar's Court by Wali's brother Fatta, and the Will may have been filed with the record of that suit. The Tahsildar dismissed the suit on the 2nd August 1881, holding that the Will was valid, but he also gave a finding that Bhagbhari would not be competent to alienate the property, and Bhagbhari in consequence appealed to the Judicial Assistant, Mr. DeCourcy. The learned District Judge thinks that the Appellate Court in that case decided that the question of Bhagbhari's power to alienate the property should be left open, but his view on this point is clearly not correct, as Mr. DeCourcy's judgment of the 11th November 1881 shows that he expressly decided that Bhagbhari was at liberty to alienate the property in any

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way she pleased, and that he modified the order of the Tahsildar accordingly.

It is contended for the respondents that Mr. DeCourcy's finding in regard to Bhagbhari's power of alienation was an unnecessary finding and should be ignored, but we cannot agree with this contention. The question whether Bhagbhari was competent to alienate the property may not have been in issue in the trial in 1881, but when the Tahsildar had given a finding on the point against Bhagbhari and Bhagbhari appealed it was necessary for the Appellate Court to determine whether the finding should stand. That Court might have been content to expunge the finding and leave the matter of Bhagbhari's power of alienation open, but instead of doing so it decided the point and held that Bhagbhari had full powers of alienation. That judgment, though it does not operate under section 11 of the Civil Procedure Code as a bar to the trial of the issue, is certainly an important piece of evidence in the appellants' favour. It seems probable that Mr. DeCourcy had Wali's Will before him when he gave the judgment, and that he came to his decision as to Bhagbhari's power of alienation after a consideration of the terms of the Will and it is an important fact that Fatta, the plaintiff in the case, appears to have accepted the decision and did not appeal to this Court.

In the circumstances, it is reasonable to hold that under Wali's Will, the validity of which is not now questioned, Bhagbhari took an absoulte estate. We hold that she was competent to bequeath the property to the defendants, and consequently the plaintiff's suit fails. It becomes unnecessary to determine the further question whether the fact of Wali's son having been murdered by one of the plaintiffs and by the father of the other two would deprive the plaintiffs of their right of succession.

We accept the appeal, reverse the decrees of the Courts below, and dismiss the suit. The respondents will pay the appellants' costs throughout.

S. D.

Appeal accepted.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 234 OF 1921.

June 16, 1922.

Present:—Mr. Hallifax, A. J. C.

NARAYAN AND ANOTHER—PLAINTIFFS—APPLICANTS

versus

DAULAT AND OTHERS—DEFENDANTS NON-APPLICANTS.

Civil Procedure Code (Act V of 1908), O. XXXIV, application of—Mortgage suit—Preliminary instalment decree by consent of parties—Decree ordering foreclosure on default—Final decree, whether to be obtained before proceeding to execution—Time for payment, enlargement of.

When a preliminary decree for payment by instalments, whether extending over more than six months or not, is passed by consent in a mortgage suit ordering foreclosure on default, the plaintiff is not only entitled but is bound to apply for a final decree before proceeding to execution and a Court has the same powers in regard to enlarging a time for payment allowed by such a decree as it has with any other mortgage-decree. [p. 275, col. 2.]

The mere fact that a preliminary decree in a mortgage-suit makes the sum due payable by instalments and not in a lump sum, to be paid on a specified day, does not take it out of the provisions of O. XXXIV of the Civil Procedure Code. [p. 275, col. 2.]

Revision against the judgment and decree of the Senior Munsif, Nagpur, dated the 5th April 1921, in Civil Suit No. 159 of 1917.

Mr. *M. R. Bobde*, for the Applicants.

Mr. *G. L. Subhedar*, for the Non-Applicants.

JUDGMENT.—The dispute in this case relates to the power of the Court to grant an enlargement of the time allowed by the decree in a mortgage suit ordering foreclosure in default of payment by instalments on specified dates. The decree was passed on the 10th of January 1919 and its terms are in accordance with an agreement at which the parties arrived. It is drawn up on the printed form provided for ordinary decrees and not on No. 3 of the forms prescribed in Appendix I of the First Schedule of the Civil Procedure Code, and sets out, "in terms of the compromise made by the parties," that the defendants owe the plaintiffs Rs. 900 on the mortgage, which they are to pay in six annual instalments of Rs. 150 each, the first being payable on the 19th of December 1919, and "that in case of any two defaults the whole balance then due will be recoverable at once and that in case the amount of decree or any part thereof is not paid by the said defendants as agreed

the mortgaged property as described in the reverse shall be foreclosed for that unpaid amount and at once put in possession of plaintiffs." It may be noted that this is scarcely consistent. The first part of the passage quoted clearly contemplates foreclosure only on the occurrence of two defaults but the second part just as clearly allows it on the occurrence of one. The last eight of the words quoted from the decree are added in the handwriting of the Munsif who passed it, and this indicates that in the agreement between the parties there was a clause, embodied in the decree, that it should become final automatically without the intervention of the Court.

(2) The defendants made no payments at all, and on the 7th of May 192: the plaintiffs applied for a final decree. What they did apply for, according to the terms of their written petition, is another preliminary decree for the payment of Rs. 900 in a lump sum and foreclosure in default of such payment. The last paragraph runs as follows: "The plaintiffs, therefore, pray that a final decree for Rs. 900 may be passed against the first, third, and fourth defendants according to the terms of the compromise decree and that in default of payment of that amount the mortgaged property may be foreclosed and possession given to the plaintiffs." We need not, however, trouble about the inartistic wording of the petition, which was clearly meant to be an application for a final decree for foreclosure on account of the default that had already occurred. Two days after this application was made the defendants put in a written petition setting out the reasons for their two defaults, stating they had tendered Rs. 300 to the plaintiffs who had refused it and that they were still prepared to pay that amount, and asking for an enlargement of time, under any conditions as to interest that might be proper, for the payment of the balance. I may say at once that the whole amount of Rs. 900 has now been deposited in Court and that the parties have agreed that if the Court has the power to grant an enlargement of time in this case it shall be granted, and in that event the amount of interest payable to the plaintiffs is Rs. 85 8-0.

(3) The plaintiffs refused the tender of Rs. 300 and opposed the application for an extension of time on the ground that the proviso (which word is mistakenly recorded by the learned Munsif as "provisions") of rule 3 of Order XXXIV cannot be applied to the present decree, for the three reasons that it is a compromise decree, that it fixes no date for payment, and that "the parties have made their own stipulation regarding payment and consequence of default and (the) Court cannot exercise its discretion in enlarging time" The first and the last of these pleas seem to have no substance. Some decrees passed by consent in mortgage suits may be put outside the contemplation of Order XXXIV, by matters which can only appear in decrees so passed, but the mere fact of their being consent decrees has nothing to do with this result. The third reason amounts to a plea that the parties to a preliminary decree on a mortgage, passed and framed strictly in accordance with the provisions of Order XXXIV, can by agreement deprive the Court of its statutory discretion to enlarge the time allowed by that decree for payment. Such an agreement by the defendant might certainly influence the Court in the direction of refusing an extension of time, but it cannot estop the defendant from asking for it or prevent the Court from granting it. The agreement that foreclosure should immediately follow default, even regarded as the parties' "own stipulation regarding payment and consequence of default" incidentally included in a decree but not really forming part of it, would still be a stipulation by way of a penalty, and it would be within the discretion of the Court under section 74 of the Contract Act not to enforce it completely.

(4) The plea that the decree was not made in strict accordance with rule 2 of Order XXXIV, in that it does not fix a date for payment, and, therefore, cannot be governed by rule 3 of the same Order is based upon the rulings of the Calcutta High Court in *Bechu Singh* v. *Bichharam Sahu* (1) and *Biswa Nath Prosad Mahata* v. *Bhagwandin Pandey* (2). In both cases the judgment was delivered by Mr. Justice Mookerjee, Carnduff, J., sitting with him in the first case and Casperz, J., in the second, and it was held that a decree similar to that with which we are concerned here "was not made in strict accordance with section 88 of the Transfer of Property Act,"

(1) 1 Ind. Cas. 677; 10 C. L. J. 91.
(2) 10 Ind Cas. 536; 14 C. L. J. 648.

which was in force at the time, and, therefore, the Court could not pass an order absolute in the case under section 89, but the Court had the inherent power mentioned in section 151 of the Civil Procedure Code, apart from the provisions of the Transfer of Property Act, to pass an order absolute on such a decree, and if the plaintiff applied for one he ought to get it. It was not held that the plaintiff was bound to apply for such an order or could not execute his decree without it, treating it as having become final automatically, and in the second case it appears to have been held that the defendant could waive his right to an order absolute before execution could be taken out.

(5) The position taken up by the plaintiffs in reliance on these rulings is this. They were not bound to apply for a final decree, because the decree they hold is not strictly in accordance with Order XXXIV and is, therefore, not governed by it; they could have treated it as becoming final automatically, like any other decree other than a decree on a mortgage of which the condition has been broken, and have proceeded to execute it; they were, however, entitled, not under Order XXXIV but under the principle enunciated in section 151, to get a final decree if they chose to apply for it *pro majore cautela*, but the defendants are not entitled under the same or any other principle to an extension of time. The position is hardly logical or consistent. If it is "necessary for the ends of justice" that the first part of rule 3 of Order XXXIV should be applied, though the rule does not govern the case, how can it be denied in the same breath that the latter part of the same rule ought to be applied for the same reason? The plaintiff cannot "have it both ways." Further, if the plaintiffs could, if they chose, execute their decree as it stands, how can it be necessary for the ends of justice or for any ends to go through the empty formality of giving them a final decree? If their present decree is outside the terms of Order XXXIV, section 151 can be called in aid to bring it within those terms either for all purposes or for none.

(6) I find myself, however, with the greatest respect, unable to accept the view stated in the judgment quoted, that such a decree as the one under consideration here is not strictly in accordance with the sections of the Transfer of Property Act or the corresponding rules of Order XXXIV which prescribe the form of the preliminary decree in a mortgage suit. The reason stated for holding that it is not is, that it lacks two of the essential characteristics of a decree so prescribed. The first is, that the entire sum due is made payable on a day specified and a decree for instalments is not contemplated by the Transfer of Property Act (or Order XXXIV), and the second that it makes the entire amount payable in a lump, the mortgagee being entitled to refuse part payment. But under both the Transfer of Property Act and Order XXXIV the amount has to be paid on or before a specified day, not on it, and every instalment decree fixes a day, that of the last instalment, on or before which the entire sum due must be paid, and an order that parts of the entire sum shall be paid on or before earlier dates only benefits the mortgagee and certainly does not interfere with his right to refuse acceptance of anything less than the entire sum on the last day fixed.

(7) It was admitted in argument here that these objections could not be raised against a preliminary decree in a mortgage suit which ordered payment of the whole amount due in six equal monthly instalments, the first exactly one month after the date of the decree, and further ordered that the whole amount should become payable at once on default in respect of any two instalments. The essential difference between an ordinary mortgage decree and one passed by consent of parties which orders payment by instalments is, therefore, not the instalments, and the only point in which most, if not all, of the decrees of the sort we are considering do not conform to the description of a preliminary decree given in Order XXXIV is that the period allowed for payment is more than six months; it seems to me, however, beyond question that the words "except with the consent of the plaintiff" can always be understood as following those which limit the period to be allowed by the Court to six months. I hold that, when a preliminary decree for payment by instalments, whether extending over more than six months or not is passed by consent in a mortgage suit, the plaintiff is not only entitled but is bound to apply for a final decree before proceeding to execution, and that the Court has the same

powers in regard to enlarging the time for payment allowed by such a decree as it has with any other mortgage decree. The application for revision is rejected and the applicants must pay all the costs incurred by the other party in both Courts. The Pleader's fee will be Rs. 32.

G. R. D. & N. H. *Application rejected.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 844 OF 1920.

June 30, 1920.

Present :—Mr. Justice Broadway.

BIRU—VENDEE—DEFENDANT—APPELLANT

versus

SAMANDA AND ANOTHER—PLAINTIFFS AND BULANDA—DEFENDANT-VENDOR—RESPONDENTS.

Custom—Alienation—Necessity—Reversioner, suit by—Consideration, small portion of, without necessity—Sale, validity of.

Where in a sale of ancestral property it is found that the sale is *prima facie* advantageous to the vendor as evidencing an act of good management on his part, and that only a small portion of the entire consideration,—in this case, one-sixth,—is without necessity, the sale should be upheld. [p. 276, col. 2; p. 277, col. 1.]

Wadhawa Mal v. *Wadhawa*, 8 P. R. 1908; 33 P. W. R. 1908; 144 P. L. R. 1906; *Ali Gauhar* v. *Mahanda*, 6 Ind. Cas. 984: 55 P. L. R. 1910; 64 P. W. R. 1910; *Ram Karan* v. *Hukman*, 22 Ind. Cas. 544; 79 P. L. R. 1914; 51 P. W. R. 1914; *Badri Mal* v. *Gopal*, 130 P. R. 1906; 100 P. L R. 1907; 155 P. W. R. 1906, followed.

Kesar v. *Sundar Singh*, 1 Ind. Cas. 888; 27 P. R. 1909; 33 P. W. R. 1909; 46 P. L. R. 1909, distinguished.

Second appeal from a decree of the District Judge, Hoshairpur, dated the 11th February 1920, varying that of the Munsif Second Class, Hoshiarpur, dated the 1st December 1919.

Sheikh *Niaz Muhammad*, for the Appellant.

Sayed *Mohsin Shah*, for the Respondent.

JUDGMENT.—On the 17th of April 1918 one Bulanda sold 1 *kanal* 10 *marlas* of land to Biru for Rs. 600. Bulanda's reversioners brought the usual suit for a declaration that this sale being without consideration and necessity would not affect their reversionary rights. The Trial Court found that the property was ancestral but that consideration had passed and necessity had been proved. The plaintiffs' suit was accordingly dismissed. They appealed to the learned District Judge who found that consideration had passed and that necessity had been established for Rs 472-12-0 out of Rs. 600, the purchase money. Rs. 11-4-0 of the balance represented the costs of conveyance and registration charges and the remaining balance was Rs. 116 regarding which it was found that necessity had not been proved. The learned District Judge, therefore, accepted the appeal and granted the appellants a declaration as prayed but added that if they succeeded by inheritance to Bulanda they would take possession only on payment to the vendee, *i. e.*, Biru, of the sum of Rs. 484. Against this decree Biru has preferred this second appeal to this Court through Sheikh Niaz Muhammad and I have heard Mr. Mohsin Shah for the respondents.

I am, of course, bound by the findings of fact arrived at by the lower Appellate Court. According to these, necessity has been established for Rs. 472 12-0. The sale, therefore, of this land has been found to be justified. In addition to the Rs. 472-12-0, Rs. 11-4-0 are also a legitimate charge. With regard to the balance this sum of Rs. 116 is made up of three items of

1. Rs. 50 said to have been due on a bond to Nur Din;

2. Rs. 35 said to have been due on a bond to Biru, appellant, and

3. Rs. 31 taken before the Sub Registrar for household expenses.

As said above, I am bound by the finding that for these three items necessity had not been established. It is not, however, necessary in every case, where a purchaser of land has been unable to prove necessity for the whole of the price paid, that a sale should be converted into a mortgage at the instance of the vendor's reversioners. In the present case the reversioners do not allege that the vendor, Bulanda, was addicted to riotous living or was in any way extravagant. His entire holding consisted of 13 *kanals* of land. Some of this land was mortgaged to the extent of about Rs. 450. By a sale of 1 *kanal* 10 *marlas* of his holding he had freed himself from debt. The sale, therefore, is, *prima facie*, advan-

tageous to him and might, I think, be regarded as an act of good management. In any case, when the amount of the consideration, for a sale of this kind, which is found to be without necessity represents only a small portion of the entire consideration, it seems to me that it is not necessary to convert such a sale into a mortgage. Rs. 116 is, roughly, one-sixth of the entire price paid. Of this Rs. 116, Rs. 66 were taken for household expenses. If, when Bulanda was selling this small plot of land he was able to secure a small sum in cash, it cannot, I think, be said that he was committing any wrongful act by so doing. In this view I am supported by *Wadhawa Mal* v. *Wadhawa* (1). In the case reported as *Ali Gauhar* v. *Mahanda* (2), Rs. 210 out of Rs. 1,200 were found to have been without necessity yet the sale was allowed to stand. Similar cases are those reported as *Ram Karan* v. *Hukman* (3) and *Badri Mal* v. *Gopal* (4).

Mr. Mohsin Shah referred to *Kesar* v. *Sundar Singh* (5), in which, although Rs. 156 out of Rs. 950 had been found to be without necessity the sale was not upheld. That case was considered in *Ali Gauhar* v. *Mahanda* (2) and is not on all fours with the present one. There a considerable fraction of the whole consideration was found to have been previously inserted to keep off pre emptors and formed no part of the price actually paid; and the sum of Rs. 156 referred to above was held never to have passed at all. As only one-sixth of the price has not been proved to be for necessity, I think in the present case the sale should have been allowed to stand. *Tara Chand* v. *Kanshi Ram* (6) is also a case in point and assists the appellant.

I, therefore, accept the appeal and, setting aside the decree of the lower Appellate Court, dismiss the plaintiffs' suit with costs throughout.

W. C. A.

Appeal accepted.

(1) 8 P. R. 1908; 33 P. W. R. 1908; 144 P. L. R. 1906.

(2) 6 Ind. Cas. 984; 55 P. L. R. 1910; 64 P. W. R. 1910.

(3) 22 Ind. Cas. 544; 79 P. L. R. 1914; 51 P. W. R. 1914.

(4) 180 P. R. 1906; 100 P. L R. 1907; 155 P. W. R. 1906.

(5) 1 Ind. Cas. 888; 27 P. R. 1909; 33 P. W. R. 1909; 48 P. L. R. 1909.

(6) 39 Ind. Cas 12'; 17 P. R. 1917; 9 P. W. R. 1917; 71 P. L. R. 1917.

CALCUTTA HIGH COURT.

CIVIL RULE No. 622 OF 1921.

February 1, 1922.

Present:—Mr. Justice Greaves.

HARA SUNDAR MAJUMDAR—DECREE-HOLDER—PETITIONER

versus

LAHABAR SINGH—CLAIMANT—OPPOSITE PARTY.

Witness, travelling expenses of—Unsuccessful party if liable.

The successful party in a litigation is entitled as against the unsuccessful party, against whom costs are awarded, to recover all proper expenses, including travelling expenses, incurred by summons of witnesses.

Rule against an order of the Munsif, Siliguri.

FACTS appear from the judgment.

Dr. *Jadunath Kanjilal*, for the Petitioner.—It is surprising that the learned Judge has declined to award costs incurred as travelling expenses for my client's witnesses. Though the witnesses were summoned by my client to depose in support of his case, the other side must pay all expenses as my client has won the case. All costs are payable to my client by the other side. The learned Judge cannot make a distinction in the matter of travelling expenses incurred by the witnesses whom my client summoned, the Judge could not have disallowed the travelling expenses It is needless for me to quote chapter and verse to support my contention as the injustice is quite palpable to your Lordship. Your Lordship can, if necessary, look into High Court circulars.

No one appeared for the Opposite Party.

JUDGMENT.—In this Rule it appears from the materials before me that the Judge has clearly acted under a misapprehension in disallowing the travelling expenses of the witnesses. He states that it is the

practice for the parties to pay such expenses. No doubt the party who summons a witness pays his expenses in the first instance. But, clearly, if he is successful, he is entitled as against the unsuccessful party against whom costs are awarded to recover all proper expenses, including travelling expenses, incurred by summons of the witness and paid in the first instance by the successful party.

The Rule is accordingly made absolute and the Judge will allow the travelling expenses of the witnesses properly incurred.

I make no order as to costs of this Rule.

W. C. A.

Rule made absolute.

LAHORE HIGH COURT.

CIVIL REVISION No. 485 OF 1920.

June 17, 1920.

Present:—Mr. Justice Broadway.

GANDA RAM—DEFENDANT—PETITIONER

versus

SUNDAR LAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Interlocutory order—Appeal—Jurisdiction, defect of—Failure of justice—Revision—Decrees, preliminary and final—Appeal from preliminary decree only not maintainable.

No appeal lies from an interlocutory order, and if an Appellate Court entertains an appeal from such an order it acts without jurisdiction and any order passed by it is bad [p. 279, col. 2.]

The High Court is not bound to interfere on the revision side even when there is a defect of jurisdiction unless failure of justice has directly resulted from such a defect. [p. 279, col 2.]

Hansa v. *Ran Singh*, 86 P. R. 1902; 22 P. L. R. 1902 (F. B.), followed.

After a final decree has been made, whether or not an appeal has been preferred against the preliminary decree, it is the duty of the party aggrieved by the final decree to prefer an appeal against the final decree and an appeal, therefore, against the preliminary decree, without challenging the final decree cannot be entertained [p 279, col. 2.]

Khirodamoyi Dasi v. *Adhar Chandra Ghose*, 21 Ind. Cas 516; 18 C. L J. 321, followed.

Mackenzie v. *Narsing Sahai*, 1 Ind. Cas. 413; 36 C. 762; 10 C. L J. 1 3 and *Kuria Mal* v. *Bishambhar Das*, 5 Ind. Cas. 276; 32 A. 225; 7 A. L. J. 210, approved.

Ghulam Jilani v. *Ghulam Haidar Khan*, 89 P. R. 1891 (F. B.), distinguished.

Petition, under section 44 of Act VI of 1918, for revision of an order of the District Judge, Ludhiana, dated the 28th October 1919, reversing that of the Munsif, First Class, Jagraon, dated the 11th June 1919.

Mr. *Badri Nath Kapur*, for the Petitioners.

Mr. *Jai Gopal Sethi*, for the Respondents.

JUDGMENT.—The plaintiffs-respondents instituted a suit for possession by partition of a half share in a house which they said belonged to them and Ganda Ram defendant, Ganda Ram being the owner of the other half. In the earlier stages of the proceedings Ganda Ram offered to let the plaintiffs-respondants take his half share in the house on payment of Rs. 575. To this the plaintiffs respondents agreed, but, for some reason or other, this arrangement was not carried through at the time and on the 4th April 1919 a preliminary decree was passed directing partition of the house and declaring that the plaintiffs-respondents were entitled to one moiety. A Local Commissioner was appointed to carry out the partition who reported that the value of the entire house was Rs. 1,258 and that the house was of such a nature as to render it practically impossible to partition it. On the 11th June 1919 the learned Munsif passed an order to the effect that the plaintiffs could choose whether they would take the lower storey of the house for themselves and pay Rs. 200 to Ganda Ram, or would allow Ganda Ram to take the lower story and be paid Rs. 200 by him. Against this order the plaintiffs-respondents referred an appeal to the District Judge who accepted the appeal and directed that instead of the house being partitioned it should be decided which party should retain the house on payment of the value of the other's half share, the decision being arrived at, if necessary, by drawing lots. The stamp on the appeal to the District Judge was refunded and the case remanded to the learned Munsif. Against this decision Ganda Ram

preferred an appeal to this Court on the 17th of January 1920. While this appeal was pending here the learned Munsif on the 6th of March 1920 proceeded to pass a final decree.

Mr. Sethi for the plaintiffs-respondents raised two objections; first, he contended that inasmuch as the order of the learned Munsif dated the 11th June 1919 was an interlocutory one, no appeal lay to the District Judge and that, therefore, no second appeal lay to this Court, and reference was made to Order XLIII, rule 1 (a), Civil Procedure Code. Mr. Kapur for the appellant was constrained to admit the correctness of this contention and urged that this appeal should be treated as a revision. Having regard to *Jogodishury Debea* v. *Kailash Chandra Lahiry* (1) it seems to me that the order of the 11th of June 1919 was an interlocutory one and that no appeal lay to the District Judge. In these circumstances, no second appeal is competent and I hold accordingly.

Next, Mr. Sethi contended that I should not interfere on the revision side. He pointed out that the defendant himself had offered to allow the plaintiffs to take the whole house on payment of Rs. 575 and that the final decree, which has been passed, gives plaintiffs the possession of the whole house on payment of Rs. 644. He also contended that inasmuch as there was now in existence a final decree which had not been appealed against and which was, therefore, absolutely final, it would only be equitable to interfere with the decision if there had been a miscarriage of justice. My attention was drawn to *Mackenzie* v. *Narsing Sahai* (2), *Kuria Mal* v. *Bishambhar Das* (3) and *Khirodamoyi Dasi* v. *Adhar Chandra Ghose* (4). In the first two cases in suits for partition the preliminary decree and the final decree had been passed and one of the parties preferred an appeal attacking the preliminary decree only, and it was held that such an appeal was futile. In *Khirodamoyi Dasi* v. *Adhar Chandra Ghose* (4) a Division Bench of the Calcutta High Court held that after a final decree had been made, whether or not an appeal had been preferred against the preliminary decree, it was the duty of the party aggrieved by the final decree to prefer an appeal against the final decree and an appeal, therefore, against the preliminary decree, after the passing but before the signing of the final decree and without challenging by appeal the final decree, was useless and could not be entertained. These authorities appear to be in point and I do not feel pressed by *Ghulam Jilani* v. *Ghulam Haidar Khan* (5) which to my mind does not apply to the point before me.

As an appeal I must dismiss the appeal filed by Ganda Ram defendant and treating it as a revision, it has to be seen whether there are any grounds for interference. It may be conceded at once that inasmuch as the District Judge entertained an appeal from an interlocutory order, he exercised a jurisdiction not vested in him by law and, therefore, his order is bad. It was, however, held in *Hansa* v. *Ran Singh* (6) by a Full Bench of the Chief Court that this Court was not bound to interfere on the revision side even when there is a defect of jurisdiction unless failure of justice has directly resulted from such a defect. Having regard to the fact that the final decree now passed in the suit practically gives effect to what Ganda Ram was prepared to accept in the earlier stages of the proceedings and gives him a somewhat larger sum than what he originally agreed to take, I find it difficult to hold that there has been a failure of justice and in the circumstances, therefore, I must dismiss this revision, leaving, however, parties to bear their own costs in this Court.

N. K. *Revision dismissed.*

(1) 24 C. 725 (F. B.); 1 C. W. N. 374; 12 Ind. Dec (N. S.) 1152.
(2) 1 Ind. Cas. 413; 36 C. 762; 10 C. L. J. 113.
(3) 5 Ind. Cas. 276; 32 A. 225; 7 A. L. J. 210.
(4) 21 Ind. Cas. 516; 18 C. L. J. 321.
(5) 89 P. R. 1891 (F. B.).
(6) 36 P. R. 1902; 22 P. L. R. 1902 (F. B.).

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION No. 3473 OF 1919.

November 4, 1921.

Present:—Mr. Justice Kajiji.

DINSHAW J. JAVERY —PLAINTIFF

versus

SECRETARY OF STATE FOR INDIA —DEFENDANT.

Bombay Abkari Act (V of 1878), ss. 6, 7—Excise Department, appointment of subordinate officers to—Appointment whether at will and pleasure of Government—Dismissal, power of, restricted.

The appointment of a subordinate officer to the Bombay Excise Department is made under section 6 of the Bombay Abkari Act by the Commissioner of Excise under delegated powers from the Government, and section 7 of the Act places a restriction on the power of the Commissioner to dismiss such an officer. Consequently an officer appointed by the Commissioner does not hold office at the will and pleasure of the Government, and before he can be dismissed the provisions of section 7 must be strictly complied with [p. 281, col. 1]

Original suit.

Mr. *Taraporewalla* (with him Mr. *Setalvad*, for the Plaintiff.

Mr. *Desai* (with him Mr. *Bahadurji*, Acting Advocate-General), for the Crown.

JUDGMENT.—The plaintiff has filed this suit to recover Rs. 50,000 as damages for his wrongful dismissal from service.

It appears that the plaintiff was employed as an Acting Inspector in the Excise Department on a salary of Rs 125 a month and by an order dated the 13th September 1917 he was dismissed from service by Mr. Arthur, Commissioner of Customs, Salt, Opium and Abkari, Bombay.

Two preliminary issues have been raised in the suit: (1) whether the plaintiff held his appointment at the will and pleasure of the Crown, and (2) if so, whether the plaint discloses any cause of action?

From the cases cited at page 213 in the case of *Jehangir* v. *Secretary of State* (1) Mr. Justice Tyabji stated that in all those cases it was laid down that you cannot limit the power of the Crown to dismiss its officers at pleasure. It is conceded by Mr. Taraporevalla for the plaintiff that if the term of employment of the plaintiff was at will and pleasure of the Crown then the Crown is entitled to dismiss the plaintiff without assigning any reason at all. But Mr. Justice Tyabji has qualified the above proposition to this extent that the power of the Crown to dismiss its public officers is necessarily limited by any statutory provision that may have been enacted for the benefit of such public servants, and it may not have application to such of the servants of Government as are not charged with functions etc. Mr. Taraporevalla has argued that the plaintiff was employed under section 6 of Act V of 1878 and section 6 enacts that:—

"To aid the Collectors in carrying out the provisions of this Act, the Commissioners may, subject to such orders as may from time to time be passed by Government in this behalf, appoint such subordinate officers with such designations, and assign to them respectively such powers and duties under this Act, as they deem fit."

Mr. Taraporevella has urged that the appointments of subordinate officers in the Excise Department are regulated by section 6 of the Act and that power has been delegated by the Government to the Commissioner and the Commissioner is the only person who can make the appointments subject to the order limiting the number of subordinate officers who have to be appointed for the purpose of carrying out the provisions of Act V of 1878. The appointment is not made by Government direct. From the record that has been shown to me I find that these appointments in the Excise Department are made under the signature of the Commissioner and I have no doubt in my mind that these appointments of officers in the Excise Department and of the plaintiff was made under section 6 of Act V of 1878. Then section 7 provides in what cases, under what circumstances, and after what enquiry, can any such officer be dismissed. Section 7 provides:—

"...The Commissioners may at any time after inquiry recorded in writing fine, dismiss, suspend or reduce any subordinate officer appointed, or any officer on whom any additional powers or duties have been conferred or imposed by them under the provisions of the last preceding section, for any breach of departmental rules or discipline, or for carelessness, unfitness, neglect of duty or other misconduct."

(1) 27 B. 189 at p. 213; 5 Bom. L. R. 30.

HAR CHAND SINGH v. NARAIN SINGH.

Mr. Taraporevalla has urged that having regard to the provision of section 7 of Act V of 1878, the Government's powers of dismissal or one of its officers in the Excise Department have been fettered and restricted by Statute and if that is so the rule laid down in the case of *Gould* v. *Stuart* (2) must apply.

The Advocate-General on behalf of the Government has urged that section 7 only restricts the power of the Commissioner and does not restrict the power of the Government. But where Government has delegated the power of appointment to other officers and if that power is restricted as to dismissal then it has to be considered whether the Legislature has restricted the power of dismissal or not. In my opinion section 7 does restrict the power of the Commissioner for dismissal and, therefore, the employment of the plaintiff ceases to be at the pleasure and will of Government and the provisions of section 7 of the Act must be strictly complied with before such officer can be dismissed. The case of *Gould* v. *Stuart* (2) is a case in point

Mr. Bahadurji says that the dismissal has to be confirmed by the Government. That, however, does not affect the merits of this case. The first order has to be passed by the Commissioner and it may be that a formal sanction or confirmation has to be obtained it is a mere formality that has to be gone into.

In my opinion, the Legislature by Statute has restricted the power of dismissal under section 7 of Act V of 1878 and that provision under section 7 of the Act is made for the protection of officers employed in the Excise Department.

Therefore, the preliminary issues, *viz.*, (1) will be answered in the negative, (2) in the affirmative and (3) is not necessary. Costs costs in the cause.

W. C. A.

Order accordingly.

(2) (1896) A. C. 575, 65 L. J. P. C. 82; 75 L. T. 110.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2037 OF 1916.

July 5, 1920

Present:—Mr. Justice Leslie Jones and Mr. Justice Dundas.

HARCHAND SINGH, MINOR SON OF HARI SINGH, THROUGH *Musammat* HARNAM KAUR—DEFENDANT—APPELLANT

versus

NARAIN SINGH AND ANOTHER—PLAINTIFFS, AKBAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage—Decree for possession by mortgagee—Second suit for possession—Possession under decree and subsequent dispossession, proof of—Cause of action.

Where a mortgagee has obtained a decree for possession on the basis of the mortgage, a subsequent suit for possession by him or his legal representatives is not maintainable unless it is shown that possession was taken under the decree and that there was a subsequent dispossession. The reason is that two suits on the same cause of action will not lie. [p. 282, col. 1.]

Second appeal from a decree of a District Judge, Karnal, dated the 13th March 1916 affirming that of the Junior Subordinate Judge, Karnal, dated the 30th January 1915.

Mr. *Sundar Das*, for the Appellant.

Mr. *Devi Dayal*, for the Respondent.

JUDGMENT.—The plaintiffs brought this suit for possession of the land mortgaged alleging that it had been mortgaged to the husband of one *Musammat* Nandi on the 7th July 1888, that *Musammat* Nandi had obtained a decree for possession on the 31st January 1900, that execution had been allowed by order of the 21st November 1903 and that *Musammat* Nandi had consequently sold her rights to one Kapur Chand who in turn sold them to the present plaintiffs.

When, however, the plaintiffs claimed mutation on the 16th April 1918 the representatives of the mortgagors objected alleging that they had paid off the mortgage as long ago as 1901.

The First Court framed an issue as to whether the suit was time-barred but gave no finding upon it.

It found that the payment of Rs. 975 principal and interest on the mortgage was not proved and also that Kapur Chand had taken possession of the land and it gave a decree for possession of the land in suit.

This decree was confirmed in the lower Appellate Court on the ground that there was no proof of the payment of the mortgage-money.

In appeal it is claimed that the suit is barred because Nandi had obtained a decree for possession which was never executed and that, therefore, a second suit was not maintainable.

It is also urged and it is true that the lower Courts have overlooked that the payment of Rs. 975 of the mortgage-money has been admitted by *Musammat* Nandi and was accepted as a fact in Mr. Martineau's judgment of the 21st November 1903. The real point is that *Musammat* Nandi having once obtained a decree for possession on the basis of the mortgage no further suit could be maintained unless it could be shown that possession had been taken under her decree and the judgment-creditor had been subsequently dispossessed.

No doubt it has been alleged that Kapur Chand obtained possession but it has not been alleged that he was since dispossessed and unless he was, a suit for possession on the same cause of action does not lie.

Indeed, as no suggestion can be made even now as to how he came to be dispossessed the allegation that he got possession can hardly be correct.

We think the respondents were unwise not to accept the offer made to them before us that any amount found due on the footing of the mortgage would be paid provided that the payment of the sum of Rs. 975 was admitted.

The whole trouble is really due to the fact that in the first instance the amount of the debt was not obtained.

The suit is not maintainable; we must accept the appeal and dismiss the plaintiffs' suit with costs throughout.

N. K. *Appeal accepted.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL No. 32 OF 1921.
June 16, 1922.

Present:—Mr. Hallifax, A.J.C.

ANNAJI AND ANOTHER—DEFENDANTS—APPELLANTS

versus

FAKIRA AND OTHERS—PLAINTIFFS AND—DEFENDANTS—RESPONDENTS

Civil Procedure Code (Act V of 1908), O. XXXIV, rr. 5 (2), 8 (4), O IX, r. 13, O. XVII, r 3—Application for final decree—Notice to defendant whether necessary—Discretion of Court—Enlargement of time.

Under the Code of Civil Procedure of 1908, the proceedings in a mortgage suit between the preliminary and the final decree are a part of the trial of the suit itself, which does not end till the final decree is passed. [p. 285. col. 1.]

When plaintiff in a mortgage suit makes an application under Order XXXIV, rule 5 (2) or 8 (4), Civil Procedure Code, for a final decree, it is not legally necessary that notice of the application should be served on the defendant or even issued to him before the final decree is passed, and although it is just and proper to give notice to the defendant, yet the passing of a final decree without notice to the defendant is not an illegality or even an irregularity which would affect the decree in any way, nor is the Court bound by Order IX, rule 13, to set aside such a decree though it may do so if it considers that the absence of notice constitutes "sufficient cause" for the absence of the defendant within the meaning of that rule in that particular case. [p. 284, col. 2 p. 285, col. 1.]

Under rule 3, Order XVII, of the Civil Procedure Code it is discretionary with the Court to pass a final decree in a mortgage suit when the defendant fails to comply with the terms of the preliminary decree, but by Order XXXIV, rules 3 (2) and 5 (2), this discretion is taken away when the plaintiff applies for a final decree which the Court is bound to pass unless the defendant appears and shows good cause for an enlargement of time. [p. 285, col. 1.]

Appeal from a decree of the Additional District Judge, Nagpur, dated the 15th September 1921, in Miscellaneous Case No. 21 of 1921.

Messrs. *M. R. Dixit* and *V. V. Chitale*, for the Appellants.

Dr. *H. S. Gour* and Mr. *W. R. Puranik*, for the Respondents.

JUDGMENT.—The following chronological notes will make the history of this case clear:—

24-6-1894—Mortgage executed for a very old debt of Rs. 42,000 and Rs. 2,307 as interest, the total of Rs. 6,307, being made payable in nine annual instalments with further interest on default.

5-8-1910—Suit instituted (at the last possible moment). Repayments admitted of Rs. 2,593 for principal and Rs. 1,194, for interest (total Rs. 3,787).

16-6-1913—Preliminary decree for foreclosure in default of payment of Rs. 8,132-7-11 by 27-10-1913 (just over four months).

5-11-1915—Defendants applied (more than two years later) for extension of time.

12-11-1915—Plaintiffs applied for a final decree.

16-12-1915—Time extended, for no apparent reason, up to 30-3-1916 on condition of payment of Rs. 4,000, by then and certain conditions in regard to interest.

30-3-1916—Rs. 1,000, paid (on that day) and time for the payment of the remaining Rs. 3,000, extended up to 29-6-1916 with the consent of the plaintiffs.

29-6-1916—Application by defendants for a further extension. Time granted till 20-7-1916 "to settle with decree-holder if possible."

20-7-1916—The defendants stated that "on account of rains and want of leave from office the judgment-debtors could not approach the decree-holders for a settlement," and also that "application has been made to the Deputy Commissioner to sanction transfer of cultivating rights in *sir* land." Plaintiffs instructed to "file their reply" by 27-7-1916.

27-7-1916—Alleged purchaser of the preliminary decree applied to be substituted. Assignment admitted by the plaintiffs. Defendant Balkrishna said to be dead and defendant purchaser to prove assignment, which was already completely proved by admission of original plaintiffs. Notices ordered on Balaji and legal representatives of deceased Balkrishna.

10-3-1917—(After seven abortive hearings, due to failure to serve various defendants) application by fresh set of assignees for substitution. Notices ordered on defendants.

19-4-1917—Certain defendants unserved.

21-6-1917—Defendant Bhagwan present. All others duly served, including Balaji, guardian for the suit of minors Annaji and Shankar, who had refused to accept notice.

2-8-1917—Assignment proved. Bhagwan present. Remaining defendants absent.

20-8-1917—Assignees of preliminary decree applied for final decree. Notices ordered on all defendants.

13-9-1917, 18-10-1917, 22-11-1917—Hearing adjourned on account of failure to serve various defendants.

3-1-1918—All defendants served. Balaji absent. Mr. Pande Pleader for Bhayaji, Annaji and Shankar. Following order passed. "Mr. Pande.....asks for extension on the ground that his application for sanction to sell *sir* was dismissed by the Financial Commissioner. The order of Financial Commissioner was passed in May 1917. The application for review was dismissed in September 1917. Since then the judgment-debtors took no steps to satisfy the decree. By taking time they want to enjoy the crops sown in the fields. The judgment-debtors are not entitled to an adjournment. As, however, they paid Rs. 1,000, and as the sum carries interest I give them one opportunity. Case for 28-2-1918."

28-2-1918—All defendants by Mr. Kelkar. Application for extension on the allegation that a purchaser for the village had been found. Following order passed. "I grant time subject to payment of Re. 1 per cent. per mensem from 27-10-1915 till satisfaction. This amount shall be till 2-5-1918."

2-5-1918—Defendants absent. No further payment or application. Final decree passed, with note at the end of order: "After writing the above defendant, Annaji, appears and again wants time. I see no reason to grant it."

10-8-1920—Case remanded by Court of Judicial Commissioner for further consideration of an order in execution as to partition of a two ninths share in the property that was declared not subject to the mortgage. (Balaji and Bhayaji having obtanied this order of remand did nothing further. Possession of the remainder had been taken before the order in execution, which was passed on 14-5-1919).

15-3-1920—Application by Annaji and Shankar (present appellants) for setting aside the *ex parte* final decree of 2-5-1918 on the grounds that they had not been duly served with notice of the application for a final decree.

26-4-1920—Applicants absent. Decree-holders present. Records of original case not received. Adjourned to 10-5-1920 (instead of dismissal in default).

10-5-1920, 28-6-1920, 19-7-1920—Adjourned because of failures to serve non-

applicant judgment-debtors (all joint with applicants).

16-8-1920—"Parties absent. Dismissed for default."

19-8-1920—Application made for restoration of application to set aside *ex parte* decree dismissed on 16-8-1920 to file.

28-8-1920—Application restored on proof by affidavit of good cause for absence.

10-1-1921—(after four hearings for pleadings and evidence) applicants made an offer of payment on terms. Decree-holders' Pleader asked for time to consult them.

21-2-1921, 25-4-1921—Abortive hearings on account of failure of witnesses to appear, (decree holders having apparently refused terms suggested).

30-6-1921—Evidence completed and case close for orders.

15-9-1921—Order passed refusing to set aside *ex parte* final decree.

13-12-1921—This appeal filed (89 days later, of which 8 were copying time).

22-2-1922—Counsel for applicants heard, but not ready with any proposal or suggestion of payment.

All this makes it perfectly clear that if for any of the technical reasons put forward the lower Court had been bound to set aside the *ex parte* decree, it would have been bound to pass another one, not *ex parte*, immediately. No reason that could possibly be urged, not even a tender of the whole amount due, would justify the Court in extending the time up to that date unless the decree-holders agreed. That the appellants had no intention of making any such tender is apparent from the way in which they have managed to evade a final decree for seven years, having paid no more than Rs. 1,000 in all that time, and still more from the fact that they came to this Court in appeal without any idea of making even a proposal for payment, reasonable or unreasonable, or of the grounds on which they would ask for a retrospective enlargement of time if their appeal should succeed; indeed, it seems clear that they have never realised that there is any necessity to give grounds for a retrospective extension of the time allowed for payment. But, technically, they cannot succeed even to the extent of getting the *ex parte* decree re opened, only to be closed again immediately.

Notice of the application to pass a final decree was duly served on Shankar's properly appointed guardian for the suit Balaji and, whatever he might be able to do in a suit to set aside the decree on the ground of gross negligence or fraud in Balaji, he certainly cannot get the *ex parte* decree set aside on the sole ground that he was not served with notice of the application for the decree in proceedings under Order IX of the Procedure Code. Still less can he do so nearly two years after the decree was passed and ten months after everybody concerned who did not know all about it before had received full notice of it by the decree-holders being put in possession of the property. As for Annaji, I am by no means sure that fresh notice of a suit has to be given to a minor defendant on his attaining majority, but even if that is assumed, it is established by the entry in the Order sheet that Annaji knew of this decree on the 2nd of May 1918, the day on which it was passed, when, according to his own case, he was not three months short of 19 years old, and he also cannot have failed to know about it when his property was handed over to the decree-holders in April or May 1919 when he was nearly twenty. His application to set aside the *ex parte* decree, made in March 1920 is then hopelessly barred by time.

But I am very clearly of opinion that when the plaintiff in a mortgage suit makes an application under rule 5 (2) or rule 8 (4) of Order XXXIV of the Civil Procedure Code for a final decree it is not legally necessary that notice of that application should be served on the defendant or even issued to him before a final decree is passed. It is certainly only just and proper to give notice to the defendant in practically every case, on the sound principle of always hearing the other side; but the passing of a final decree without service of notice on the defendant of the application for it or even issue of such notice to him is not an illegality or even an irregularity that would affect the decree in any way, nor would the Court be bound by rule 13 of Order IX to set aside such a decree, though it might do so if it considered that the absence of notice constituted "sufficient cause" for the absence of the defendant

within the meaning of that rule in that particular case.

Confusion of thought appears to exist on this point, arising out of the old conflict of views as to the nature of the proceedings in a mortgage suit between the preliminary and final decrees. There is, however, no room for doubt or confusion since the passing of the present Procedure Code in 1908; the proceedings are a part of the trial of the suit itself, which does not end till the final decree is passed. In many subordinate Courts, however, the view taken seems to be that these proceedings are certainly a continuation of the suit, because it is not laid down in many rulings, but only technically and for certain purposes; there are frequent instances of their being treated as execution proceedings and the provisions of Order XXI, particularly those in rule 2, being applied to them. They are as real and essential a part of the suit itself as those between the preliminary and final decrees in a suit for accounts or partition.

Now, the preliminary decree in a mortgage suit, whether for foreclosure or sale, must under rule 2 or rule 4 of Order XXXIV direct the payment of a certain sum of money into Court by a date to be fixed; there is no mention of payment out of Court to the plaintiff. The preliminary decree, therefore, grants time to the defendant for the performance of an act necessary to the further progress of the suit. If he fails to perform that act within the time allowed the Court may under rule 3 of Order XVII proceed to decide the suit forthwith on the materials before it, that is to say, to pass a final decree. And by rules 3 (2) and 5 (2) of Order XXXIV the discretion left to the Court by rule 3 of Order XVII is taken away when the plaintiff applies for a final decree, unless the defendant appears and shows good cause for an enlargement of time. It is strictly for the defendant to appear and do this on or before the date fixed, and the plaintiff is certainly not legally bound to give him an opportunity to do it after that date.

The only ruling I have been able to find dealing directly with this point is that of the Calcutta High Court in *Bechu Singh* v. *Bichharam Sahu* (1). The matter was not directly in issue there and the judgment dealt with the state of things existing before the passing of the Civil Procedure Code, 1908. But the view taken by the High Court of Calcutta of an order absolute under the Transfer of Property Act was that it was a decree, and the remarks of Mookerjee, J., apply, therefore, to Order XXXIV. The learned Judge said: "That previous notice to the judgment-debtor is just in the case of enforcement of a conditional or contingent decree is obvious from the circumstance that such a procedure has been followed in other systems of law. For instance, as explained by this Court in the case of *Jogendra Chandra Roy* v. *Syam Das* (2), in England a writ of *scire facias* was necessary when the execution-creditor sought to enforce a conditional or contingent judgment upon the allegation that the condition has not been performed or the contingency has happened. The same principle was adopted by this Court in the case of *Bibi Tasliman* v. *Harihar Mahto* (3), when it was ruled by a Full Bench that an order absolute under section 89 of the Transfer of Property Act ought not to be made *ex parte*, although that section does not expressly provide for the issue of notice to the mortgagor, and that if such an order has been made without notice to the judgment-debtors mortgagors, the Court has inherent power to set aside the order made *ex parte*." It is not here stated but rather assumed or conceded, that there is no legal necessity for the issue of a notice.

My own impression is that it has always been similarly assumed, almost as axiomatic, that under the Civil Procedure Code, 1908, the issue of notice is not legally but only practically necessary, and that this is casually mentioned in many published judgments but naturally never discussed. There is, however, a fairly general belief, illustrated in this case, that if a defendant has not been served with notice of the application for a final decree it can be said that the summons in the suit of which rule 13 of Order IX speaks was not duly

(1) 1 Ind. Cas. 677; 10 C. L. J. 91.
(2) 1 Ind Cas. 168; 9 C. L. J. 271 at p. 277; 36 C. 543.
(3) 32 C. 253 at p. 256 (F.B.); 9 C. W. N. 81.

served on him and the Court is, therefore, bound to set aside the final decree if it was passed in his absence.

The latest published ruling of this Court on the subject is *Seth Bhagwandas* v. *Shridhar* (4) decided in February 1907. In *Chaitram* v. *Daolat Gond* (5) Stevens, J. C., held in 1895 that no notice was required, and gave three very sound reasons for that view. In 1903 in *Amolakchand* v. *Jawahir Mahomed* (6) Ismay, J. C., expressed a doubt as to the correctness of this view but did not go into the question, which did not really arise in the case before him. In 1907 Stanyon, A. J. C., referred to both these cases in *Seth Bhagwandas* v. *Shridhar* (4) and dissented from the first of them, holding that the Court was bound to issue notice before passing what is now called a final decree but in those days was known as a final order. The basis of the decision is that the proceedings on the application for that final order are not a continuation of the suit, though they are not execution proceedings, which was the only alternative previously suggested, but anomalous proceedings *sui generis*. That view may or may not have been correct then; it is certainly not correct now.

Even, therefore, if no notice of the application for a final decree had even been issued to the two appellants, and they had applied within the time allowed to have the *ex parte* decree set aside, neither of them would be entitled to get this relief as of right. That they are not entitled to any enlargement of time in equity or even as an indulgence is abundantly clear from the history of the case set out at the beginning of this judgment, which shows that for nearly six years they managed on no grounds whatever to retain possession of the property and enjoy the income. It is also clear that they have in fact had full knowledge of every detail of the proceedings from beginning to end. The appeal is accordingly dismissed and the appellants must pay all the costs of the opposite party in both Courts. These costs will be payable personally by the appellants and will not be added to the price of redemption.

W. C. A.

Appeal dismissed

(4) 3 N. L. R. 55.
(5) 9 C. P. L. R. 5.
(6) 16 C. P. L. R. 92.

CALCUTTA HIGH COURT.

CIVIL RULE No. 520 OF 1921.

December 12, 1921.

Present:—Mr. Justice Suhrawardy, and Mr. Justice Ghose.

SANTOSH BALA DEBI AND OTHERS—PETITIONERS

versus

RAM CHANDRA GHATI AND OTHERS—OPPOSITE PARTIES.

Civil Procedure Code (Act V of 1908), s. 115, O. XXI, rr. 89, 92—Application to set aside sale on deposit—Notice to persons affected thereby—Process fee, payment of, if obligatory on the applicant—Revision—Practice of High Court—Confirmation of auction sale—Jurisdiction.

Although Order XXI, rule 92, Civil Procedure Code, requires that no orders shall be made under rule 89 unless notice of an application to set aside the sale has been given to all persons affected thereby, it is not in every case obligatory on the applicant to pay the process fee or to serve notice according to the mode of service prescribed in the Code. [p. 287, col. 2.]

The High Court has jurisdiction (under section 115 Civil Procedure Code) to interfere with the wrong exercise by subordinate Courts of powers vested in them under the provisions of the law dealing with confirmation or setting aside of auction-sales. [p. 287, col. 2.]

Rule against an order of the Court of the Sub Judge, Asansol.

FACTS appear from the judgment.

Babu *Dwarkanath Chuckerbutty* (with him Babu *Bankim Chandra Mukerji*), for the Petitioner.—The learned Munsif was wrong in refusing the application made under Order XXI, rule 89, Civil Procedure Code. The Court should not have confirmed the sale. Order XXI, rule 92, does not make it obligatory on the applicant to pay process fee or to serve notice in every case. The Pleader of the auction-purchaser entered appearance,

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Refers to *Bhairab Pal* v. *Premchand Ghose* (1) No *talbana* was necessary. I submit that gross fraud has been perpetrated.

Babu *Satindranath Mookerji*, for the Opposite Parties.—I submit that the proviso in Order XXI, rule 92, is mandatory and your Lordships cannot interfere with an order which was passed in the exercise of rightful jurisdiction. Refers to *Amir Hassan Khan* v. *Sheo Bakhsh Singh* (2). Even on February 9 process-fee was not deposited in Court. The Courts cannot be said to have acted illegally and without jurisdiction. Refers to Order XLVIII, rule 2, as regards the mode of service of notices.

Reply not called.

JUDGMENT.—The petitioners in this case, who are *parda nashin* ladies, invite us to vacate the order of the Munsif dated the 11th February 1921 confirming the sale of the petitioners' property and virtually refusing an application made by them under Order XXI, rule 89, Civil Procedure Code.

It appears that the property was sold on the 18th December 1920 and purchased by the opposite party for Rs. 730 who deposited the earnest money on that day. On the 4th January 1921 the opposite party deposited the balance of the purchase money and the 22nd of January, was fixed for confirmation of the sale. On the 17th January the judgment-debtors, petitioners before us, deposited the claim and costs with compensation and prayed that the sale might be set aside. On the 22nd January, the date fixed for the confirmation of the sale, the Court passed the following order "Judgment-debtors Nos. 1 to 5 have deposited the claim costs with compensation money within time. Issue notice on the auction-purchaser. Judgment-debtors Nos. 1 to 5 do file process-fee and duly filled in processes within 3 days. Put up on 9th February next." On the 9th February it was found that processes and process-fee had not been filed and deposited in Court. The case was accordingly adjourned to the 11th February for orders. On that date the Court passed the following order: "Judgment debtors' Pleader Babu Ram Pada Mukherjee and clerk Babu Kashinath Catterjee were asked to take steps for the service of notice on the auction-purchaser. But they did not take any steps. So the money deposited by the judgment-debtors cannot be accepted by the Court. Let the sale be, therefore, confirmed."

It is contended by the petitioners that this order is wrong and the Court should not have confirmed the sale in the circumstances detailed above. Order XXI, rule 92, Civil Procedure Code, no doubt, lays down that no order shall be made under rule 89 unless notice of the application has been given to all persons affected thereby, and no doubt the auction-purchaser, who is one of such persons, is entitled to notice of the application under that rule. Rule 92, however, does not make it obligatory on the applicant to pay the process-fee or to serve notice according to the mode of service prescribed in the Civil Procedure Code, in every case. It is clear from an examination of the record that the auction-purchaser appeared through a Pleader on the 18th December 1920, the day on which the sale was held. He further appeared in Court on the 4th January 1921, when he deposited the balance of the purchase-money. He must, therefore, be considered as a party on the record who had entered appearance in Court and accordingly notice of the application could have been given to his Pleader on the record. We have not been referred to any authority which makes it incumbent on the judgment-debtor in such circumstances to pay any process-fee for a formal service of notice of the application on the auction-purchaser. We are satisfied that the order passed by the learned Munsif which was affirmed on appeal by the Subordinate Judge of Asansol is wrong and ought to be set aside.

It is argued by the opposite party that this Court is precluded by virtue of section 115, Civil Procedure Code, from interfering with an order like the present one though passed wrongly. It is needless to say that in innumerable instances this Court has interfered with wrong exercise by the Courts below of powers vested in them under sections dealing with confirmation or setting aside of auction sales. If it is necessary to say anything on the question of jurisdiction we may add that the learned Munsif had no jurisdiction to confirm the sale when the judgment debtors had complied with all the provisions of law and deposited the necessary amount within the time prescribed for that purpose.

(1) 1 C. W. N. clxi (161) *notes*.

(2) 11 I. A. 237; 11 C. 6; 4 Sar. P. C. J. 559; Rafique & Jackson's P. C. No. 83; 5 Ind. Dec (N. S.) 760 (P. C.).

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The result is that this Rule is made absolute and the order of the Munsif of Angeol dated the 11th February 1921 is set aside and the case remanded to that officer for the disposal of the application under Order XXI, rule 89, Civil Procedure Code, in the presence of all parties interested.

Costs of this Rule will abide the result. We assess the hearing fee at two gold *mohurs*.

N. F. *Rule made absolute.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO 463 OF 1920.

June 24, 1 20.

Present :—Mr. Justice Broadway.

THAKAR DAS—DEFENDANT—APPELLANT

versus

S. ABDUL HAMID—PLAINTIFF —RESPONDENT.

Easement—Light and air, obstruction of—Injury—Injunction the rule—Damages the exception—Re-roofing of dominant tenement—Easement not affected.

If the erection of a building completely blocks a window and causes total obstruction of light and air, it is *prima facie* an injury of a serious character and a mandatory injunction should issue. In such a case, injunction is the rule and damages the exception. [p. 289, col. 1.]

Nandkishore Balgovan v. *Bhagubhai Pranvalabhdas*, 8 B. 95; 8 Ind. Jur. 260; 4 Ind. Dec. (N. S.) 437, relied on

Kirpa Ram v. *Gurbaksh*, 2 P. R. 1893, referred to.

The mere fact that it is possible for the owner of the dominant tenement to neutralise the effect of the obstruction of light by re-arranging or altering his own building is no ground for affording him a money compensation. [p. 290, col. 1.]

Ramanujulu Naidu v. *Apparanji Ammal*, 9 Ind. Cas. 417; (1911) 1 M. W. N. 261; 9 M. L. T. 383; 21 M. L. J. 313, referred to.

If a room has existed for over 20 years, the mere fact that it has been re-roofed recently would not deprive its owner of an easement which had been acquired and the latter is *prima facie* entitled to be maintained in his enjoyment of the said easement. [p. 289, col. 1; p. 290, col. 1.]

The grant of an injunction is purely a matter of discretion, to be exercised in a judicial manner. [p. 290, col. 1.]

Second appeal from a decree of the District Judge, Lahore, dated the 12th February 1920, affirming that of the Munsif, First Class, Lahore, dated the 16th October 1919.

Lala *Durga Das*, for the Appellant.

Bakhshi *Tek Chand*, for the Respondent.

JUDGMENT.—The plaintiff, Sheikh Abdul Hamid, owns certain property adjoining the property owned by the defendant, Thakar Dass. Thakar Das commenced to erect certain buildings which threatened to obliterate the window in a room in the second storey of the house belonging to the plaintiff. Thereupon the plaintiff instituted a suit asking for a declaration to the effect that he was entitled to the uninterrupted use of light and air through this window and praying for a mandatory injunction to issue to the defendants prohibiting him from interfering with this window and blocking it in any way. The defendant pleaded that no easement had been acquired *qua* this window, that the window was in a parapet and not in a room, and that the room which now exists was a recent construction. The Trial Court came to a finding that the window had existed for more than 20 years prior to suit and that the window opened into a room and had so opened for over 20 years; a decree was, therefore, granted to the plaintiff as prayed.

Thakar Das, therefore, preferred an appeal to the District Judge which was dismissed, he has now come up to this Court in second appeal through Mr. Durga Das and on behalf of the plaintiff respondent I have heard Mr. Tek Chand. It was argued by Mr. Durga Das that the plaintiff did not live in this house which was let out on small rents to people of the coolie class. It appears there is no evidence to show that the tenants are of this class.

He further contended that the room in question was the only room in the second storey and that it was 12 feet by 14 feet in dimensions having a door leading into it in the western wall while the window in question was in the northern wall. There is no window or door of any kind whatsoever in the southern or eastern wall Mr. Durga Dass took up a great deal of time in endeavouring to show that the learned District Judge had not come to a finding as to the existence of the room as a room for a period of 20 years. Mr. Tek Chand took up an equal length of time in showing that a finding had been arrived at on this point. It is true that the expressions used by the learned District Judge are not particularly happy, but after a careful consideration of his judgment it seems to me that the only conclusion to arrive at is that he has found that the room existed as a room for

over 20 years. He says: "There is every indication of there having always been a room into which the window gave light and air and even if the room had been recently built, it does not, in my opinion, affect merits of the case." It appears that admittedly the room has recently been re-roofed. If as found the room has existed for over 20 years, the mere fact that it has been re-roofed recently would not deprive the plaintiff of an easement which had been acquired.

Again, Mr. Durga Das contended that the learned District Judge had entirely lost sight of the provisions of section 26 of the Limitation Act and had not found that the period of 20 years during which the plaintiff had been receiving light and air through this window ended within few years of the suit. What has been found, however, is that the plaintiff's room with the window in it has been in existence for a period of over 20 years. The provisions of section 26 of the Limitation Act have in no way been contravened or lost sight of by the learned District Judge.

Next, it was argued, that inasmuch as the plaintiff could easily open a window in the southern, western, or eastern wall, it was inequitable to prevent the defendant from building his house so as to block these ancient lights and my attention was drawn to *Vir Bhan* v. *Ramjidas* (1), *Arjan Das* v. *Ganesh Das* (2), *Delhi & London Bank Ld* v. *Hem Lall Dutt* (3) and *Sethuram Madigai Row* v. *Gopal Row Peishwa* (4). In *Vir Bhan* v. *Ramjidas* (1) it was held that in a suit of this nature the rule of decision was whether, in consequence of the obstruction, the plaintiff had less light and air than before to such an appreciable degree as to injure his property in point of value, comfort, convenience, or usefulness, according to its character as a residence or a place of business or warehouse, and that an injunction was the proper remedy where substantial and wrongful injury had been done to the plantiff's rights. Mr. Tek Chand contended that this ruling really assisted him while Mr. Durga Das urged that it was in his favour inasmuch as the plaintiff had not proved that the blocking of this window would result in any loss in value or in comfort, convenience or usefulness. In that case, however, an injunction was granted although there had not been a complete blocking of the ancient lights. *Arjan Das* v. *Ganesh Das* (2), is also a decision of the Chief Court (Agnew, J.) in which the usual principles to be found in all text books on the subject are refered to. That case, however, did not deal with the entire blocking of ancient light but with a problematical reduction in the light which might arise out of the building of a certain balcony. This case does not appear to me to afford assistance in the present one. In *Delhi & London Bank Ld*, v. *Hem Lall Dutt* (3), there had been a diminution of light and it was held that that diminution was not such as to render the house unfit for the ordinary purposes for which it was used. In *Sethuram Madigai Row* v. *Gopal Row Peishwa* (4) there was no question of easement at all. Certain common property had been appropriated by one of the co-owners and it was held that where upon a balance of convenience damages would be an adequate remedy, relief by way of mandatory injunction should not be granted. It has to be borne in mind that in the present case both the Courts below have inspected the property and both have come to the conclusion that the room would become practically uninhabitable if this window was entirely blocked. Here we have not a case of a diminution of light and air but a total obstruction. The building proposed to be erected by the defendant will completely block this window. No doubt it is possible for the plaintiff to open another window on the opposite wall or one of the other walls. It might be a neighbourly act on his part to meet the defendant in this way. But at the same time he is not legally bound to do so and is entitled to enjoy the light and air that he has been enjoying through this window for over 20 years. In *Kirpa Ram* v. *Gurbalsh* (5) in a somewhat similar set of circumstances the plantiff's right to light and air had been completely taken away and it was held that a mandatory injunction should issue.

(1) 1 Ind. Cas. 441; 8 P. R. 1909; 50 P. W. R. 1909; 88 P. L. R. 1909.
(2) 21 Ind. Cas. 249; 172 P. W. R. 1913; 308 P. L. R. 1913.
(3) 14 C. 839; 7 Ind. Dec. (N. S.) 555.
(4) 23 Ind. Cas 785; 1 L. W. 166.
(5) 2 P. R. 1893.

SARAT KAMINI DASI v. CHAITANYA CHANDRA PROHORAJ.

As to the question of actual injury to the house it seems to me that any act by the defendant which controls or obstructs the light and air to which the plaintiff is entitled is *prima facie* an injury of a serious character. In this view I am fortified by the decision in *Nandkishore Balgovan* v. *Bhagubhai Pranvalabhdas* (6), relied on by Mr. Tek Chand. The proposed erection of this building by the defendant is, therefore, a very serious menace to the plaintiff's property, and *prima facie* it seems to me that the plaintiff is entitled to an injunction. It was suggested by Mr Durga Das, that compensation would meet the situation, but in this view I am unable to agree. In this connection *Ramanujulu Naidu* v. *Apparan i Ammal* (7) is instructive. Their Lordships of the Madras High Court held that an injunction was the rule and damages the exception in cases of this nature. They also held that there was no authority for the proposition, that if it was possible for the plaintiff to neutralize the effect of the defendant's buildings by altering or re-arranging his own buildings, then compensation in money would afford adequate relief. It having been proved that the plaintiff has acquired an easement whereby he is entitled to have free access of light and air through this window, he is *prima facie* entitled to be maintained in his enjoyment of the said easement. Again, the grant of an injunction is purely a matter of discretion, a discretion which is, of course, to be exercised in a judicial manner. The Courts below have agreed in thinking that a proper exercise of this discretion entitles the plaintiff to the grant of an injunction and I am unable to see any reason for taking a different view.

I accordingly dismiss this appeal with costs.

N. K. *Appeal dismissed.*

(6) 8 B. 95; 8 Ind. Jur. 260; 4 Ind. Dec. (N. S.) 437.
(7) 9 Ind. Cas. 417; (1911) 1 M. W. N. 251; 9 M. L. T. 382; 2 M. L. J. 313.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2250 OF 1919.

February 9, 1922.

Present :—Justice Sir N. R. Chatterjea, Kt., and Mr. Justice Pearson.

Srimati SARAT KAMINI DASI, AND ON HER DEATH HER HEIRS AND LEGAL REPRESENTATIVES HER SONS JAMINI MOHAN SARKAR AND OTHERS—PLAINTIFFS—APPELLANTS

versus

CHAITANYA CHANDRA PROHORAJ *alias* CHAITANYA CHARAN (CHANDRA IN *Vokalatnama*) MOHAPATRA AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXII, r. 4 (3)—Death of one of several defendants—Legal representative not brought on record - Suit, when does not abate as a whole.

When one of two or more defendants dies and no application is made under Order XXII, rule 4 (3), the suit abates as against the deceased defendant. The question, whether the suit abates as a whole, would depend upon whether the suit can be proved in the absence of the legal representatives of the deceased defendant. If the latter had no joint interest with the other defendants and the interests of the several defendants can be discriminated, the abatement of the suit with respect to the deceased defendant will not result in the dismissal of the entire suit. [p. 291, col. 2; p. 292, col. 1.]

Appeal against a decree of the District Judge, Bankura, dated the 4th August 1919, affirming that of the Munsif, Third Court at that place, dated the 22nd April 1918.

FACTS appear from the judgment.

Babu *Panchanan Ghosh* (with him Babu *Jotindranath Sanyal* for Babu *Kalikinkar Chakravarty*), for the Appellants.—The plaintiff is the appellant. The appeal arises out of a suit for ejectment. Plaintiff's case is that she purchased the interest of Raja Balabhadra Singh who got the estate as reversioner after two ladies had held it in limited interest. The defence is that they held the lands from various grants by those ladies and these were, therefore, binding on the plaintiff and that the plaintiff being a *benamdar* could not maintain the suit. The First Court dismissed the suit on preliminary grounds. Then there were two appeals. In one of them from which the present appeal arises one of the respondents being dead the appeal was dismissed. The ques-

tions in the present appeal are two, *viz.*, (1) whether on the death of one of the respondents in the Court of Appeal below the whole appeal abated or only as against the deceased respondent and (2) whether if some of the parties compromised the whole suit could be dismissed.

[CHATTERJEA, J.—Were the defendants interested in the same plot of land ?]

No. The land was held by forty-eight persons each claiming separate plots under different grants. The only issue tried by the First Court related to the maintainability of the suit by the *benamdar*. These things were not gone into. Refers to Order XXII, rule 4 of the Code of Civil Procedure. I submit the other issues must be tried before it can be known whether they had joint interest. The case in *Kali Dayal* v. *Nagendra Nath* (1) cannot apply as there has been no decree at all in the present case. Refers to *Bai Full* v. *Adesang* (2), *Khuda Bakhsh* v. *Mathra Das* (3), *Hem Kunwar* v. *Amba Prasad* (4), Mullah's Civil Procedure Code 343. As regards the second question two *solenamahs* were filed in the First Court between the plaintiff and two sets of defendants. The Court below has dismissed wrongly the suit as against the others.

Dr. *Sarat Chandra Basak* (with him Babu *Narendra Nath Chowdhury*), for the Respondents.—As regards the question whether the defendants jointly owned the lands there was no issue raised. The relief sought is for *khas* possession of the entire *mouza*. Refers to *Kali Dayal* v. *Nagendra Nath* (1), *Dharanjit Narayan Singh* v. *Chandeshwar Prosad Narayan Singh* (5) and *Azimuddin Mandal* v. *Tara Sankar Ghose* (6). I submit the appeal was imperfectly constituted and has, therefore, been rightly dismissed. As regards the second point the petition of compromise was merely filed. No order was passed on it.

Babu *Panchanan Ghosh* replied in brief.

JUDGMENT.—The plaintiffs-appellants sought to recover possession, by ejectment of the defendants, of the property in dispute under a purchase from Raja Balabhadra Singh. There are a large number of defendants in the case. Among other defences they raised the plea that the plaintiff was the *benamdar* for her husband and, as such, she could not maintain a suit for recovery of possession and for ejectment.

The suit was tried along with another which was also dismissed on the same grounds.

There were appeals in both suits. The other suit was remanded to the lower Court for re-trial, the Court having found that the plaintiff was entitled to maintain the suit. So far as the present case is concerned, it appears that one of the defendants, namely, defendant No. 20, Nagendra Nath Mahapatra, died while the appeal was pending before the Court of Appeal below and no application for substitution of the heirs was made within the period allowed by law. The learned District Judge held that the entire suit be dismissed as there was nothing from which the interest of the several defendants could be discriminated.

The plaintiffs appeal to this Court.

There is no doubt that when one of two or more defendants dies, and no application is made under Order XXII, rule 4, sub-rule (3) the suit shall abate as against the deceased defendant.

The question, whether the suit abates as a whole, depends upon whether the suit can be proved in the absence of the legal representatives of the deceased defendant.

No inquiry appears to have been made by the learned District Judge in the matter. He merely says there is nothing from which the interest of the several defendants could be discriminated.

The plaintiff, no doubt, brought a suit for recovery of possession of a *mouza* but a very large number of persons were made parties defendants. Some of the defendants in their written statement claimed to be in possession of specific parcels of land within the *mouza* separately from the other defendants. It also appears from two petitions put in by some of the defendants, by which they compromised the case with the plaintiff, that they claimed to hold specific parcels of land within definite boundaries, with regard to which they had come to an amicable settlement with the plaintiff.

(1) 54 Ind. Cas. 822; 24 C. W. N. 44 at p. 48; 30 C. L. J. 217.
(2) 26 B. 208; 3 Bom. L. R. 786.
(3) 18 Ind. Cas. R. 182; 85 P. L. R. 1913; 89 P. W. R. 1913; 62 P. R. 1913.
(4) 22 A. 430; A. W. N. (1900) 136; 9 Ind. Dec. (N. s.) 1324.
(5) 11 C. W. N. 504; 5 C. L. J. 393.
(6) 47 Ind. Cas. 638; 28 C. L. J. 201.

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These go to indicate that there are, at any rate, some lands which are held separately by some of the defendants: and if the deceased defendant had no joint interest in these plots of land which the defendants claim to hold separately from the others, it is difficult to see why the abatement of the suit with respect to the defendant No. 20 should result in dismissal of the suit with respect to the entire property.

We think, in these circumstances, that there should be an inquiry into the question whether the lands held by the several sets of defendants were held separately from each other. If the Court comes to the conclusion that the defendants are in possession of specific plots of land in which the deceased defendant had no share, it will proceed to try the case as against such of the defendants. But if, with respect to any plot of land, the deceased defendant No. 20 was jointly concerned, the suit must be dismissed with respect to such plot. The Court will also consider the petition of compromise referred to above.

The case is accordingly remanded to the lower Appellate Court for disposal according to law, having regard to the observations made above.

Costs to abide the result.

N. K.

Case remanded.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No 232 OF 1920.

April 24, 1922.

Present:—Mr. Batten, J. C.

AHILIA AND OTHERS—DEFENDANTS—APPELLANTS

versus

BADANSINGH—PLAINTIFFS—RESPONDENTS.

C. P. Tenancy Act (XI of 1898), s. 46 (1)—Occupancy tenant—Succession—Nearer collateral, heir disqualified under the section whether lets in distant heir.

Section 46 (1) of the C. P. Tenancy Act, 1898, creates a rule of restriction so far as collaterals are concerned The condition requiring the collateral who claims succession to have shared in the cultivation is a disqualification which disentitles the nearest collateral if he has not fulfilled the condition. But it does not confer any right of succession to the occupancy-tenure on a more remote collateral even though he may have shared in the cultivation. [p. 294, col. 1.]

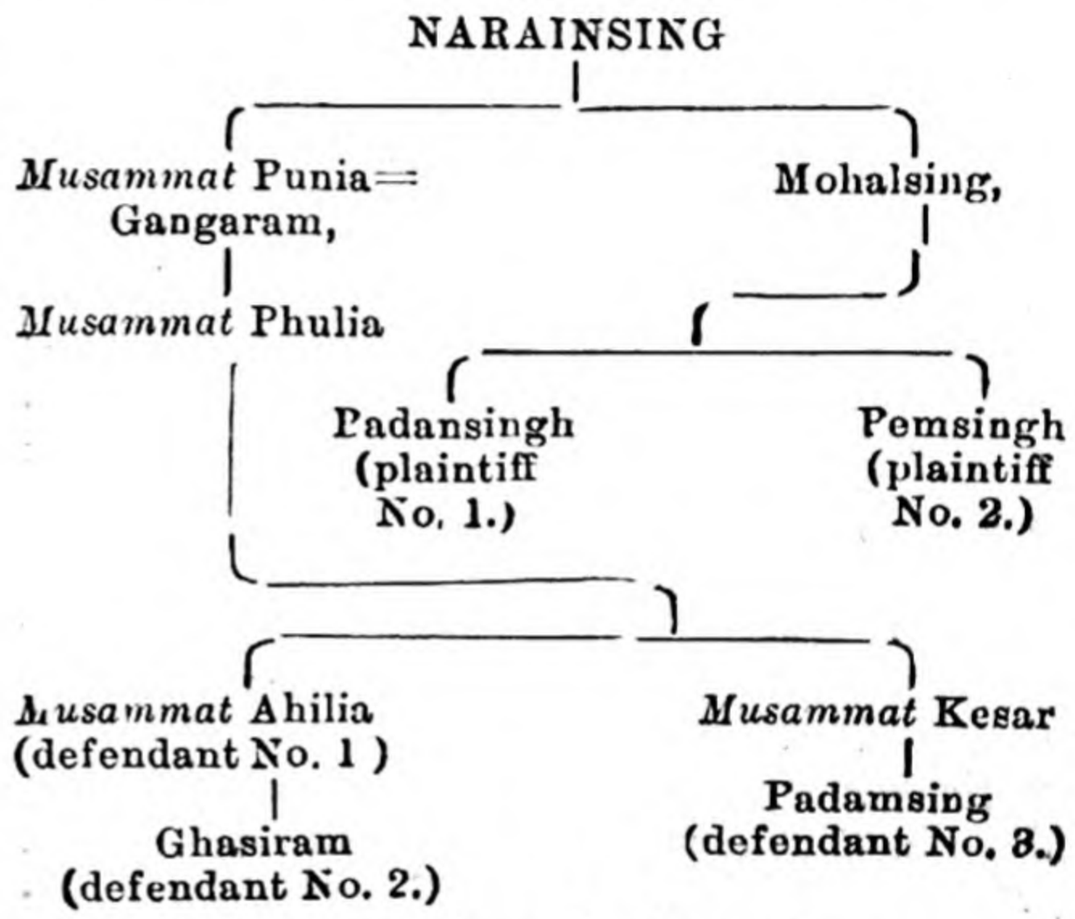
Sheoshankurpuri v. *Musammat Rukhma*, 15 C. P. L. R 89 and *Shankar Lal* v. *Dalip Singh*, 17 A. 33; A. W. N. (1894) 194; 8 Ind. Dec. (N. S.) 345, referred to.

Appeal from a decree of the District Judge, Nimar, dated the 28th February 1920, in Civil Appeal No. 159 of 1919.

Mr. *S. R. Pandit*, for the Appellants.

Mr. *S. P. Golhale*, for the Respondents.

JUDGMENT.—The following genealogical table shows the relationship of the parties:—



It has been found that the occupancy fields in suit were acquired by Gangaram. After Gangaram's death his widow and heir *Musammat* Punia seems to have gifted the fields to the first plaintiff. At any rate in the Settlement of 1896 the fields were recorded in the joint names of Punia and the first plaintiff. On the death of *Musammat* Punia about A. D. 1907, the name of the first defendant *Musammat* Ahilia was according to the *jamabandi* of Samvat 1964 recorded in the place of *Musammat* Punia, but it has been found as a fact that neither *Musammat* Ahilia nor the other two defendants have had anything to do with the fields since the death of Punia, and that the *malguzar* has accepted the first plaintiff as the sole tenant.

The decision of the lower Appellate Court is on the assumption that on the death of Punia her tenancy rights devolved on the second and third defendants. *Musammat* Ahilia pleaded that she was not the tenant herself but her name was entered as representing

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her minor son Ghasiram, with whom defendant No. 3 Padamsing had equal rights.

The lower Courts have held that the tenancy rights of defendants Nos. 1 and 2 have been lost by implied surrender, since neither they nor Ahilia on their behalf cultivated the land or paid rent for more than two years. The appeal by the defendants is against this finding.

In the last Settlement of 1918 the name of the first defendant was entered as sole tenant of field No. 11, and as joint tenant with the plaintiffs of fields Nos. 140 and 143 in suit. It is also alleged by the plaintiff that the defendants have taken possession of part of field No. 11. The plaintiffs pray for a declaration that the plaintiffs are sole tenants of all three fields and for possession of the land of which the defendants have taken possession. The plaintiffs' claim has been decreed in full.

In this Court the learned Counsel for the appellants does not oppose the plaintiffs' claim to a half share in field No. 11 and I gather that similarly he admits the correctness of the Settlement entry as regards the other two fields in which the plaintiffs are recorded as tenants along with the first defendant.

On the view I take of the case, it is not necessary for me to go into the merits of the appeal relative to the correctness of the decision that the defendants have lost their tenancy rights by implied surrender.

The third issue was: "Who are the legal and the preferential heirs of Gangaram, plaintiffs or defendants Nos. 2 and 3, and whom did the holdings devolve on the death of *Musammat* Punia?". The learned Munsif held that the plaintiffs being Gangaram's brother's sons are *gotraja sapindas* while the second and third defendants being daughter's daughter's sons are heritable *Bandhus*. The *gotraja sapindas* he held to have preference over heritable *Bandhus*. He goes on to say: 'But under proviso of section 46 sub section (1) of the C. P. Tenancy Act, 1898, a collateral relative of a tenant cannot inherit a right of tenancy unless at the death of the tenant he was a co-sharer in the holding or unless failing any such co sharer, he held the land or was permanently resident in the village in or from which his holding is cultivated and is in the male line of descent from an ancestor who occupied the holding. Plaintiffs' case does not come under any of these exceptions, nor is this the case pleaded by him. The defendants Nos. 2 and 3 were, therefore, the preferential heirs of Gangaram after *Musammat* Punia's death under section 46 of the C. P. Tenancy Act, and the holdings after their death devolved upon them". This view of the law was not contested in first appeal.

But in this Court the learned Pleader for the respondents under rule 22 Order XLI of the First Schedule of the Civil Procedure Code supports the decree by contesting the correctness of the above view of the law. He argued that a disqualified agnate excludes a *Bandhu* who is a remoter heir. He was not able to cite any authority. The learned Counsel for the appellants also cited no authority, beyond authorities to the effect that a daughter's daughter's son may be an heir in the absence of a nearer heir.

I have, however, since found two rulings on the subject. In *Sheoshankarpuri* v. *Musammat Rukhma* (1), the following observations were made by Ismay, J. C.

"The Civil Judge also remarks incidentally that section 70 (of the C. P. Tenancy Act) has the effect of modifying the Hindu Law of succession and that by reason of the provisions of that section a daughter's daughter's son would exclude any collateral *gotraja sapinda*. Here I think the learned Judge is wrong. The section referred to creates a rule of restriction but nothing more. It first lays down that the person to inherit must be one who would inherit if the property were immoveable property of a totally different kind, and it thus proceeds to exclude some of those persons from the benefit they would otherwise derive as heirs. But such exclusion would not have the effect of letting in any person who is not the heir. In the example given the daughter's daughter's son could not claim to succeed merely because a nearer collateral relative was not a co-sharer in the holding when the tenant died. This was the view taken by the Allahabad High Court in *Shankar Lal* v. *Dalip Singh* (2) and it is no doubt the correct view."

(1) 15 C. P. L. R. 89.
(2) 17 A 33; A. W. N. (1894) 194; 8 Ind. Dec. (N. S.) 1345.

OSMAN MANDAL v. RADHIKA MOHAN ROY.

The above remarks of Ismay, J C., appear to be *obiter dicta*, but that is not the case in respect to the ruling cited by him, which dealt with the present question under the N. W. P. Rent Act XII of 1881, section 9. I would quote the following passage from the judgment of Burkitt, J: "The facts here are that the more remote collateral shared in the cultivation while the nearer collateral did not so share, and the contention is that, to use a phrase of Hindu Law, the more remote collateral, therefore, excludes the nearer, which is a strange proposition. To this proposition I cannot accede. Under the words of section 9 the right shall devolve as if it were land. I hold, therefore, that the person on whom that right devolves is the person indicated as heir by the law to which he is subject, and not a person more remote in the line of succession who may have shared in the cultivation with the deceased occupancy tenant. As has been very properly remarked by my learned brother, the condition requiring the collateral who claims succession to have shared in the cultivation is a disqualification which disentitles the nearest collateral if he has not fulfilled the condition. But it does not confer any right of succession to the occupancy-tenure on a more remote collateral, even though he may have shared in the cultivation."

These arguments are applicable to the facts of the present case, and with due deference I consider them to be correct.

Thus the defendants Nos. 2 and 3 are not entitled to succeed to Gangaram's occupancy holding, in spite of the fact that the plaintiffs, the nearer heirs under Hindu Law, are disqualified. They have no other claim to the holding.

The plaintiffs have a right of suit, for it has been found that the *malguzar* has recognised them as the sole tenants; and they must succeed as the defendants have no *locus standi* at all. The appeal is dismissed with costs.

N. H.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 1396 and 1457 OF 1920.

February 8, 1922.

Present:—Mr. Justice Greaves and Mr. Justice Panton.

OSMAN MANDAL—DEFENDANT—APPELLANT

versus

RADHIKA MOHAN ROY—PLAINTIFF RESPONDENT.

Bengal Tenancy Act (VIII of 1885), s. 50 (1), (2), applicability of—"Permanent settlement," meaning of —Presumption under s. 50 (2).

To gain the advantage of section 50 of the Bengal Tenancy Act, it must be shown that the rate of rent has not been changed from the time of the Permanent Settlement of 1793. [p. 295, col. 2.]

The words "Permanent Settlement" in section 50 (1) and (2) of the Bengal Tenancy Act refer to the Permanent Settlement of 1793, and not to any other Settlement when the land itself was permanently settled. [p 295, col. 2.]

Even if a case does not come within section 50 of the Bengal Tenancy Act, the fact that uniform rent has been paid for a period of 20 years, may create a presumption in favour of the tenure-holder that the rate of his rent has not been changed from the time of the Permanent Settlement of 1793. [p. 295, col. 2.]

Appeals against the decrees of the Officiating Subordinate Judge, Second Court, 24-Parganahs dated the 1st March 1920.

FACTS appear from the judgment.

Babu *Ramgati Sarkar*, for the Appellant:—Notwithstanding the definition of Permanent Settlement contained in section 3-sub section (12) of the Bengal Tenancy Act, the expression "Permanent Settlement" referred to in section 50 of the Act does not mean only the Permanent Settlement of 1793. It may refer to the settlement when the land of the tenancy itself was permanently settled. In the present case the land not having been permanently settled until 1905, the words "Permanent Settlement" as used in section 50 refer to the Settlement of 1905. See *Tamasha Bibi* v. *Ashutosh Dhur* (1) and *Khettermoni Dasi* v. *Jiban Krishna Kundoo* (2). Even if it be held that the presumption under section 50 is not available to the defendant by reason of the land having been permanently settled only in 1905, the fact of uniform payment of rent for a period of more than 20 years

(1) 4 C. W. N. 513 at p. 517.
(2) 28 Ind. Cas. 510; 21 C. L. J. 315; 19 C. W. N. 546.

would, under the general law, raise a presumption of fixity of rent in favour of the defendant. See *Gulab Mister* v. *Kalanand Singh* (3), *Nityananda Pal* v *Nanda Kumar* (4) and *Pran Krishna Shaha* v. *Mukta Sundari Dassya* (5). My last contention is that the lower Appellate Court ought not to have increased the enhancement allowed by the Trial Court without referring to the materials stated in section 30 sub-section (*b*) of the Bengal Tenancy Act.

Babu *Surendra Nath Sen* (with him Babu *Rai Kumar Chakravarty*) for the Respondent, was not called upon to reply.

JUDGMENT.—These two appeals are by the defendant against decisions of the Subordinate Judge of 24-Parganahs affirming decisions of the Munsif of Baruipur.

The main point that arises for our decision in these appeals is, whether the tenant defendant who is an occupancy *raiyat* is entitled to the protection of section 50 of the Bengal Tenancy Act. Now, what has been argued before us is that, despite the definition of Permanent Settlement contained in section 3, sub-section (12) of the Act, the decisions of this Court go to show that the words Permanent Settlement as used in section 50 are not to be confined to the Permanent Settlement of 1793 and it is said that inasmuch as the land in suit was not permanently settled until 1905 we should hold that the words Permanent Settlement as appearing in section 50, sub-section (1) and also in sub section (2) refer not to the Permanent Settlement of 1793 but to the Settlement of 1905 when the land itself was permanently settled. Now, no decision has been cited to us which would show that the words Permanent Settlement in section 50, sub-section (1) of the Bengal Tenancy Act, do not relate to the Permanent Settlement of 1793. But so far as sub-section 2 is concerned we have been referred in support of the argument addressed to us to the case of *Tamasha Bibi* v. *Ashutosh Dhur* (1) and to the remarks of Sir Francis Maclean at page 514 in that case when he says discussing sub-section (2) of section 50 that he sees no reason for restricting the operation of the section to the Permanent Settlement of 1793. We have been further referred to a passage in Mr. Justice Banerjee's judgment at page 515 to the same effect. The other case to which we have been referred is the case of *Khettermoni Dasi* v. *Jiban Krishna Kundoo* (2) which cites and follows the decision in *Tamasha Bibi* v. *Ashutosh Dhur* (1). Now, as we read the decision in *Tamasha Bibi* v. *Ashutosh Dhur* (1) neither of the learned Judges who decided that case say that the Permanent Settlement in section 50 sub-section (2) does not mean the Permanent Settlement of 1793. But what they say is this that the presumption of the sub section still applies even if the rent was permanently settled at a later date than 1793. That seems to us to be the real *ratio decidenti* of the decisions in both the cases to which we have been referred. Accordingly it does not seem to us that there is any force in the first contention raised before us with regard to the meaning of the words Permanent Settlement in the two sub-sections of section 50 to which we have referred. To gain the advantage of section 50, therefore, the defendant has to show that the rate of rent has not been changed from the time of the Permanent Settlement of 1793. But there is an express finding that the *jama* was created some 70 years ago. Accordingly it is not fact that the rent has not changed since 1793. Then again so far as sub-section (2) is concerned no doubt there is a finding of the Munsif that the rent has not been changed during the 20 years prior to the institution of the suit and that is a finding to the contrary within the meaning of the excluding part of the sub-section as the origin of the *jama* has been found to be some 70 or 75 years ago.

A further point was urged before us, namely, that assuming that section 50 has no application, from the fact that uniform rent has been paid for a period of 20 years the Court might draw a presumption in favour of the defendant and we were referred to the case of *Nityananda Pal* v. *Nanda Kumar* (4) in support of this proposition. Now there is no doubt that this is so. But so far as the present case is concerned this point was never raised in the lower Appellate Court, and although it is true that there is a finding of the Munsif that the tenant paid rent at a uniform rate for more than 20 years we have no express finding of the lower Appellate Court with regard to this although he does

(3) 6 Ind. Cas. 217; 12 C. L. J. 107; 14 C. W. N. 884.
(4) 10 Ind. Cas. 163; 13 C. L. J. 415.
(5) 21 Ind. Cas. 544; 18 C. L. J. 193.

refer to the payment of uniform rate of rent for a period of 24 or 25 years. But if even if there were such a finding we should not be prepared from the length of time or under the facts and circumstances of the present case to draw the presumption which we were asked to draw.

One further point was argued. The Munsif enhanced the rent under the provisions of section 30 sub-section (*b*) by two annas in the rupee. The learned Subordinate Judge has increased the enhancement by six pies in the rupee. It is said that there is nothing to show how he arived at this figure. But he does state that the plaintiff is entitled to get an enhancement by 3 annas 6 pies in the rupee. Therefore, we must take it that he has applied his mind to the necessary materials under section 30 sub-section (*b*) in granting the enhancement of 2 annas 6 pies in the rupee which he has allowed.

In the result these appeals fail and must be dismissed with costs.

W. C. A.

Appeals dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 530 OF 1920.
April 24, 1922.
Present :—Mr. Hallifax, A. J. C.
DEBILAL—PLAINTIFF—APPELLANT
versus
KRISHNAJI—DEFENDANT No. 1
—RESPONDENT.

Civil Procedure Code (Act V of 1908), O III, r. 4 (2), s. 151—Plaint returned for presentation to proper Court—Power of Pleader to represent his client, if determined—S. 151, inherent power under, when to be used.

Under Order III, rule 4 (2), Civil Procedure Code, the appointment of a Pleader is not determined until all proceedings in the suit are ended so far as regards the client. [p. 297, col. 2.]

Where a plaint is returned for presentation to the proper Court, the original *vakalatnama* of the plaintiff's Pleader is not determined where the presentation of the plaint before the proper Court can be considered as a continuation of the proceedings in the suit as originally instituted for the purposes of O. III, r. 4 (2) of the Civil Procedure Code, as for instance, where the plaint is presented to the proper Court on the same day on which it is returned. [p 297, col. 2.]

By its very terms section 151, Civil Procedure Code, does, in certain specified circumstances, nullify the clear and imperative provisions of the Code as well as those that are ambiguous or advisory, if any of the latter classes exist The provisions which cannot be nullified by virtue of the power mentioned in that section are not those that are clear and imperative but only those whose operation in the particular case will not defeat the ends of justice or lead to abuse of the process of the Court. [p. 297, col. 1.]

The power mentioned in section 151, Civil Procedure Code, must be used sparingly and only in the last resort if only because of the great danger of mistake as to what the justice of a given case may be.

Appeal from a decree of the Additional District Judge, Nagpur, dated the 31st August 1920, in Civil Appeal No. 89 of 1920.

Mr. *N. G. Sarkar*, R. B., for the Appellant.
Mr. *M. B. Kinkhede*, for the Respondent.

JUDGMENT—The plaint in this suit was originally presented in the Court of the Senior Munsif, Katol, on the 12th of March 1919, having been held back till the very last possible day in accordance with the incomprehensible custom prevalent among Indian litigants. The claim was originally valued at Rs. 1,750 but on enquiry it was found that the proper valuation was Rs. 356 only. As the Court of the Senior Munsif tried no suits with a valuation of less than Rs. 400 the plaint was, on the 24th of July 1919, returned to Mr. Bakre, the Pleader who was representing the plaintiff in that Court under a proper *vakalatnama*, for presentation to the proper Court, which was that of the Junior Munsif. Mr. Bakre presented the plaint in the Court of the Junior Munsif on the same day, and with it he put in a written application stating that he understood that his power to act for the plaintiff had expired, and asking that he might be given time for procuring a fresh *vakalatnama* from his client who lived at Shegaon in the Buldana District, the plaint being provisionally accepted in the meantime.

The learned Junior Munsif, purporting to exercise the power mentioned in section 151 of the Civil Procedure Code, admitted the plaint and treated it thereafter as having been presented on that day. On the 4th of August 1919 Mr. Bakre put in a fresh *vakalatnama* duly signed by the plaintiff, the Court having allowed him time up to that

day for that purpose. On the merits, the suit was decided in favour of the plaintiff, who was given a decree for possession of the land he claimed against the first defendant. The latter appealed and the learned Additional District Judge ordered the dismissal of the suit as barred by time, holding that it had not been properly presented in the Court of the Junior Munsif till the 4th of August 1919, and that that Court had no power, under section 151 of the Civil Procedure Code, to allow the plaintiff time for the production of the *vakalatnama*, as that would be to nullify the provisions of rules 1 and 4 of Order III of the Civil Procedure Code.

The only reason stated for the view that section 151 could not be called in aid in this case is that the provisions of the two rules which were overridden by virtue of that section are clear and imperative. The learned Judge writes: "The provisions of rules 1 and 4 of Order III of the Civil Procedure Code are quite clear and imperative and, therefore, I hold that the lower Court could not, under section 151 of the Civil Procedure Code, make an order which had the effect of nullifying the provisions of the said rules." But by its very terms section 151 does, in certain specified circumstances, nullify the clear and imperative provisions of the Code as well as those that are ambiguous or advisory, if any of the latter classes exist The provisions which cannot be nullified by virtue of the power mentioned in that section are not those that are clear and imperative but only those whose operation in the particular case will not defeat the ends of justice or lead to abuse of the process of the Court.

I am strongly inclined to agree with the learned Munsif that the present case is a proper one for the application of section 151. But the power there mentioned must be used very sparingly and only in the last resort, if only because of the great danger of mistake as to what the justice of a given case may be, and the same result can here be achieved in accordance with the letter as well as the spirit of the law. The fundamental assumption made by the learned Pleader for the plaintiff, to which both Judges who dealt with the case and both parties have all along assented, is that the *vakalatnama* executed for the purposes of the suit in the Senior Munsif's Court expired with the return of the plaint and did not enure for the purposes of the further proceedings in the Junior Munsif's Court. This appears to me to be wrong. Under rule 4 (2) of Order III the original appointment of the Pleader in the Senior Munsif's Court remained in force till all proceedings in the suit were ended so far as regards the plaintiff.

The express provision that a *vakalatnama* remained in force till all proceedings in the suit were ended first appeared in the Civil Procedure Code of 1882. But the principle had been accepted long before that. In 1867 in *Shah Mukhun Lal* v. *Sreekishen Singh* (1) the Calcutta High Court allowed a Pleader to appear without fresh authority in an application for leave to appeal to the Privy Council because he had filed a *vakalatnama* in the appeal to the High Court. Similarly, in 1869 the Pleader who had appeared in the original suit which was dismissed in default was held, in *Rajah Sutto Churn Ghossal Bahadoor* v. *Suroop Chunder Doss* (2), not to require a fresh *vakalatnama* to enable him to file an application for restoration. In 1892, in *Raghunath Singh* v. *Raghubir Sahai* (3), the Allahabad High Court allowed a Pleader to put in an application for the restoration of an appeal that had been dismissed in default by virtue of the *vakalatnama* authorising him to conduct the appeal. Lastly, the Bombay High Court in 1895 enunciated, in *Sadashiv Ganpatrao* v. *Vithaldas Nanchand* (4), the principle that has always been accepted since then, that for the purposes with which we are now concerned execution proceedings are a part of the original suit. I can see no difference in principle between these cases and that of the present appellant.

I wish to guard myself carefully against being understood to say that the presentation of a plaint in the proper Court after its return to the plaintiff by a Court to which it had been wrongly presented, is always continuation of the proceedings in the suit originally instituted, for the purposes of rule 4 (2) of Order III of the Civil Procedure Code. All it is necessary, and

(1) 8 W. R. 92
(2) 12 W. R. 465.
(3) 15 A. 55; A. W. N. (1892) 222; 7 Ind. Dec. (N. S.) 751.
(4) 20 B. 198; 10 Ind. Dec. (N. S.) 694.

therefore, all it is permissible, for me to say is that in this particular case the proceedings in the suit instituted in the Court of the Senior Munsif did not end so far as regards the plaintiff for the purposes of rule 4 (2) of Order III when that Court returned the plaint to his Pleader, but were continued by, and in, the proceedings in the Court of the Junior Munsif.

The *vakalatnama* filed in the First Court was not, as a matter of fact, produced with the plaint in the Second Court, but that is because it was mistakenly supposed by both Courts and by the Pleader to have expired and had been retained in the First Court; it was mentioned in the application put in with the plaint in the Second Court. For these reasons I hold, that the suit was not barred by time, and as the appeal was decided on that preliminary issue the case must be remanded to the lower Appellate Court for a fresh decision on the merits. Costs in this Court will follow the result. There will be no certificate for the refund of Court fees.

B. N. & N. H.

Case remanded.

CALCUTTA HIGH COURT.
CIVIL RULE No. 577 OF 1921.
December 21, 1921.
Present:—Mr. Justice Suhrawardy and Mr. Justice Cuming.
PANCHANAN PODDAR AND ANOTHER—PLAINTIFFS—PETITIONERS
versus
KHITISH CHANDRA *alias* BHOLA SAHA AND OTHERS—DEFENDANTS—OPPOSITE PARTIES.

Contract Act (IX of 1872), s. 25 (3)—Acknowledgment of barred debt—Implied promise to pay—Limitation Act (IX of 1908), s. 19—Renewal of barred debt.

A document renewing a debt which had already become barred by limitation, cannot operate as an acknowledgment under section 19 of the Limitation Act.

An unconditional acknowledgment of a barred debt cannot be given effect to, as giving rise to an implied promise to pay within the meaning of section 25 (3) of the Contract Act.

Rule against the order of the Sub Judge, First Court, Pabna, exercising the powers of a Court of Small Causes.

FACTS appear from the judgment.

Babu *Charu Chandra Sen* (with him Babu *Brojendra Kumar Ray*), for the Petitioners.—I submit that I am entitled to recover even if it is a barred debt. Refers to section 25, clause (3), of the Indian Contract Act. The opposite party promises to pay the amount. I contend that when the defendant's predecessor executed the *hatchita* I am entitled to recover the amount due. Barred debt is to be regarded as the consideration for the contract. I submit that it is a promise to pay. I do not say that it is an acknowledgment, but it is a fresh promise to pay. Refers to illustration (*e*) of clause (3), section 25, Contract Act.

[SUHRAWARDY, J.—Unless there is express promise to pay you cannot come under section 25, Contract Act.]

I submit that if the defendant says, "I admit I owe you so much," that amounts to a promise to pay.

[CUMING, J.—No, this is merely an acknowledgment, and so the Limitation Act stands in your way.]

I have already submitted that having regard to the provisions of clause (3) of section 25 and illustration (*e*) of the Contract Act, my claim to recover the sum cannot be defeated. It is a clear promise to pay and is so enforceable under the law.

Babu *Jatindra Mohan Choudhury*, for Babu *Dwijendra Krishna Dutt*, for the Opposite Parties, not called upon.

JUDGMENT.—One Mohim Chandra Poddar and the plaintiffs were partners in a business. On accounts being adjusted in 1312 Mohim Chandra Poddar executed a *hatchita* in favour of the plaintiffs on the 2nd of Baisakh 1312 for Rs 227-11-9. This *hatchita* was renewed on the 7th Magh 1315 by another *hatchita* in which this amount is mentioned as due. It was subsequently renewed several times in 1318, 1321 and, lastly, on the 25th Pous 1324. The plaintiffs brought this suit basing

his cause of action on the *hatchita* executed in 1324.

The learned Subordinate Judge of Pabna, exercising Small Cause Court Jurisdiction, dismissed the plaintiffs' suit on the ground that on the 7th Magh 1315 when the *hatchita* was renewed for the first time the debt had already become time-barred and so it could not operate as an acknowledgment under section 19 of the Limitation Act.

It is argued in this Rule, which has been obtained by the plaintiffs, that the *hatchita* of the 7th Magh 1315 ought to be treated as a contract within the meaning of section 25, clause (3) of the Contract Act. That clause, so far as it is pertinent to the present enquiry, says that "an agreement made without consideration is void unless it is a promise made in writing and signed by the person to be charged therewith * * * to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitations of suits." It is clear that such an agreement must be a promise to pay a barred debt. The *hatchita* as it stands is merely an unconditional acknowledgment of a debt which, at the date it was executed, was barred. If effect is given to such an acknowledgment, as giving rise to an implied promise to pay, the provisions of the Contract Act would make the condition precedent of the debt being an existing debt as laid down in section 19 of the Limitation Act totally nugatory. We are, therefore, of opinion that the learned Judge is right in his view that the present suit is barred by limitation.

The Rule is discharged with costs to the appearing opposite party. We assess the hearing-fee at one gold *mohur*.

S. D.

Rule discharged.

LAHORE HIGH COURT.

LETTERS PATENT APPEAL No. 188 OF 1921.

February 4, 1922.

Present:—Sir Shadi Lal, KT., Chief Justice, and Mr. Justice Campbell.

RAM CHANDRA—DEFENDANT—APPELLANT

versus

RAGHBIR SINGH—PLAINTIFF—RESPONDENT.

Injunction—Discretion—Duty of Court—Injury to defendant.

In dealing with suits for injunction the Court has to consider in each case not merely whether the plaintiff's legal right has been infringed or even materially infringed, but also whether, under all the circumstances of the case, he ought to be granted an injunction as the proper and appropriate remedy for such infringment.

Ghanasham Nilkant Madkani v. *Moroba Ramchandra Rai*, 18 B. 474 at p 488; 9 Ind. Dec. (N. S.) 825, relied upon

Where a suit for injunction is prompted by a desire to cause injury to the defendant, the Court will refuse to grant an injunction.

Letters Patent Appeal from the decree of Mr. Justice Martineau (passed in Civil Appeal No. 2538 of 1920) dated the 27th June 192', affirming that of the District Judge, Karnal, dated the 10th of August 1920.

Mr. *Manohar Lal*, for the Appellant.

Bakhshi *Tek Chand*, for the Respondent.

JUDGMENT.—A perusal of the plan makes it perfectly clear that the portion of the wall marked C. D. in the sketch given in the judgment of the Munsif stands between two rooms, which belong to the defendant, and that the plaintiff cannot have any access to that portion of the wall without committing a trespass on the defendant's property. The wall may be joint, but it is quite clear, and indeed it has been found by Mr. Justice Martineau, that "the pulling down of the wall and the building of the staircase" does no harm to the plaintiff, and that the mandatory injunction, if granted, would certainly injure the defendant.

In these circumstances, we are of opinion that the plaintiff is not entitled to a mandatory injunction. As pointed out in *Ghanasham Nilkant Madkani* v. *Moroba Ramchandra Rai* (1), the Court has to consider in each case not merely whether the plaintiff's legal right has been infringed or even

materially infringed, but also whether, under all the circumstances of the case, he ought to be granted an injunction as the proper and appropriate remedy for such infringement. It appears that the parties, though relatives, are on bad terms, and that the present suit for injunction is prompted by a desire to cause injury to the defendant.

We accordingly accept the appeal, and, setting aside the judgment of the Single Bench, dismiss the suit with costs throughout. The cross-objections are dismissed.

Z. K.

Appeal accepted.

(1) 18 B. 474 at p. 488; 9 Ind. Dec. (N. S.) 825.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1435 OF 1920.

February 10, 1922.

Present:—Mr. Justice Greaves and Mr. Justice Panton.

HEMANGINI DASI—PLAINTIFF—APPELLANT

versus

SITAL MONDAL AND ANOTHER—DEFENDANTS—RESPONDENTS.

Hindu Law—Joint estate—Separation in mess—Possession of one co-sharer, whether adverse to other co-sharers.

In the case of a joint estate, the fact that the co-sharers are separate in mess, would not render the possession of one co-sharer adverse to the others.

Balaram Guria v. *Syama Charan Mondal*, 60 Ind. Cas. 298; 24 C. W. N. 1057; 33 C. L. J. 344, referred to.

Appeal against a decree of the Officiating Subordinate Judge, Second Court, 24-Parganas, dated the 20th February 1920, reversing that of the Munsif, First Court at Basirhat, dated the 27th of January 1919

FACTS appear from the judgment.

Babu *Dwijendra Nath Mookerjee*, for the Appellant.—I submit that the decision of the learned Munsif is right and that of the learned Subordinate Judge is clearly wrong in law and so must be set aside. It cannot be denied that Motilal and Baikuntha separated,

[GREAVES, J.—Motilal separated. He and Baikuntha were joint at the time of the lease. For five years Baikuntha received rent.]

Motilal and Baikuntha separated in mess, but their properties were never partitioned. There is no finding as to separation of property. Till death Motilal lived in the same *bari*, but they were in separate mess no doubt. The worst against my client is that he did not have possession and did not receive rent, nor did he pay rent to his superior landlord. The very fact that the defendant raises adverse possession shows that their properties were not partitioned. Under the aforesaid circumstances the possession of Baikuntha and his heirs cannot be held as adverse to Motilal's heirs. *Balaram Guria* v. *Syama Charan Mondal* (1), is clearly in point and disposes of the contention of the learned Subordinate Judge.

No one appeared for the Respondent.

JUDGMENT.—This is an appeal by the plaintiff against a decision of the Officiating Subordinate Judge of the 24-Parganas reversing a decision of the Munsif of Basirhat. The plaintiff sued for declaration of her title to, and to establish her right to the rent of, certain land. Her case was that the land belonged originally to one Motilal and that she acquired the land by purchase from Moti Lal's successors-in-interest. The defence was that the land belonged not to Motilal but to Baikuntha and that the defendants were the heirs of Baikuntha. It appeared in evidence that the lands in suit were acquired at a time when Motilal and Baikuntha were joint and, accordingly the plaintiff reduced her claim to 8-annas share in the land claiming Motilal's share. The Munsif decreed the suit in the plaintiff's favour so far as regards the 8 annas share. But the lower Appellate Court reversed the Munsif's finding holding that Motilal and his successors-in-interest were barred by the adverse possession of Baikuntha and his heirs. It is said that the lower Appellate Court was wrong in so holding and that in-

(1) 60 Ind. Cas. 298; 24 C. W. N. 1057; 33 C. L. J. 344.

asmuch as Motilal and Baikuntha only separated in mess and not in estate the possession of Baikuntha and his heirs could not be held as adverse to their co-sharers, that is to Motilal's heirs. We were referred to the case of *Balaram Guria* v. *Syama Charan Mondal* (1). We think that the appellant's contention is correct, and that the Munsif correctly stated the law on the point and that the Subordinate Judge has wrongly held, under the circumstances, that the possession of Baikuntha and his heirs was adverse to Motilal and his heirs.

The result is, that we reverse the decision of the Subordinate Judge and restore the decision of the Munsif. The plaintiff will be entitled to the costs of this appeal and to her costs in the lower Appellate Court.

W. C. A. *Appeal allowed.*

LAHORE HIGH COURT.

MISCELLANEOUS SECOND CIVIL APPEAL No. 1629 OF 1921.

January 6, 1922.

Present:—Mr. Justice Martineau.

HONDA RAM—SURETY-JUDGMENT DEBTOR—APPELLANT

versus

THE FIRM SETH KANWAR BHAN-SUKH NAND AT MULTAN—DECREE-HOLDER AND THE OFFICIAL RECEIVER, ESTATE OF THE FIRM NAND & CO. OF MULTAN—JUDGMENT-DEBTOR—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 182, Explanation I—Decree against principal and surety—Surety, liability of, only on default of principal—Decree, whether joint—Execution proceedings against principal, whether effective against surety.

Where a decree in a suit against a principal and his surety directs that the surety would be liable when the money is not realized from the principal, and owing to the principal's insolvency an application for execution is made against the surety more than three years after the date of the decree but within three years from the date of the application for execution against the principal, it is not barred in accordance with Explanation I of Article 182 of Schedule I to the Limitation Act inasmuch as the principal and surety are not made liable under the decree for different portions of the subject-matter thereof but each is made liable for the whole decretal amount and, therefore, the decree is a "joint" one passed against both of them.

Narayan Ganpatbhat Agsal v. *Timmaya*, 31 B. 50; 8 Bom. L. R. 807, distinguished.

Miscellaneous second appeal from an order of the District Judge, Multan, dated the 7th April 1921, reversing that of the Munsif, First Class, Multan, dated the 2nd October 1920.

Lala *Madan Gopal*, for the Appellant.

Dr. *Gokal Chand Narang* and Lala *Har Gopal*, for the Respondents.

JUDGMENT.—The firm of Kanwar-Bhan Sukh Nand obtained a money-decree in 1914 against Nand and Company as principal debtors and against Honda Ram as surety, the decree resiting that Honda Ram would be liable if the money were not realized from Nand and Company. Execution was first taken out against Nand and Company, but they were adjudicated insolvents, and on the 16th July 1918 application for execution was made against Honda Ram. That was consigned to the record room, and in the following year a fresh application was made which is the subject of the present appeal. The First Court dismissed the application on the ground that the decree-holders should have first taken steps to recover their money from the property of Nand and Company, but the District Judge on appeal set aside the order and held that the decree-holders were entitled to proceed against the surety. The latter has appealed to this Court. The second and third grounds of appeal have not been argued, and the only contention put forward by Mr. Madan Gopal on the appellant's behalf is, that the decree was not passed jointly against Nand and Company and the surety and that, therefore, as execution was not applied for against the appellant till more than three years had elapsed since the decree was passed, the present application for execution is barred by limitation. I cannot agree with this contention. Nand and Company and the appellant are not made liable under the decree for different portions of the subject-matter thereof, but each is made liable for the whole of the decretal amount. The decree is passed "jointly" against both

the judgment-debtors notwithstanding the fact that it is to be executed against the surety only in case the decree-holders fail to realize it from the principal debtors. The previous applications for execution against Nand and Company, therefore, take effect also against the appellant under Explanation I to Article 182 of the First Schedule of the Limitation Act, and the present application for execution against the appellant is within time.

Narayan Ganpatbhat Agsal v. *Timmaya* (1), which is cited on behalf of the appellant, is not in point, as in that case the surety had made himself liable only under section 253 of the Civil Procedure Code of 1882 (corresponding to section 145 of the present Code) and there was no decree against him.

The appeal fails and I dismiss it with costs.

S. D. *Appeal dismissed.*

(1) 31 B. 50, 8 Bom. L. R. 807.

CALCUTTA HIGH COURT.
CIVIL RULE No. 565 OF 1921.
February 7, 1922.
Present:—Justice Sir John Woodroffe, Kt., and Mr. Justice Ghose.
ABDUL HUQ AND ANOTHER—PETITIONERS
versus
MOHAMADD N AND ANOTHER—OPPOSITE-PARTY.

Calcutta Rent Act (III of 1920)—Government of India Act, 1915, (5 & 6 Geo. V, c. 61), s. 107—Controller under Rent Act, Court of, whether Civil Court—High Court, power of, to interfere—Civil Procedure Code (Act V of 1908), O. XX, r. 4 (2)—Judgment based on personal inspection—High Court, power of, to set aside.

The Court of the Controller, appointed under the Calcutta Rent Act, is a Court of civil jurisdiction, and the High Court, by virtue of the general powers of superintendence conferred upon it by section 107 of the Government of India Act, 1915, has power to revise orders made by the Controller [p. 303, col. 1.]

Where the judgment of a Court appears to be based solely on a personal inspection by the Presiding Officer, and contains no reference to the evidence taken in the case, it is liable to be set aside by the High Court. [p. 303, cols. 1 & 2.]

Rule against an order of the Court of the Controller of Rents, Calcutta.

FACTS appear from the judgment.

Babu *Mohendranath Roy*, (with him Babu *Santosh Kumar Bose*), for the Opposite Party.—This matter arises out of a decision of the Rent Controller appointed under the Calcutta Rent Act. I submit this Court has no power to revise the order under section 115 of the Code of Civil Procedure, the Rent Controller being no Court under the Code.

Babu *Manmatha Nath Mookerjee* (with him Babu *Nanda Gopal Banerjee*), for the Petitioner.—I submit there is no substance in the preliminary objection. It has been held by this Court that the order of the Rent Controller is revisable by this Court. Further section 107 of the Government of India Act confers wide powers of superintendence over all subordinate Courts by the High Court. The petitioner is a tenant of the premises. The rent was originally Rs. 180. Then the opposite parties took lease of the premises from the landlord and enhanced my rent to Rs. 400. Hence I applied for standardisation of rent under section 15 of the Calcutta Rent Act. After the evidence was adduced by the parties the Controller went to the spot and inspected the premises and brushing aside all evidence, he came to the conclusion that the premises in question were excluded from the scope of the Act. The question is can he do that? He held that the premises are godowns. I submit the Controller has not acted as Court. Our case was that the house was partly let out for residential purposes and partly for storing hides. He has absolutely no jurisdiction to make such enquiry according to the rules under section 23 of the Act. He did not refer to the evidence at all and ought to have considered the original purpose for which the premises were let.

Babu *Mohendranath Roy* (with him Babu *Santosh Kumar Bose*), for the Opposite Parties.—This Court has no powers to interfere under section 115 inasmuch as the judgment is based on inspection note. We have distinctly set out the plea that the premises were let out as hide godowns. The Controller had to decide that question. In the Court below no lease was produced and the whole matter had to be decided on oral evidence. There is evidence on the record to

ABDUL HUQ v. MOHAMADDIN.

show that the premises were used as godowns. He inspected the place after the conclusion of the evidence. The mere omission to refer to the evidence does not vitiate the judgment.

Babu *Manmathanath Mookerjee* replied in brief.

JUDGMENT.—In this case the petitioner who is a tenant who rented certain premises at a rent of Rs. 180 a month and whose rent was enhanced from Rs. 180 to Rs. 400, asked that the standard rent might be fixed under the Calcutta Rent Act. Evidence was taken, we are told, from both parties, and at the conclusion of the evidence the Controller went and inspected the premises in question and then wrote his judgment holding that the premises he inspected were not "premises" within the meaning of the definition in the Calcutta Rent Act. These "premises" are defined as "any building or part of a building or *hut* let separately for residential, charitable, educational or public purposes or for the purposes of a shop or an office including any land appertaining thereto and let therewith." The Controller held in his judgment that this was not a case in which the standard rent could be fixed. An application was then made to this Court to revise that decision on the ground that the Rent Controller had acted illegally or with material irregularity in basing his decision upon his inspection without, it is said, any reference to the evidence which has been taken in the case.

A preliminary objection is raised that we have no power in revision to interfere with the decision of the Rent Controller. It has, however, been held by this Court that the Rent Controller's Court is a Court of civil jurisdiction and that the High Court has power to revise the Rent Controller's orders under its general power of superintendence under section 107 of the Government of India Act. We see no reason for dissenting from that decision. It is then said that even if we have jurisdiction to hear this matter, this is not a case in which we should do so. His judgment is expressed in such a way as to indicate, (whether it be the fact or not), that it is based on inspection only; for no reference is made to the evidence which had been previously taken. Whether in fact the Judge had in his mind such evidence and based his decision on such evidence we cannot say. We can only deal with the judgment as it is and draw such inference as the language there used implies. We see no reference made to the evidence. Again, we do not know what use the learned Judge made of that inspection whether it was for the purpose of explaining the evidence, assuming that he had in his mind the evidence which he had taken, or whether or not the learned Judge's decision was based directly and solely upon such inspection. There must accordingly be an order directing the Controller to re-hear and determine the case upon the evidence relying only upon the inspection in so far as such inspection may enable him to understand better the evidence which he has taken and which both parties have given. Whether or not further evidence should be allowed will be determined by the Controller. It may be that it has not been sufficiently clear to him and the parties that in order to see whether a property comes within the term "premises" as defind in the Act it is necessary to ascertain the purpose for which the premises were let. It may be that the actual user of the premises may be relevant on that point. In determining the case the Rent Controller should bear in mind the purposes for which the property was let. The Rent Controller will have to determine whether the premises in question were let for the purposes mentioned in section 2 clause (*c*) of the Calcutta Rent Act, though, as I have said, on the question what was the purpose of the original letting, the actual user of the premises may be evidence. I do not say it must be evidence but it may be evidence. This depends on the circumstances of the case.

The Rule, therefore, is made absolute and the order of the Rent Controller is hereby set aside and he is directed to determine the application having regard to the observations made in our judgment. The hearing fee is assessed at five gold *mohurs* in this Rule.

The costs of this Rule will follow the event, that is, the hearing by the Controller.

We may observe that this matter has been pending from a long time and we are told that a suit is now also pending in respect of these proceedings. We, therefore,

ask the Rent Controller to dispose of this matter as quickly as possible.

Let the record be sent down to the Court below without delay.

W. C. A.

Rule made absolute.

LAHORE HIGH COURT.

LETTERS PATENT APPEAL No. 166 OF 1921.

December 5, 1921.

Present:—Sir Shadi Lal, Kt., Chief Justice, and Mr. Justice Harrison.

MUNSHI RAM—DEFENDANT—APPELLANT

versus

MAGHAR MAL—PLAINTIFF AND JAGAN NATH AND OTHERS—DEFENDANTS—RESPONDENTS.

Pre-emption—Transfer by vendee after institution of suit—Transferee, whether can set up superior right of pre-emption—Lis pendens, *doctrine of, applicability of.*

Where after the institution of a suit for pre-emption the vendee transfers the property in dispute to a third person but the transfer is not made in recognition of the superior right of pre-emption of the transferee, the doctrine of *lis pendens* applies, and the latter cannot plead his superior right of pre-emption in answer to the plaintiff's claim.

Letters Patent Appeal from an order of Mr. Justice Martineau, dated the 13th May 1921, passed in Civil Appeal No. 312 of 1921, affirming that of the District Judge, Ferozepore, dated the 10th December 1920.

Dr. *Gokal Chand Narang*, for the Appellant.

Mr. *Badr-ud-Din Qureshi*, for the Respondents.

JUDGMENT.—On the 23th January 1919 a plot of land was sold by Jagan Nath to Amar Nath, and on the 24th January 1920 a suit for pre emption was brought by the plaintiff Maghar Mal. It is beyond doubt that he has a right of pre emption against the vendee, but his claim is resisted by one Munshi Ram who on the 25th January 1920 got the property by exchange from the vendee Amar Nath; and the question is whether he can defeat the suit by relying upon his superior right of pre emption.

There can be no doubt that the transfer being made *pendente lite* could not adversely affect the plaintiff's right as it existed at the time of the institution of the suit. It is, however, contended that the doctrine of *lis pendens* is not applicable to the case of a rival claimant who by asserting his right of pre-emption acquires the property out of Court, and whose right to sue had not become barred by lapse of time before the date of transfer in his favour. It is true that there are some judgments of the Punjab Chief Court which lay down the rule that where, after the institution of a suit for pre-emption another pre-emptor asserted his right of pre emption privately, and the vendee in recognition of his right transferred the property to him before the *lis* became contentious, the doctrine of *lis pendens* did not apply to such a transfer. Now, assuming for the sake of argument the correctness of the above proposition of law, we have no hesitation in holding that it has no application to a case like the present where the transfer, as found by the District Judge, was not made in recognition of the right of pre emption. It is to be observed that the transfer in favour of the appellant was not a sale but an exchange, and that the deed makes no reference whatsoever to any right of pre emption. In view of the clear finding arrived at by the learned District Judge that the transfer was not made in recognition of the right of pre-emption, we must hold that the appellant was not entitled to rely upon the transfer in order to defeat the claim of the plaintiff.

We accordingly dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 824 OF 1920.

February 25, 1921.

Present:—Mr. Justice Chevis.

NABI BAKHSH—DEFENDANT—PETITIONER

versus

MUHAMMAD ALI AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 35 (ii)—Suit for value of fruit removed from tree—Jurisdiction, objection to, not taken in Trial Court, effect of.

A suit to recover the value of fruit removed from a tree is excluded from the cognizance of a Small Cause Court by Article 35 (ii) of Schedule II to the Provincial Small Cause Courts Act, if the removal amounts to theft.

The fact that no objection as to jurisdiction is taken in the Trial Court, has not the effect of conferring a jurisdiction on that Court which it otherwise did not possess.

Petition, under section 25 of Act IX of 1887, for revision of a decree of the Munsif, First Class, with powers of a Judge Small Cause Court, Batala, District Gurdaspur, dated the 15th October 1920.

Lal *Mehr Chand Mahajan*, for the Petitioner.

Lala *Jagan Nath*, for the Respondents.

JUDGMENT.—This is a suit for the value of fruit removed by defendant from a tree which plaintiff claims to be his. It has been decreed by a Small Cause Court. If the plaintiff's case be correct the defendant's action amounts to theft and so the case is not triable by a Small Cause Court, see Article 35 (ii) of the Second Schedule to the Provincial Small Cause Courts Act.

Lala Jagan Nath urges that objection as to jurisdiction was not taken in the lower Court. This is correct, but this will not confer jurisdiction. And as the question of title is involved it will be better to get it decided at once by a judgment which will be binding on the parties. Defendant should have objected in the lower Court, and following the course taken in *Ram Prosad* v. *Sricharan* (1), the case on which defendant relies I accept this application and setting aside the lower Court's decision I direct the plaint to be returned to a Court having jurisdiction, and I also order that defendant shall pay costs in the Small Cause Court, and in this Court; I assess costs in this Court at Rs. 16, and in the lower Court at Rs. 10. The District Judge should make over the case for trial to some officer other than the Small Cause Court Judge who has already tried the case. Stamp on application to this Court will be refunded.

W. C. A.

Application accepted.

(1) 41 Ind. Cas. 276; 21 C. W. N. 1109; 27 C. L. J. 594.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 470 OF 1921.

June 29, 1922.

Present:—Mr. Hallifax, A. J. C.

BED PRASAD—PLAINTIFF—APPELLANT

versus

KANGALU—DEFENDANT—RESPONDENT.

Muafi khairati *tenants, different kinds of.*

Two classes of persons may be recorded as *muafi khairati* tenants. In one class a man may be entitled to hold certain land free of rent as long as he performs certain services, both tenure and exemption being dependent on the services and ending with them. In the other are persons entitled to hold land as tenants, with an added condition that they shall pay no rent as long as they perform certain services, the exemption but not the tenure being dependent on the services and ending with them. [p 308, col. 1.]

Appeal from the decree of the Additional District Judge, Bilaspur, dated the 14th of July 1921, in Civil Appeal No. 113 of 1921.

Mr. *J. C. Ghosh*, for the Appellant.

JUDGMENT.—The fact that the defendant respondent and his ancestors have been recorded as "*muafi khairati*" tenants does nothing but help to confirm the finding of the two lower Courts that their exemption from paying rent was for services to be rendered to the *malguzar*, not for services to be rendered to the village. It does not help us to decide in which of the two classes of persons who are recorded as "*muafi khairati*" the defendant falls. The distinction between the two classes is perfectly

clear and has been set out in several published rulings of this Court, but it has certainly not been grasped in either of the Courts below. A man may be entitled to hold certain land free of rent as long as he performs certain services, both tenure and exemption being dependent on the services and ending with them. That is one class. In the other are persons entitled to hold land as tenants, with an added condition that they shall pay no rent as long as they perform certain services, the exemption but not the tenure being dependent on the services and ending with them.

In this particular case the defendant admitted that his tenure as well as his exemption depended on the performance of certain services, though he added that the services were to the village Rest House and not to the *malguzar* personally, and those he had not ceased to perform This is very clearly stated in his written statement and he repeated it in unequivocal terms in this Court, where he appeared in person. What he said here was this: "If I stop doing the work for which the land was given to my ancestors I shall have to give up the land, but I am still doing the work, as my father and grandfather did before me, that is the work of the *gali*. That is the work for which the land was given rent free to my ancestors, not the private service of the *malguzar*."

It has been found by both the Courts below that the services for which the land was given were private services to be rendered to the *malguzar*, and this finding is further shown to be in accordance with actual fact by the entry in the *wajib-ul-arz* drawn up in 1910-11 which runs: "*Ta chakari mof malguzar ka nij naukar hai* (Rent-free during service. He is the private servant of the *malguzar*)." It is the basis of the case for both parties that the defendant has ceased to render these private services to *malguzar*. He must, therefore, give up the land, which he is entitled to hold only so long as he does render those services. The decree of the lower Appellate Court is set aside and in lieu thereof it will be decreed that the defendant is to give possession of field No. 1172/3 D (area ·61) in Birkona to the plaintiff. The learned Advocate for the plaintiff-appellant has stated here that he abandons his claim for mesne profits up to the end of the agricultural year 1921-22.

G. R. D.

Decree set aside.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2018 OF 1918.

November 6, 1919.

Present:—Mr. Justice Wilberforce.

KARTAR SINGH—PLAINTIFF—APPELLANT

versus

RALLA AND OTHERS—DEFENDANTS—RESPONDENTS.

Shamilat *land—Grazing rights—Land in excess of requirements—Appropriation of excess by proprietor—Civil Procedure Code (Act V of 1908), O. XXII, applicability of—Legal representatives not brought on record*—Bona fide *mistake.*

In cases where the area of *shamilat* land, over which the grazing rights extend, is larger than that required by the persons with those rights, the proprietor of the *shamilat* may use the excess land for his own purposes. [p 307, col. 2.]

Bhola Nath Nundi v. *Midnapore Zemindari Co.*, 31 C. 502; 31 I. A. 75; 8 C. W. N. 425; 14 M. L. J. 152; 8 Sar. P. C. J. 611 (P. C.); *Hansraj* v. *Narain Chand*, 13 Ind Cas. 716; 86 P. R. 1911; 229 P. W. R. 1911, *Gurditta* v *Dheru*, 14 Ind. Cas. 56'; 150 P. W. R. 1912; 160 P. L. R 19 2, *Hira* v. *Nathu*, 119 P. R. 1889, *Nagina* v. *Baggu*, 100 P. R. 1881, followed.

The provisions of Order XXII of the Code of Civil Procedure do not apply where through a *bona fide* mistake in the copy of the judgment, the legal representatives of a deceased party, though brought on the record in the Appellate Court, are not brought on the record of second appeal; but even if they did apply, there would be ground for extending the period of limitation. [p. 307, col. 1.]

Second appeal from the decree of the Additional Judge, Hoshiarpur at Jullundur, dated the 11th April 1918, reversing that of the Subordinate Judge, Second Class, Hoshiarpur, dated the 17th January 1917.

Mr. *Sundar Das*, for the Appellant.

Lala *Fakir Chand*, for the Respondent.

JUDGMENT.—In this case there is a preliminary objection that the appeal had abated, two of the defendants, Ishar Singh and Hamir Singh, died during the pendency of the appeal in the lower Appellate Court. Their legal representatives were brought on to the record by that Court but by a mistake these legal representatives were not made respondents in this Court and it was not till some nine months after the institution of the

appeal that an application was made for the rectification of this error. The error was due to a mistake in the judgment on the part of the Copying Department which did not show the names of the legal representatives, although they had long been brought on to the record. It is urged for the respondents that the appeal has, therefore, abated as the legal representatives were not on the record in this Court but I do not consider that the provisions of Order XXII, Civil Procedure Code, apply to these circumstances. If they did apply, the mistake being a *bona fide* one there would be sufficient ground for extending the period of limitation.

The plaintiff in this case, who is the proprietor of a large area of *shamilat* land, brought a suit for a perpetual injunction against *adna maliks* and other tenants of the village that they should be prohibited from grazing their cattle except on a small area of 198 *kanals* 13 *marlas* which he considered sufficient for their use. The first Court held that the whole *shamilat* of 2126 *kanals* was excessive for the requirements of the defendants and, after issuing a commission for inquiry as to the suitable area to be set aside, granted the plaintiff an injunction except with regard to an area of 648 *kanals plus* 92 *kanals* and some other rights which it is unnecessary to mention.

Against this decision the defendants appealed and the learned District Judge, after a discussion of the law on the subject, held that the plaintiff was not entitled to restrict the exercise by the defendants of their grazing rights to any particular portion of the 2126 *kanals*. He, therefore, dimissed the suit.

Against this decision a second appeal has been preferred and it is mainly argued on the contentions that the District Judge has made a mistake of fact in considering that the defendants are *adna maliks* of this land, and has also made a mistake in law in considering that in such cases a proprietor is not competent to use for his own purposes a part of land over which grazing rights have been given, if that land is in excess of the requirements of the persons who have those rights.

It is clear that the District Judge was in error in stating the defendants to be the *adna maliks* of the land in suit. They are *adna maliks* of the other land in the village but plaintiff is the sole proprietor of the land in suit and the defendants have only the grazing rights therein and also the right to cut wood for their own purposes. These facts are admitted by Counsel for both parties before me.

The only question, therefore, is whether the plaintiff is entitled to restrain the defendants from the user of the whole area. It is clear that in cases where the area over which grazing rights extend is larger than that required by the persons with those rights a proprietor may use the excess for his own purposes. The defendants cannot prevent him from developing any excess area and using it to its best purposes. This has been laid down in many judgments such as *Bhola Nath Nundi* v. *Midnapore Zemindari Co.*, (1), *Hansraj* v. *Narain Chand* (2), *Gurditta* v. *Dheru* (3), *Hira* v. *Nathu* (4) and *Nagina* v. *Baggu* (5). Counsel for the respondents does not seriously contest this view but raises other objections against the decision of the first Court which will have to be dealt with by the lower Appellate Court. He contends that it is not shown that the area allotted will give the defendants the ample grazing which they have enjoyed hitherto especially in the seasons of draught. It is also possible, he argues, that owing to improvements in cultivation the number of cattle of the defendants may increase. As for the rights in the wood to which defendants have been accustomed, he urges that in a restricted area, even if the wood is sufficient at first, the growth in future will be rendered precarious owing to the number of cattle in a small area. All these arguments will have to be considered by the lower Appellate Court in hearing the appeal on the merits.

I accept this appeal and remand the case under Order XLI, rule 23, Civil Procedure Code, for decision of the other grounds of appeal. Costs to be costs in the cause.

W. C. A. *Appeal accepted; Case remanded.*

(1) 31 C. 503; 31 I. A. 75; 8 C. W. N. 425; 14 M. L. J. 152; 8 Sar. P. C. J. 611 (P. C.).
(2) 13 Ind. Cas. 716; 83 P. R. 1911; 229 P. W. R. 1911.
(3) 14 Ind. Cas. 562; 150 P. W. R. 1912; 160 P. L. R. 1912.
(4) 119 P. R. 1889.
(5) 100 P. R. 1881.

KESHAV RAGHUNATH JOSHI v. GAFURKHAN DAIMKHAN BUBERE.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 425 OF 1921.

January 20, 1922.

Present:—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Coyajee.

KESHAV RAGHUNATH JOSHI —PLAINTIFF—APPELLANT

versus

GAFURKHAN DAIMKHAN BUBERE —DEFENDANT—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 134—Mortgage—Sale by mortgagee as ostensible owner—Valuable consideration, passing of—Vendee, status of—Mortgagor, suit by, to recover possession—Limitation.

When a mortgagee sells the mortgaged property as an ostensible owner, and there is valuable consideration for the sale, the right of the purchaser becomes unassailable by the mortgagor by the lapse of 12 years from the date of the purchase, under Article 134 of Schedule I to the Limitation Act, and the fact that the purchaser comes to know of his transferor being only a mortgagee soon after the purchase would not stop the running of the time in his favour. [p. 308, col. 2.]

Bagas Umarji v. *Nathabhai Utamram*, 12 Ind. Cas. 737; 36 B. 146 at p. 150; 13 Bom. L. R. 1057, approved.

Second appeal from the decision of the District Judge, Thana, in Appeal No. 342 of 1920, reversing the decree passed by the Subordinate Judge at Panvel, in Civil Suit No. 328 of 1919.

Mr. *P. B. Shingne*, for the Appellant.

Mr. *Pendse* (with him Mr. *V. D. Limaye*), for Respondent No. 1.

JUDGMENT.

MACLEOD, C. J.—The plaintiff sued to recover by redemption possession of the plaint property. The property had been mortgaged with possession in 1891 by one Ganpat Bhiva Chavan for himself and as guardian of his minor nephew, Krishna Babaji Chavan, to the first defendant's father Martand. The equity of redemption eventually came to two girls, Kondi and Niri, from whom the plaintiff purchased in 1918.

In 1902, Martand sold the property to the second defendant purporting to be the owner thereof, and the second defendant has since been in possession.

It is clear then that any suit against the second defendant to recover possession of the suit property must fall under Article 134 of the Indian Limitation Act if it is not filed within twelve years from the date of the transfer. But the appellant wishes to rely on the fact that within a few months of the transfer, the second defendant acquired the knowledge that Martand was a mortgagee and not an owner. Defendant No. 2 stated that he asked Martand why he sold the property if he was only a mortgagee, and Martand said he had become the owner in pursuance of an agreement, which he promised to give to the second defendant later on. Whether that story is true or not, the Indian Limitation Act makes no provision for the case of a transferee who gives valuable consideration at the time of transfer from an ostensible owner, but finds later on that his transferor was only a mortgagee, and not owner of the property transferred.

There does not seem to be any direct authority on this point. But unless direct provision is made in the Act that on the acquisition of such knowledge, the time which had previously begun to run against the mortgagor should stop, it is difficult to say that the later knowledge on the part of the transferee would prevent time running in his favour. Good faith is no longer required on the part of the transferee. Article 134 of the Indian Limitation Act XV of 1877 had the words "and afterwards purchased from the trustee or mortgagee for a valuable consideration," while in the present Article 134 the words are "and afterwards transferred by the trustee or mortgagee for a valuable consideration." In *Bagas Umarji* v. *Nathabhai Utamram* (1) it was pointed out that the alteration in the language of Article 134 of the Indian Limitation Act (IX of 1908) was a "legislative recognition of the soundness of the view that the Article was intended to give protection to all transferees for value including mortgagees." Therefore, the appeal must be dismissed with costs.

COYAJEE, J.— I agree that in the present state of the law it is difficult to give effect to the contention raised on behalf of the appellant, namely, that five or six months after the purchase the second defendant obtained the mortgage-deed itself from Martand and that, therefore, he

(1) 12 Ind. Cas. 737; 36 B. 146 at p. 150; 13 Bom. L. R. 1057.

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had knowledge of the nature of his vendor's rights. The learned District Judge in this connection observes :—

"There is, however, nothing to show, and no good reason to believe that the recitals in his sale-deed were made in collusion with him and the mortgage-bond was handed over to him at the time the sale-deed was passed and not subsequently as stated by him. On the whole, therefore, I find upon the strength of the recitals in the sale-deed, that the mortgagee Martand had purported to sell the land as his absolute property and defendant No. 2 had purchased it as such. That being so, the case is governed by Article 134 of the Indian Limitation Act."

The learned Judge is right. When a mortgagee sells the mortgaged property as an ostensible owner and there is valuable consideration for the sale, the right of the purchaser becomes unassailable by the mortgagor by the lapse of twelve years from the date of the purchase. The mortgagee may be dishonest, the purchaser may not make any enquiry as to his vendor's title, the mortgagor may be ignorant of the sale of his property by the mortgage: these facts no longer affect the rights of the purchaser who has given valuable consideration. Article 134 of the Indian Limitation Act (IX of 1871) required "good faith" on his part. That condition was, however, removed by Act XV of 1877 and is not re imposed by Act IX of 1908. The language of the enactment now in force being clear, the plaintiff's suit must fail.

W. C. A.

Appeal dismissed.

LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 79 OF 1922.
(FORMERLY CIVIL APPEAL No. 1702 OF 1921.)
December 2', 1921.

Present:—Mr. Justice Abdul Raoof.

RADHA KISHEN GUARDIAN OF *Musammat* VIDYA, MINOR—PETITIONER

versus

KHUSHI RAM AND OTHERS—2ND PARTY—RESPONDENTS.

Guardians and Wards Act (VIII of 1890), ss. 34 (d), 47—Order directing guardian to deposit money due to minor—Appeal—Revision.

An order under section 34 (*d*) of the Guardians and Wards Act, directing a guardian to deposit into Court the money due to the minor is not subject to appeal, but the High Court may interfere in revision to correct a mistake apparent on the face of the record. [p. 310, col. 1.]

Petition for revision of an order of the Senior Subordinate Judge, Ludhiana, dated the 9th July 1921.

Mr. *Kanwar Narain*, for Mr. *Bishan Narain*, for the Petitioner.

Lala *Badri Das*, R. B., for the Respondents.

JUDGMENT.—This appeal purports to be one under the Guardians and Wards Act, and it has arisen under the following circumstances:—

Radha Kishen, appellant, was appointed guardian of the minor, *Musammat* Vidya, by an order dated the 25th July 1918. The guardian came into possession of certain ornaments and other properties, both moveable and immovable belonging to the minor. There were certain debts due to the minor which the guardian realized. He also performed the marriage ceremony of the minor and had to incur expenses. Apparently under the provisions of section 34, clause (*d*) the Court called upon the guardian to file accounts and to deposit into Court whatever may be due to the minor. Upon the statement prepared a sum of Rs. 2,580-8-10 was shown as being due to the minor. The Court ordered this to be deposited, but appended a foot-note to the effect that the sum of Rs. 540 belonged to the guardian himself, having been paid to his account by one Sultani *lambardar*. If this foot note were to be given effect to, the sum due to the minor would be Rs. 2,040-8-10 only, but in spite of this note the Court by an oversight made an order directing the guardian to deposit Rs. 2,540-8-10 into Court within a fortnight. This order was made on the 9th July 1921. The present appeal is preferred against this order. On the appeal coming up for hearing the learned Counsel for the respondent raised a preliminary objection to the hearing of it. His objection is that the present order does not come under any of the clauses mentioned in section 47 of the Guardians and Wards Act. Section 43 of the Act provides that "save as provided by the last foregoing section, and by section 622 of the Code of Civil

Procedure, an order made under this Act shall be final, and shall not be liable to be contested by suit or otherwise."

Mr. Kanwar Narain, the learned Counsel for the appellant, has argued that the order may possibly come under clause (i) of section 47, as the order amounts to an order regulating the conduct, or proceedings of a guardian. The learned Counsel for the respondent in reply argues that there is a specific provision for such an order to be found in clause (d) of section 34, and no appeal has been given by section 47 against an order made under clause (d). Looking at the several clauses of section 47 it appears rather strange why a right of appeal should not have been given against an order of such importance as the order under appeal in this case, but unless the Legislature chooses to give a right of appeal it is not open to an appellant to prefer an appeal against such an order. In the last resort, Mr. Kanwar Narain has asked me to treat this matter as a revision. Ordinarily, I would be slow to exercise the revisional powers under such circumstances, but in this case there is an apparent mistake on the face of the record which must be corrected. Even Counsel for the respondent admits that there is a clerical mistake and the appellant ought to have been ordered to deposit Rs. 2,040 8-10 and not Rs. 2,540 8-10. I modify the order to this extent in revision. In other respects it will stand. The *ad interim* order for stay of execution is discharged. No order as to costs.

Z. K.

Order modified.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 105-B OF 1921.

June 23, 1922.

Present:—Mr. Prideaux, A. J. C.

RAJE UDAJIRAM *alias* GOPALRAO—DEFENDANT—APPLICANT

versus

RAJESHWAR AND OTHERS—PLAINTIFFS—NON-APPLICANTS.

Stamp Act (II of 1899), s. 61—Partition decree, unstamped—Validity, whether can be questioned after execution—Inadmissible document, validity of—Civil Procedure Code (Act V of 1908), s. 152—Alteration of decree six years after enforcement.

The validity of a partition decree which has been executed and acted upon cannot be called in question on the ground of its not being stamped. [p. 311, col. 2.]

Jotindra Mohan Tagore v. *Bejoy Chand Mahatap*, 32 C. 488, *Stamp Reference by the Board of Revenue, In re*, 23 Ind. Cas. 98; 36 A. 137; 12 A. L. J. 113; 1 O. L. J. 190, *Thiruvengadathan Aiya* v. *Mangayya*, 12 Ind. Cas. 775; 35 M. 26; (1911) 2 M. W. N. 506, referred to.

Although a document may be inadmissible in evidence, it does not follow that it is invalid. [p. 311, col. 2.]

A decree which has been allowed by the parties to be enforced for six years cannot be altered under section 151, Civil Procedure Code. [p. 311, col. 2.]

Revision against the order of the Additional District Judge, Akola, dated the 4th April 1921.

Messrs. *M. K. Padhye* and *D. W. Kathalay*, for the Applicant.

Mr. *K. K. Gandhe*, for the Non-Applicants.

JUDGMENT.—In Civil Suit No. 19 of 1912 the parties were plaintiff Raje Rajeshwar Trimbak and defendants Raje Gopal Kashirao, minor, Moreshwarrao Ramrao, Laxmanrao, Jagjiwanrao, Devidas and Amritrao. On 6th May 1914 a compromise petition was put in and accepted by the Court on behalf of the minor defendant No. 1. That compromise petition divided the property in dispute and determined what each of the parties was to get. A decree was passed on the 15th May 1914 purporting to be in accordance with the terms of the compromise. This decree has been acted on. On 12th February 1920 the plaintiff in that suit made an application, purporting to be under section 152 of the Civil Procedure Code, stating that there had been a clerical mistake in the decree on the compromise, for in the compromise application it was asked that defendant No. 1 should give notice to the plaintiff and to the other defendants every year in November and should sell by auction the Bazar after consultation with the others present at the auction and should divide the money according to their shares, and that the plaintiff and defendants should sell the mango produce

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in accordance with their share or keep them for their own use. These two matters had, through an oversight, not been entered in the decree in the suit. The applicant asked that they might be entered in the decree in accordance with the terms of the compromise and that the judgment and decree be amended accordingly. The non-applicants contested the application stating that it was not a clerical or arithmetical mistake. The Judge framed the following issue: Whether the omissions in the decree were accidental or intentional? The Judge who framed the decree was examined as the sole witness. He stated: "I see that clauses Nos. 2 and 5 from the application are referred to neither in the judgment nor in the decree. It is not possible for me to say positively from memory why reference to them was omitted from the judgment and the decree. I must have omitted reference to them being of opinion that they related to procedure with regard to enjoyment of certain property laid down for the guidance of the parties themselves. My opinion must have been that this portion could not be a part of the decree to be executed through suit" On this evidence the Judge came to the conclusion that the amendment as prayed for should be made in the decree and did so purporting to act under section 152. Against that order this application for revision has been filed by the first defendant Gopal Rao. Some of the others, namely, the plaintiff Rajeswar, Ramrao, Laxmanrao and Jagjiwanrao applied against Gopalrao and Devidas in Civil Revision No. 17 B of 1921.

It is contended that the decree could not be altered under section 152 as the frame of the decree sought to be amended was not due to an accidental slip or omission, that it was not the intention of the parties that all the details of the compromise should find a place in the decree and that the evidence of the Judge shows that the two points now raised were intentionally omitted from the decree, that a long time had passed since the passing of the decree and it should not now be amended. The applicant in his revision case also asked for revision of the order passed complaining that the amended decree invests the non-applicant alone with the power of dividing the sale-proceeds and has not allowed the applicants to auction their share of the Bazar and mango crops separately: in accordance with the compromise the applicants had got that right. I notice from the record that an application to amend the decree by the defendant No. 1 Gopal was made on 23rd November 1914, but this was abandoned on the 17th April 1915.

It is here contended that the decree is not a decree at all because it has not been endorsed on a stamped paper. I am referred to clause (15) of section 2 of the Indian Stamp Act which states that an instrument of partition includes a final order for effecting a partition passed by a Civil Court. It is stated that a decree requires a stamp and it is recoverable under section 45. On the other hand, when an instrument has been admitted in evidence such admission should not, except as provided in section 61, be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped.* In the present case the decree was passed in 1914, or 8 years ago. It has been acted upon and I do not think now its validity can be called in question on the ground of its not being stamped. I am aware of the decisions in *Jotindra Mohan Tagore* v. *Sejoy Chand Mahatap* (1), *Stamp Reference by the Board of Revenue, In re* (2) and *Thiruvengadathan Aiyar* v. *Mangayya* (3), but in the present case the difficulty lies in the fact that the decree has been executed and though a document may be inadmissible in evidence it does not follow that it is invalid. It seems to me it is too late at this stage to call for a decree upon a properly stamped paper. On the other hand, it seems to me fairly obvious that the omission to mention the Bazar or mango rights in the compromise decree was not due to a clerical or arithmatical mistake and, therefore, section 152 of the Code of Civil Procedure does not apply. Nor does, in my opinion, section 151 cover the case. The parties allowed a decree to be enforced for six years before any of them really attempted to get it changed and I think they are now bound by its terms.

I set aside the amended order of the lower Court. In Civil Revision No 105 B of 1921 the applicant will get his costs from the non-

(1) 32 C 483.

(2) 23 Ind. Cas. 98; 36 A. 137; 12 A. L. J. 113; 1 O. L. J. 190.

(3) 12 Ind. Cas. 775; 35 M. 26; (1911) 2 M. W. N. 516.

*See section 35 of the Stamp Act—[Ed.]

applicants. I fix Pleader's fee at Rs. 15. It is unnecessary to pass orders in Civil Revision No 171-B of 1921 beyond stating that the application is dismissed, for both applications were heard together and order already passed for costs is sufficient.

S. D. *Order set aside.*

LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 551 OF 1921.

January 11, 1922.

Present:—Mr. Justice Abdul Raoof.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL, THROUGH THE COLLECTOR OF DELHI—DEFENDANT—PETITIONER

versus

MESSRS. SHAM LAL DEOKI NANDAN OF DELHI—PLAINTIFFS—RESPONDENTS.

Railways Act (IX of 1890)—Carriage of goods by Railway at Railway risk—Short weight—Railway Company, refusal of, to give "open delivery"—Cause of action—Suit for value of goods.

Where goods are consigned for carriage by Railway, at Railway risk, and at destination are found to be short in weight, the fact that the Railway Company declines to give "open delivery," of the consignment affords no cause of action to the consignee to maintain a suit for the value of the goods, there being no provision in the Railways Act to make it incumbent upon a Railway Company to make "open delivery." [p. 313, col. 2.]

Jwala Pershad and Co. v. *Great Indian Peninsula Railway*, 21 Ind. Cas. 418; 11 A. L. J. 772, relied upon.

Petition, under section 25 of Act IX of 1887, for revision of the decree of the Judge, Small Cause Court, Delhi, dated the 21st April 1921.

Lala *Jai Lal*, R. B., Assistant Legal Remembrancer, for the Petitioner.

Lala *Sardha Ram*, for the Respondents.

JUDGMENT.—This was a suit for the recovery of Rs. 447-8-9. The claim was originally made against the East Indian Railway Company, but the plaint was subsequently amended and the Secretary of State for India in Council was also impleaded as a co-defendant, the reason being that the parcel in respect of which the claim was preferred had been carried also on the N. W. State Railway. The following facts will disclose the nature of the claim :—

The plaintiff was the endorsee for value of one box of scent under Railway Receipt No. 303109—D, dated the 11th July 1920, from Karachi to Delhi. The plaintiff went to take delivery of the parcel from the Railway Authorities at Delhi, but finding that there was a deficiency of half a seer in weight called upon the authorities to open the parcel, compare the contents with the lists contained in the *beejak* and effect, what is technically called, an open delivery. As the Railway Authorities refused to give an open delivery the plaintiff did not take delivery of the consignment and left the parcel with the defendants. It may be mentioned that before the parcel was weighed the plaintiff had given a clear receipt after paying freight, etc. The plaint also stated that the parcel had arrived in a pilferred condition. Paragraph 5 of the plaint states the cause of action for the claim in the following words:—

"Cause of action arose at Delhi in July 1920 when goods were found in a pilferred condition and plaintiff was not allowed to compare it with the *beejak*."

The detail of the claim is given in the plaint as follows:—

		Rs.	A.	P.
Value of scent	...	380	11	3
Railway freight	...	8	4	0
Terminal tax	...	0	3	6
10 per cent. profit	...	58	6	0
TOTAL	...	447	8	9

The claim was resisted mainly on the following grounds, namely:—(1) that the consignment had arrived at Delhi in good condition and was delivered accordingly; (2) that the plaintiff took delivery of the consignment under a clear receipt and paid the freight Rs. 8-4-0 due on it at Delhi on the 21st July 1921, but subsequently he refused to remove the consignment as the contents of the parcel were not compared with the *beejak* in his possession, and (3) that section 75 (1) of the Indian Railway Companies Act absolutely exonerated the North Western Railway from all liability in the transaction.

The following issues were framed by the Judge of the Small Cause Court:—

(1) Are the goods in this case such as are exempted under section 75 (1) and the Railway is not liable?

(2) Did the plaintiff take delivery on a clear receipt and refused to take up the goods afterwards?

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(3) Or, did the plaintiff deliver the Railway receipt and sign the register in pursuance of the practice of the Railway by which every owner of goods is bound to tender the Railway receipt and sign the Railway register before he is allowed access to the goods?

(4) If the plaintiff is entitled to his claim, what are the damages suffered by him?

On the first issue the learned Judge held that the consignment consisted of perfumery and was not excepted under clause (*q*) of Schedule II, that it did not require to be insured and that, therefore, the Railway was not absolved on that ground alone. It is common ground that the goods were despatched at Railway risk. On the second issue the finding is, that the outer case of the parcel was in good condition, and that there was a deficiency of half a seer in weight. The contents were examined and compared with the original invoice of Messrs. Zenobia, Limited, by the Commissioner appointed by the Court and it was found that two items out of No. 502 and three items out of No. 504 were missing. The Court was of opinion that the Railway Authorities were not justified in refusing to give an open delivery merely because the outer condition of the parcel was good. Finally, the Court arrived at the conclusion that, in the ordinary course, if the Railway had agreed to give open delivery the liability would have extended merely to the extent of the deficiency, but as the goods were on Railway risk and as there was a deficiency of half a seer in weight, the plaintiff was justified in refusing to take delivery and that the Railway was liable for the amount claimed. The claim was accordingly decreed, and the Secretary of State has come up in revision to this Court. Two pleas are taken in the petition for revision, namely, (1) that the defendants were not bound to offer open delivery and that the plaintiffs were bound to accept delivery as tendered, and (2) that the goods in question were excepted articles under Schedule II of the Indian Railways Act, 1890.

This last plea, has, however, been abandoned and has not been pressed by Mr. Jai Lal, Assistant Legal Remembrancer. The only question that has been pressed and requires determination is that contained in plea No. 1. What I have to decide is, whether the refusal by the Railway Authorities to effect what is called an open delivery gave any cause of action to the plaintiff for the present claim. There is no provision in the Railways Act making it incumbent upon a Railways Company to effect an open delivery, nor has any rule or regulation been brought to my notice, according to which the plaintiff could insist upon the Railway Authorities to open the parcel and compare its contents with the items given in the *beejak* in his possession. The plaintiff, therefore, was not justified in refusing to take delivery of the parcel and then to prefer the claim for the price of the goods. In support of this view I may cite the case of *Jwala Pershad and Co.* v. *Great Indian Peninsula Railway* (1). The facts of that case were almost similar to those of the present case. The learned Judge, who decided the reported case, made the following observation with reference to the facts of the case.

"The question is, whether or not the Railway Company has committed any wrong by reason of which damage has accrued to the plaintiff. The wrong alleged is the refusal to grant the 'open delivery.' The learned Vakil for the plaintiff is unable to show me any rule of the law or any rule of the Railway under which, in circumstances like the present, a consignee can demand that the Railway Company shall open a consignment and allow him to examine it before giving up the Railway receipt.....It seems to me that the plaintiff's action, though entirely *bona fide*, was mistaken. What he ought to have done was to enter on the back of the receipt the fact that the actual weight was less than that entered in this receipt and also the fact that the Goods Clerk had refused to open and examine the consignment. He should then have signed the receipt, tendered the freight and taken delivery. It would then have been open to him to examine.....either at the Goods Shed...or elsewhere and he then would have had a good case...for recovery of damages for the loss sustained, if any. The consignment was carried at Railway risk. Instead of doing this, the plaintiff himself refused to take delivery."

As already observed, the plaintiff has no cause of action to maintain the suit according to law.

(1) 21 Ind. Cas. 448; 11 A. L. J. 772.

I, therefore, allow this application for revision and set aside the decision of the Court below. The plaintiff, however, is entitled to the price of the items discovered to be missing. I, therefore, grant a decree for the price of the two items out of No. 502 and three items out of No. 504 of the *bejak*. The amount due to the plaintiff will be determined in the execution proceedings. As the suit, however, as put in the plaint, fails, the plaintiff must pay the costs throughout. The result is, that the decree of the Court below is modified.

W. C. A.

Revision allowed.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL NO. 79 OF 1921.
May 10, 1922.
Present:—Mr. Justice Lindsay and Mr. Justice Kanhaiya Lal.
HANS RAJ AND OTHERS—DEFENDANTS—APPELLANTS
versus
Musammat SOMNI—PLAINTIFF—RESPONDENT.

Hindu widow—Alienation without legal necessity—Alienee building on land alienated, position of—Transfer of Property Act (IV of 1882), s. 51, application of.

A mortgagee of a piece of land from a Hindu widow who advances the loan without making proper enquiries about there being any legal necessity for the same, and builds a house upon the land, cannot, when the mortgage is declared invalid, claim the cost of the house inasmuch as he did not act in good faith, but he may be allowed to take away his materials. [p. 315, col. 1.]

Bhagwat Dayal Singh v. *Ram Ratan Sahu*, 65 Ind. Cas. 69; 20 A. L. J. 26; 26 C. W. N. 257; (1922) M. W. N. 102; 35 C. L. J. 121; 42 M. L. J. 243; 4 U. P. L. R. (P. C.) 7; 24 Bom. L. R. 336; 3 P. L. T. 229; 15 L. W. 481 (P. C.), distinguished.

Second appeal from a decree of the Additional Judge, Gorakhpur, reversing a decree of the City Munsif.

Mr. *S. S. Sastry* for Mr. *Haribans Sahai*, for the Appellants.

Messrs. *Iswar Saran* and *Harnandan Prasad*, for the Respondent.

JUDGMENT.—The dispute in this appeal relates to a house situated in Gorakhpur city. The house was originally an enclosure, belonging to Chunni. Chunni died leaving two widows, *Musammat* Pati and *Musammat* Somni, and a daughter, *Musammat* Ganga Dei. In 1910 a partition took place whereby the disputed enclosure was allotted to the share of *Musammat* Pati. On the 7th of September 1914 *Musammat* Pati mortgaged that land with Hansraj for Rs. 150 stating that Rs. 25 out of the same were required for the repairs of her own dwelling house and Rs. 125 for giving a caste dinner in connection with the death ceremonies of her husband. Her husband had died about 4 years earlier. The Court of first instance found that Rs. 25 had been borrowed for the purpose of repairing the dwelling house occupied by *Musammat* Pati, which was in a dilapidated condition, but there was no legal necessity for borrowing Rs. 125 for giving a caste dinner. It, however, awarded Rs. 600 to the mortgagee on account of the cost of constructing a house over the disputed land after the mortgage. On appeal the Additional District Judge came to the conclusion that there was no legal necessity whatever for the mortgage and that the mortgagee was not entitled to claim the cost incurred by him in constructing a house on the disputed land. He accordingly allowed the claim and directed the defendant to remove the materials of the house constructed by him, within two months from the date of the decree. The defendants have come here in second appeal and the main points argued on their behalf are: (1) that on the facts found the mortgagee was entitled to claim Rs. 150, the entire amount lent by him to *Musammat* Pati, and (2) that in any event he was entitled to the value of the improvements made by him under section 51 of the Transfer of Property Act (Act IV of 1882).

With regard to the first point it is stated by the learned Additional District Judge that *Musammat* Pati's means were sufficient to enable her to repair the house, which

she was occupying, and that the caste dinner had already been given by *Musammat* Somni within a fortnight of the death of her husband. In view of those facts it can hardly be said that there was any legal necessity for *Musammat* Pati to have borrowed the money for repairing the house or to give another dinner to the people of her caste in response to their wishes in the matter. The learned Additional District Judge observes that it was usual and perhaps the duty of the widows to give a caste dinner soon after the death of their husband and that such a feast had been given by *Musammat* Somni. We are not, therefore, in a position to say that a second feast was necessary and that the mortgage was justified.

With regard to the second point, section 51 of the Transfer of Property Act has no application. It applies only to the case of a transferee of immoveable property, who makes any improvement in the property, believing in good faith that he is absolutely entitled thereto. But in the case of a Hindu widow a person dealing with her would ordinarily know that she has only a life-interest and he can reasonably be expected to make enquiries as to whether there was any legal necessity for the mortgage and whether the widow had any right to make the transfer. The mortgagee cannot be said here to have acted in good faith in dealing with such a widow so as to affect more than her life interest. The learned Counsel for the defendant-appellants relies on the decision in *Bhagwat Dayal Singh* v. *Ram Ratan Sahu* (1), but in that case the sale was held to have been partially made for legal necessity, and the improvements made consisted of the erection of seven or eight big tanks and the construction of a dyke for the purpose of irrigation, which had the effect of permanently increasing the rental value of the disputed property. *Musammat* Pati is dead and her interest has reverted now to the plaintiff by survivorship. It is not necessary to enter into the other questions raised in this appeal.

(1) 65 Ind. Cas. 69; 20 A. L. J. 26; 26 C. W. N. 257; (1922) M. W. N. 102; 35 C. L. J. 121; 42 M. L. J. 243; 4 U. P. L. R. (P. C.) 7; 24 Bom. L. R. 336; 3 P. L. T. 229; 15 L. W. 481 (P. C.).

The learned Counsel for the defendants-appellants asks for three months time for removing the materials of the house constructed by the defendant-appellants.

The appeal is dismissed except in so far that we extend the time for the removal of the materials to three months from the date of the decree of this Court. The defendants-appellants will bear their own costs and pay those of the plaintiff-respondent.

N. H.

Appeal dismissed.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 133 OF 1921.

May 11, 1923.

Present :—Mr. Justice Coutts and Mr. Justice Das.

RAM LAL SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Musammat BIBI SHAHRUNNISSA AND OTHERS—DEFENDANTS—RESPONDENTS.

Registration Act (XVI of 1908), s. 33—Power-of-attorney executed by parda-nashin *lady—Attestation by Sub-Registrar—Presumption—Onus—Proof—Construction of power—Power to execute mortgage, whether includes power to incur loan—Power to sign, whether includes power to mortgage.*

Where a Sub-Registrar has attested under section 33 (2) of the Registration Act a power-of-attorney, purporting to be executed by a *parda-nashin* lady, it will be presumed that he was satisfied that it had been voluntarily executed by the lady; but a presumption is only a rule of evidence which throws the onus on the other side; and it is of no avail where there is evidence on the record which would lead the Court to the conclusion that there was not evidence sufficient to satisfy the Registrar that the power-of-attorney was voluntarily executed by the *parda-nashin* lady. [p. 316, col. 2.]

All powers-of-attorney should be construed strictly. [p. 317, col. 1.]

The power to execute a document carries with it the necessary power to enter into the transaction itself, and, therefore, the power to execute a mortgage carries with it the power to incur any loan. [p. 317, col. 1.]

Obiter.—A power to sign a mortgage does not carry with it a power to enter into a mortgage transaction. [p. 317, col. 1.]

Roy Radha Kissen v. *Nauratan Lal*, 6 C. L. J. 490, referred to.

Appeal from a decision of the District Judge, Gaya.

Messrs. *Manuk* and *S. N. Roy*, for the Appellants.

RAM LAL SINGH v. BIBI SHAHRUNNISSA.

Messrs. *Sultan Ahmed* and *B. C. Sinha*, for the Respondents.

JUDGMENT.

DAS, J.—This appeal comes before us from the judgment of the learned District Judge of Gaya and arises out of a suit instituted by the plaintiffs against the defendants to enforce two mortgage-bonds executed by the defendant No. 1 through her attorney, Abdul Hakim. The Court of first instance gave the plaintiffs a mortgage-decree against the defendant No. 1 but on appeal the learned District Judge has reversed the decision of the Court of first instance.

The mortgage-bonds, as I have mentioned, were executed by the lady through her attorney Abdul Hakim. The question which was debated before the Courts below was whether the lady had in fact executed the power-of-attorney in favour of her husband, Abdul Hakim, and whether the documents were read and explained to the lady. The validity of the documents was also called into question and it was argued on behalf of the lady that there was a distinct violation of the provisions of section 33 of the Registration Act. The learned District Judge differing from the Court of first instance came to the conclusion that there was such a violation and that it followed that the power-of-attorney was not executed and authenticated in accordance with law.

Section 33 of the Registration Act lays down that "If the principal, at the time of executing the power of attorney, resides in any part of British India in which this Act is for the time being in force, a power-of-attorney executed before, and authenticated by, the Registrar or Sub-Registrar within whose district or sub-district the principal resides shall alone be recognised in Courts of law." The learned District Judge came to the conclusion that the power-of-attorney on which the plaintiffs rely was not executed in accordance with paragraph (*a*) of section 33 of the Registration Act, but then he entirely ignored the provisions of the proviso to that section which provides that amongst other persons "persons exempt by law from personal appearance in Court shall not be required to attend at any Registration Office or Court for the purpose of executing any such power-of-attorney as is mentioned in clauses (*a*) and (*b*) of this section." The defendant No. 1 is admittedly a *parda nashin* lady and accordingly is exempt by law from personal appearance in Court. She could not, therefore, execute the power-of-attorney in the manner provided by paragraph (*a*) of section 33 of the Registration Act. Paragraph (2) of section 33 gives the procedure which should be adopted by the Registrar in cases where persons exempt by law from personal appearance in Court are concerned. That paragraph provides that "In every such case the Registrar or Sub-Registrar or Magistrate (as the case may be), if satisfied that the power-of-attorney has been voluntarily executed by the person purporting to be the principal, may attest the same without requiring his personal attendance at the office or Court aforesaid." In my opinion, provided the plaintiffs have established that the Sub-Registrar did attest the document after being satisfied that the power-of-attorney was voluntarily executed by the defendant No. 1, the plaintiffs are entitled to succeed so far as this point is concerned. Unfortunately the learned District Judge did not consider the question whether the Sub-Registrar was so satisfied and whether he attested the document after being so satisfied. Mr. Manuk on behalf of the appellants urges that since the Sub-Registrar did attest a power-of-attorney it ought to be presumed that he was satisfied that it had been voluntarily executed by the person purporting to be the principal. There is great force in the argument but still a presumption is only a rule of evidence which throws the onus on the other side and there may be evidence on the record which would lead the Court below to the conclusion that there was not evidence sufficient to satisfy the Sub-Registrar that the power-of-attorney was voluntarily executed by the defendant No. 1 in favour of her husband. While I hold that the decision of the learned District Judge is wrong on this point, I am clearly of opinion that the case must go back in order to enable the learned District Judge to decide whether the Sub-Registrar attested the power of attorney after being satisfied that it had been voluntarily executed by the defendant No. 1 in favour of her husband.

There is another point on which the learned District Judge has decided this appeal in favour of the respondents, *viz*, the power-

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of attorney gave authority to Abdul Hakim "to execute and admit its execution before the Registering Officer all sorts of deeds as sale, mortgage lease, bonds etc. etc. and do the needful in the Registration Office;" The learned District Judge is of opinion that such a power-of-attorney has to be construed strictly and I entirely agree with him that all powers of-attorney have always to be construed very strictly. But when the learned District Judge says that a power to execute a mortgage does not carry with it the power to incur any loan I entirely differ from him. Mr. Sultan Ahmed, appearing on behalf of the respondents, has relied upon the case of *Roy Radha Kisen* v. *Nauratan Lal* (1). That was a case where it was held that a power to sign a mortgage-bond did not carry with it a power to enter into a mortgage transaction. I entirely agree with the view which was taken in that case. It is worthy of note that in that case a distinction was drawn between a power to sign a document and a power to execute a document. In my opinion the power to execute a document carries with it the necessary powers to enter into the transaction itself.

The other points have all been decided by the learned District Judge in favour of the appellants; but there is another question which he did not decide. It was contended in the Court of first instance on behalf of the defendants that, assuming it be held that the defendant No. 1 did execute the power of attorney, the document was not read over and explained to her and that she did not understand what the nature of the document was.

The learned Munsif dealt with this question at very great length and came to the conclusion that the power of attorney was in fact read out and explained to the defendant No. 1 and that she understood the nature of that document. The learned District Judge has, however, not dealt with the question. It is obvious that this question must be investigated by the Court below.

In the result, then, I would allow the appeal, set aside the judgment and decree passed by the Court below and remand the case to that Court for decision after a consideration of the two points which I have mentioned in my judgment. Costs to abide the result.

COURTS, J.—I agree.

S. D.

Appeal allowed.

(1) 6 C. L. J. 490.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 16 OF 1922.

May 1, 1922.

Present:—Mr. Justice Piggott and Mr. Justice Walsh.

MUNNU LAL—OPPOSITE PARTY—APPELLANT

versus

KUNJ BEHARI LAL—APPLICANT—RESPONDENT.

Provincial Insolvency Act (V of 1920), ss. 5, 75 (3)—District Court, power of, to grant review—Appeal from order granting review—High Court when will interfere.

A District Judge acting under the Provincial Insolvency Act has power to review his own order, because section 5 of that Act gives a District Judge, when sitting as an Appellate Court, the same powers under the Code of Civil Procedure which he would have had if he had been sitting to hear an ordinary appeal. [p. 318, col. 1.]

Though an appeal lies to the High Court under section 75 (3) of the Provincial Insolvency Act, from an order granting a review of judgment, yet the Court in dealing with such an appeal should be guided by the principles laid down in the Civil Procedure Code. [p 318, col. 2.]

Shikri Prasad v. *Hafiz Aziz Ali*, 63 Ind. Cas. 601; 19 A. L. J. 862; 3 U. P. L. R. (A) 195, referred to.

First appeal from an order of the District Judge, Aligarh.

Mr. *Panna Lal*, for the Appellant.

Mr. *Peary Lal Banerji*, for the Respondent.

JUDGMENT.—The Court of the District Judge of Aligarh sitting in insolvency had before it an appeal from a decision of the Subordinate Judge of that place in the exercise of insolvency jurisdiction, by which certain questions arising under section 4 of the Insolvency Act, No. V of 1920, had been decided in favour of the Receiver in

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bankruptcy for the benefit of the general body of creditors. The District Judge did not hear or dispose of the appeal on the merits. He recorded a finding, if it can be called a finding, that the questions raised by the pleadings of the parties in this matter were of such a nature that they ought to be decided by a regular suit and not in the course of insolvency proceedings. On this ground alone he allowed the appeal, set aside the decision of the Subordinate Judge and gave certain directions to the Receiver. A little more than two weeks later the Receiver petitioned the District Judge pointing out, in the first place, that it was impossible for him to comply precisely with the directions which had been given him. In issuing those directions the District Judge had overlooked the fact that possession had passed under the transaction which the Receiver was seeking to impugn, so that a suit for a mere declaration would not be maintainable. The Receiver asked the District Judge, in effect, to re-consider his own position and submitted that the view which the District Judge had taken regarding the powers and duties of an Insolvency Court in a matter of this sort was a mistaken one and not in accordance with the latest decisions of this Court. Reference has since been made to the case of *Shikri Prasad* v. *Hafiz Aziz Ali* (1) which was published after the District Judge had passed his first order on the appeal. The District Judge issued notice to the opposite party and, after hearing both parties, passed an order granting a review of his own previous judgment and fixing a date for hearing and determining the appeal on the merits. We have before us an appeal against that order, and a number of legal objections have been raised on both sides. We are content to say that, in our opinion, the District Judge had jurisdiction to review his own order, because section 5 of the Provincial Insolvency Act, No. V of 1920, gave him when sitting as an Appellate Court, the same powers under the Code of Civil Procedure which he would have had if he had been sitting to hear any ordinary appeal. On the other hand, it has been questioned before us whether there is any right of appeal from this order granting review of judgment, or whether, assuming such right to exist, it is not bounded by the provisions of rule 7, Order XLVII, of the Civil Procedure Code. We may note that the appeal before us does not purport to be preferred under Order XLIII, rule 1 (*w*), of the Code of Civil Procedure, but under section 75 (3) of the Provincial Insolvency Act, No. V of 1920, the leave of the District Court having been obtained for the purpose. We think, however, in dealing with an appeal of this sort, we ought in any case to be guided by the principles laid down in the Code of Civil Procedure. We are satisfied that the first order passed by the District Judge on the appeal before him was a mistaken and unfortunate order and that it was proper in the interests of justice that he should proceed to hear and dispose of the appeal before him on the merits, as he is anxious to do. He will have full jurisdiction in the matter when he comes to hear the appeal, and if in his opinion there has been anything unsatisfactory in the procedure of the Subordinate Judge sitting as a Trial Court, that is a matter which can be considered and gone into at the hearing of the appeal. We are further satisfied that under the Code of Civil Procedure this order granting a review of judgment could not be questioned under any of the provisions of rule 7 of Order XLVII of that Code. On the whole, the conclusion we come to is that the order in question granting review is not one with which we ought to interfere.

The result is that we dismiss this appeal with costs, including fees on the higher scale.

W. C. A. *Appeal dismissed.*

(1) 63 Ind. Cas. 601; 19 A. L. J. 862; 3 U. P. L. R. (A.) 195.

JAMANLAL v. RAGHO.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 265 OF 1921.

June 23, 1922.

Present:—Mr. Prideaux, A. J. C.

JAMANLAL AND ANOTHER —DEFENDANTS—APPELLANTS

versus

RAGHO—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 47, 144—Restitution—Execution proceedings—Suit for relief of restitution, whether may be treated as proceedings.

Although a suit for restitution is barred by section 144 (2) of the Civil Procedure Code, yet where such a suit is instituted it can be treated as proceeding, under section 47 (2) because an application for restitution is in substance a proceeding in execution.

Appeal from an order of the Additional District Judge, Wardha, dated the 28th of February 1921, in Civil Appeal No. 20 of 1921.

Mr. *G. M. Pande*, for the Appellants.
Mr. *V. D. Kale*, for the Respondent.

JUDGMENT.—The present appellants obtained a decree against the plaintiff for possession of a house. This decree was reversed in appeal but before that happened defendants took possession. The plaintiff applied to the Court of first instance for restitution but only got possession of the vacant site. He now sues for recovery of Rs. 150 for damages on account of materials of the house taken away by the defendants and Rs. 50 for damages for injury caused to his adjoining house.

The defendants denied the alleged removal of the materials and damages and contended that plaintiff's remedy was by an application for restitution to the Executing Court and not by a separate suit. The First Court held that the costs of the materials removed by the present appellants amounted to Rs. 100 but found that the suit was barred by sub-section 2 of section 144, Civil Procedure Code, and dismissed the suit. On appeal the amount of damages has been confirmed but the lower Appellate Court finds that though the relief was restitution and the case primarily falls under section 144, it is yet one relating to the execution of the decree and as such will also fall under section 47, Civil Procedure Code, and as under that section the Court has the power to treat a suit as a proceeding or a proceeding as a suit, it treated the present suit as a proceeding and confirmed the payment of Rs. 100 as damages by the defendants to the plaintiff. The defendants now appeal.

It is contended here that sub-section (2), section 144, Civil Procedure Code, bars the suit. This is doubtless true. It is also contended that the case cannot fall within section 47, Civil Procedure Code. But there is authority for the view adopted by the learned Additional District Judge, namely, *Balvantrav Ore* v. *Sadrudin* (1), *Narayana Patter* v. *Gopalakrishna Potter* (2) and *Hamidali* v. *Ahmedalli* (3) and *Saran* v. *Bhagwan* (4). The case of *Jamini Nath Roy* v. *Dharma Das Sur* (5) though quoted by the appellants in the present case is really in favour of the view argued for the respondent. It seems to me that though applications for restitution may have to be brought under section 144 of the Code of Civil Procedure, yet they are in substance execution proceedings and as such cognizable by the Executing Court. I think they also come under section 47, Civil Procedure Code, and suits under that section can be treated as execution proceedings and proceedings as a suit. That is what the Additional District Judge had the power to do and which he has exercised in the present case.

It is contended that the lower Appellate Court has not in dealing with the question of damages dealt with all the evidence. There are two witnesses for the appellants: one has been obviously considered and the other who is a defendants' servant says nothing about the value of the house. There is thus no force in this contention.

But I think there is some ground in the argument that, as the suit was treated as

(1) 13 B. 485; 7 Ind. Dec. (N. S.) 322.
(2) 15 M. L. J. 247; 28 M. 355.
(3) 62 Ind. Cas. 233; 45 B. 1137; 23 Bom. L. R. 480.
(4) 25 A. 441; A. W. N. (1903) 100.
(5) 33 C. 857; 4 C. L. J. 192.

an execution proceeding, defendants should not be mulcted in the value of the stamp required for the plaint. I direct, therefore, that in both Courts the successful plaintiff in his costs is only entitled to eight annas as the cost of stamp. Beyond this modification of the decree this appeal fails and is dismissed. Costs will be in proportion to success and failure in the Courts below.

N. H. *Decree modified.*

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 156 OF 1921.

May 4, 1922.

Present:—Mr. Justice Piggott and Mr. Justice Walsh.

SHARIF HUSAIN—PLAINTIFF—APPELLANT

versus

HAIDAR HUSAIN AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. IX, r. 13, O. XLIII—Order refusing to re-admit application to set aside ex parte *decree—Appeal.*

An order refusing to re-admit and re-consider an application to set aside an *ex parte* decree dismissed for default is not appealable either under the Civil Procedure Code or any other law.

Civil revision from an order of the Subordinate Judge, Jaunpur.

Mr. *Mukhtar Ahmad*, for the Appellant.

JUDGMENT.—No appeal lay under the Code or under any other law that we are aware of from the order of the First Court refusing to re-admit and re-consider an application for the setting aside of an *ex parte* decree and restoration of the suit in which the said decree had been passed, which application the Court of first instance had dismissed for default. The order of the Appellate Court on this point is without jurisdiction. We allow the application accordingly and set aside the order complained of. The applicant is, in our opinion, entitled to his costs although the opposite party have seen fit to enter no appearance. We allow him his costs including the fees certified by him.

R. N. *Application allowed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2100 OF 1915.

May 8, 1919.

Present:—Mr. Justice Broadway and Mr. Justice Abdul Raoof.

SALIG RAM AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

BASSAO MAL AND CHARAN DAS DEFENDANTS AND ANOTHER—PLAINTIFF—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 92—Hindu temple—Suit by worshipper for declaration—Sanction, whether necessary.

A Hindu entitled to worship in a temple is not competent, as such, to maintain a suit for possession of property alleged to belong to the temple, as *prima facie* it is only the trustees who can claim that relief. But he can sue for a declaration that a certain property is trust property attached to the temple and no sanction is necessary under section 92, Civil Procedure Code, to bring such a suit. [p. 321, col. 1.]

Second appeal from a decree of the District Judge, Jullundur, dated the 17th April 1915, affirming that of the Subordinate Judge, First Class, Jullundur, dated the 16th February 1915.

Mr. *Nanak Chand*, for the Appellants.

Bakhshi *Tek Chand*, for Respondent No. 1.

JUDGMENT.—The facts of the suit out of which this appeal has arisen are briefly as follows:—On the 12th of October 1907 one Charan Das, *chela* of Gobind Das, *asadh bairagi*, of Nakodar, sold a certain house to Bassao Mal. On the 13th of October 1913 Mul Raj, Salig Ram and Raja Ram, sons of Badhawa, Brahmans of Nakodar, instituted this suit against Bassao Mal and Charan Das in which they asked for a decree for possession of the "open space" in suit after removal of the materials thereon, or, in the alternative, for a decree to the effect that

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the said "open space" together with the materials thereon was the property and in possession of a certain temple, and that the possession of the said property should be made over to the said temple after the sale in question had been set aside. As to the first prayer, it was claimed that the plaintiffs' ancestors had made this particular property in suit *dharm arth* to provide for the expenses of the temple in Bhallian street and that, therefore, the property being *dharm arth* Charan Das, the man in charge, was not entitled to sell it. The Courts below have held that the property in suit was not at any time the property of the plaintiffs' ancestors and had not been dedicated for religious purposes by them. This question has not been re-opened and need not be further considered. As to the prayer in the alternative, the primary Court having decided the case on the first point gave no finding. The learned District Judge, however, came to the conclusion that before the plaintiffs could institute the suit, assuming the property to pertain to a religious institution, it was necessary for them to obtain the necessary sanction laid down by section 92, Civil Procedure Code. Against this decision the plaintiffs have preferred this second appeal through Mr. Nanak Chand, and we have heard Bakhshi Tek Chand on behalf of the respondents.

Our attention has been drawn to the fact that the learned District Judge has confused two houses. One house is the house in which there is a *gurdwara*, and the other house is the one in suit. A reference to the judgment of the learned District Judge at page 9, lines 1 to 7 of the printed book, indicates that there had been some confusion as alleged. The *muafi* referred to was not granted in connection with the house in suit but in connection with the house in which there is a *gurdwara*, and this house is not in suit. In face of this confusion the finding of the learned District Judge at line 14, page 9, of the printed book that the property having descended from *guru* to *chela* is, therefore, religious in character, is one that requires re-consideration.

With regard to the applicability of section 92, Civil Procedure Code, Mr. Tek Chand admitted that if the claim was merely confined to a declaration that the property in suit was *dharm arth* and, therefore, not alienale, the plaintiffs could sue without recourse to section 92. He, however, contended that, inasmuch as possession of the temple was also asked for this further prayer brought the suit within the purview of section 92, Civil Procedure Code. Mr. Nanak Chand, however, contended that this further prayer was a mere surplusage and might, and should, be regarded as such. Now, it seems to us that the plaintiffs could not, as worshippers, sue for possession, as *prima facie* it is only the trustee who could claim that relief. The plaintiffs, however, can sue for a declaration, and to such a suit section 92 has no application. We hold, therefore, that no sanction was necessary under section 92 for a suit for a declaration and, as the learned District Judge has confused the two properties, we consider that there should be a re-hearing of the appeal before him.

We accordingly accept this appeal and return the case to the Court below who will re-hear the appeal so far as the claim for a declaration is concerned and come to a definite finding thereon. Costs in this Court will follow the event.

R. N.

Appeal accepted; Case remanded.

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 149 OF 1921.

June 16, 1922.

Present:—Mr. Justice Kanhaiya Lal.

DURGA PRASAD—APPLICANT

versus

BABU LAL AND OTHERS—OPPOSITE PARTIES.

Civil Procedure Code (Act V of 1908), O. XXI, r. 89—Tender of money with application to set aside sale—Tender, whether application—Limitation Act (IX of 1908), s. 4, applicability of.

RAJARAM SITARAM v. JAGANNATH GOVINDRAO YESHWANTRAO.

The terms of section 4 of the Limitation Act are wide enough to cover an application of every kind, which a man is called upon to make in Court.

A tender of money made with an application under O XXI, r. 89, for the setting aside of a sale is in itself an application offering to pay the money and is, therefore, governed by section 4 of the Limitation Act.

Civil revision from an order of the First Additional Judge, Aligarh.

Mr. *M. L. Agarwala*, for the Applicant.
Mr. *K. R. Dang*, for the Opposite Parties.

JUDGMENT.—This is an application in revision for the discharge of an order setting aside a sale held in execution of a decree under Order XXI, rule 89 of the Code of Civil Procedure. The sale took place on the 25th August 1920. The Civil Courts closed for the vacation on the 16th September 1920 and re opened on the 25th October 1920. On that date an application was made by the judgment debtor for setting aside the sale. He filed with the application a tender offering the amount mentioned in the proclamation of sale with the compensation payable to the auction-purchaser. But his tender could not be signed by the presiding Judge of the court concerned that day and the actual payment of the money was not, therefore, made till the next day, though the applicant was ready to pay it on the day on which the tender was made. The Court below accepted the application and set aside the sale.

The learned Counsel who appears for the auction purchaser contends that the deposit should have been made within thirty days from the date of the auction-sale and that the judgment-debtor was not entitled to the benefit of section 4 of the Indian Limitation Act (IX of 1908) so as to allow him to make the same after the re-opening of the Court. The terms of section 4 are wide enough to cover an application of every kind, which a man is called upon to make in Court. An application asking for the setting aside of the sale under Order XXI, rule 89, of the Code of Civil Procedure had been duly made on the date the Court re-opened. It was accompanied by a tender which in itself was an application offering to pay the money required as a preliminary to the setting aside of the sale. Section 4 would govern that application also. The Court below rightly held that the delay in the payment was not due to any fault of the judgment-debtor. The application, therefore, fails and is dismissed with costs.

S. D.

Application dismissed.

BOMBAY HIGH COURT.
SECOND CIVIL APPEAL No. 534 OF 1921.
February 13, 1922.
Present:—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Coyajee.
RAJARAM SITARAM POTPHODE—DEFENDANT—APPELLANT
versus
JAGANNATH GOVINDRAO YESHWANTRAO—PLAINTIFF—RESPONDENT.

Khoti Settlement Act (I of 1880), s. 21—Entry in Settlement Register, whether final—Decision of Recording Officer, binding effect of—"Such decision or entry," meaning of.

It is nowhere provided in the Khoti Settlement Act, 1880, that the mere entry in the Settlement Register of the name of a particular person as the occupant of a Survey Number is either final and conclusive, or that it is binding upon all parties concerned unless and until it is reversed or modified by a decree of the Civil Court. [p 324, col. 1,]

Under section 21 of that Act, it is the *decision* of the Recording Officer which is made binding, and not a mere *entry* of a person's name in the Settlement Register. [p. 324, col. 2.]

The expression "such decision or entry" in section 21 of the Act means, such decision or the entry which is the result of such decision. [p 324, col. 2.]

Second appeal from a decision of the District Judge, Ratnagiri, in Appeal No. 29 of 1920, confirming a decree passed by the Subordinate Judge at Devrukh, in Civil Suit No. 229 of 1918.

Mr. *A. G. Desai*, for the Appellant.
Mr. *P. B. Shingne*, for the Respondents.

JUDGMENT.

COYAJEE, J.—The plaintiff in this case and the twelfth defendant are Khots of Mouje Kosumb in the Ratnagiri District. The defendants Nos. 1 to 11 are members of a family named Potphode. The plaintiff brought the suit which has given rise to

this appeal to recover possession of lands comprised in Survey No. 239, *Fulni* No. 4, alleging that he was the owner thereof, that they formed part of his Khoti Khasagi estate and that the Potphode defendants had unlawfully dispossessed him of the same.

The third defendant was the only party who contested this claim in the Trial Court. He denied the plaintiff's title and possession as alleged, and asserted that the said lands belonged to, and were continuously enjoyed by, members of the Potphode family. He further contended that the suit lands were entered in the village Botkhat in the name of some members of his family; that the plaintiff did not get such entry reversed or modified by the decree of a competent Court within the period prescribed by law, and that, therefore, the entry had become binding upon the plaintiff.

The first two issues framed by the Trial Court related to the questions whether the plaintiff had proved his title and his possession within the twelve years preceding the commencement of this suit. The third issue was: whether the said entry in the Botkhat was a "decision" within the meaning of section 21 of the Khoti Settlement Act, 1880, so as "to give finality against plaintiff, and what would be its effect?"

The learned Judge held that the plaintiff had satisfactorily established his title and also his possession within the twelve years immediately preceding the suit; and that the entry in the Botkhat was not such a "decision" as was contemplated by section 21, and was, therefore, not binding upon the plaintiff. He, therefore, granted the reliefs claimed in the plaint.

From that decree an appeal was preferred to the District Court, not by the third defendant, but by the defendants Nos. 2, 9 and 19 who, until then, had taken no part in the proceedings. The appeal, however, failed, the learned Judge recording his complete agreement with the findings made by the Trial Court.

The original defendants Nos. 2, 3, 9 and 10 have now brought this appeal here and it is contended on their behalf that the entry in question has become binding upon the plaintiff according to the provisions of the said section 21.

For the determination of this question it becomes necessary to examine the material provisions of sections 16 to 21 which come under Part III of the said Act.

Section 16 provides that the Settlement Register prepared under section 108 of the Bombay Land Revenue Code, 1879, shall show whether a particular Survey Number is held by a privileged occupant or not; and if it is held by one or more privileged occupants, then the said register shall further specify (1) the tenure; (2) the names of the occupants; and (3) in the case of land held by a permanent tenant whether his interest therein is transferable otherwise than by inheritance or not. In this case the entry in question does specify the names of some members of the Potphode family as the occupants of the suit lands. By section 17 it is provided that the other records prepared under the said section 108 shall specify the description and amount of rent payable to the Khot. These two sections (16 and 17) are headed "Settlement Records."

Sections 18 to 21 fall under a different heading. "Custody and Amendment of Records: Determination of Disputes". Section 18 deals with the custody and amendment of the Settlement Register, and here I do not overlook sub-section (3) (*e*).

Then section 19 (1) enacts that—

"If it appears to the Recording Officer that there exists any dispute as to any matter which he is bound to record, or as to any amendment proposed to be made under section 18, he may, either on the application of any of the disputant parties, or of his own motion, investigate and decide such dispute, and frame or amend the Settlement Register or other record accordingly".

It is only when a dispute arises as to any matter which the Recording Officer is bound to record that he proceeds to "investigate" it in the manner provided in sub section (2); as a result of such investigation he arrives at his "decision" and he has then to "frame or amend the Settlement Register or other record accordingly," *i. e.*, to make an *entry* in accordance with the result of his *decision*.

Section 20 enacts that entries recording (1) certain facts regarding the interest of a permanent tenant, or (2) the liability of a privileged occupant to pay rent, shall be

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"conclusive and final evidence of the fact or liability so recorded."

Lastly, it is provided by section 21 that "in any other matter" the decision of the Recording Officer shall be binding upon all the parties affected thereby until reversed or modified by a final decree of a competent Court.

It becomes clear then that—these being the only sections bearing on the question—the Act nowhere provides that the mere entry in the Settlement Register of the name of a particular person as the occupant of a Survey Number is either final and conclusive, or that it is binding upon all parties concerned unless and until it is reversed or modified by a decree of the Civil Court. In support of his contention Mr. Desai, who has presented the appellants' case with care and ability, appeals to the provisions of section 21. But what is made binding by these provisions is the *decision* of the Recording Officer and not a mere *entry* of a person's name in the Settlement Register. As observed by Scott, C. J., in *Mahomed Ibrahim* v. *Ali Mahomed Ali Pengarkar*, Second Appeal No. 850 of 1914, decided by Scott, C. J., and Shah, J., on the 12th July 1915: "it seems to us quite clear that the word 'decision' refers to a determination of a dispute either in the presence or not in the presence of parties such as is referred to in section 19." And as there, so in this case, "there is no indication that any such dispute had arisen for the decision of the Recording Officer." In *Bhiva Bhika Chokekar* v. *Babu Balshet Bathate* (1), Hayward, J., interpreted section 21 thus:—

"Now that section makes conclusive certain decisions of the officer defined as the Recording Officer. What those decisions are is to be gathered from the preceding sections and a perusal of those preceding sections seems to me to make it clear that the mere entry of the name of some particular person as occupant was not intended to be included among those decisions of the Recording Officer."

I am of the same opinion. The Act does not invest a mere entry, such as we have here, with any degree of finality; and much could be said in favour of the view that the Legislature has deliberately refrained from giving to it that effect. Mr. Desai has, however, urged that the proviso to section 21 favours his contention. But it seems to me that the expression "such decision or entry" occurring there means no more than "such decision or the entry which is the result of such decision." Reference may in this connection be made to the material words in section 19 (1) which are that, "the Recording Officer may investigate and decide such dispute, and frame or amend the Settlement Register accordingly."

Finally, it was contended for the appellants that the entry in question may be regarded as a "decision" of the Recording Officer based upon a consent of all parties affected thereby. The argument derives no support either from the language of sections 19 and 21, or from the decisions referred to above. It is, however, sufficient to say that this contention was not pressed before the lower Courts and it cannot, therefore, be allowed to be raised here for the first time in this second appeal.

I would for these reasons affirm the decree of the lower Court and dismiss this appeal with costs.

MACLEOD, C. J.—I agree.

W. C. A.

Appeal dismissed.

(1) 51 Ind. Cas. 7; 21 Bom. L. R. 350; 43 B. 460.

NAGPUR JUDICIAL COMMISSINER'S COURT.

SECOND CIVIL APPEAL No. 415 OF 1921.

June 16, 1922.

Present:—Mr. Hallifax, A. J. C.

KESHEORAM—DEFENDANT No. 7—APPELLANT

versus

BHANGILAL AND OTHERS PLAINTIFFS Nos. 1 TO 3 DEFENDANTS Nos. 1 TO 6 AND 8 TO 11—RESPONDENTS.

Transfer of Property Act (IV of 1882), ss. 83, 84—Mortgagee impliedly admitting sufficiency of amount tendered, whether subsequently can plead insufficiency—Civil Procedure Code (Act V of 1908), s. 11, Exp. IV.

Where a mortgagee refuses to accept payment of a sum deposited under section 84 of the Transfer of Property Act, on the sole ground that the amount does not include interest up to the date on which he is summoned to appear in Court, and there is no suggestion that the amount deposited was not

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the full amount due for principal and interest on the date on which the deposit was made, he cannot, under the principle embodied in Explanation IV of section 11 of the Civil Procedure Code, be subsequently heard to say that the amount deposited was less than the sum due to him on the mortgage on the date of the deposit.

Appeal from a decree of the District Judge, Raipur, dated the 27th April 1921, in Civil Appeal No. 3 of 1921.

Mr. *W. R. Puranik*, for the Appellant.

Dr. *H. S. Gour*, for the Respondents.

JUDGMENT.—In the judgment of the First Court a finding is recorded that the amount privately tendered was Rs. 3,300. The judgment on this point is contradictory and the finding would almost certainly have been set aside if it had been considered in the lower Appellate Court. The matter was contested in the appeal to that Court, but was not considered and the finding of the First Court was accepted as stated. It has not been mentioned in the memorandum of grounds of appeal to this Court, and we have, therefore, to assume that the appellant has accepted the finding. We are concerned, then, only with the question of the money deposited on the 5th of August 1919, which was Rs. 3,352 9-0.

If interest for the months intercalated in the first and fourth years of the continuance of the mortgage is included, as was agreed in the mortgage bond, the amount due on it on the date of the deposit was Rs. 3,355-15-0, or Rs. 3-6-0 more than the amount deposited. This deficiency was only discovered during the course of this suit. When the plaintiffs appeared in answer to the notice of the deposit sent to them under section 84 of the Transfer of Property Act the only reason they gave for refusing to accept it as sufficient was that it did not include interest up to the date on which they were summoned to appear in Court; it was never suggested that it was not the full amount due for principal and interest on the date on which the deposit was made. Even in the pleadings in this suit and in the deposition of the second defendant it is not suggested that the deposit was insufficient on the day it was made and it is admitted that the only reason for its refusal was that it was insufficient on the date of hearing.

It must then, I think, be taken to have been admitted by the plaintiffs as a fact in the proceedings under section 84 of the Transfer of Property Act that the deposit was of the full amount due on the date it was made. It was argued by their learned Counsel in this Court that no admission of the sufficiency of the amount would make it sufficient if it was not so in fact. This is not correct. The plaintiffs were entitled to accept as sufficient to satisfy their mortgage any sum less than the amount which would be found due on a mathematically exact calculation of the amount due on it. Their admission of sufficiency would also include admissions of one or more of a number of facts such as previous payment. It is to be presumed that they made a correct calculation of the amount due to them on the date of the deposit, and after making allowance for any small sum that might have been paid or might be due by them to the mortgagor or might be remitted or intentionally neglected by them, came to the conclusion that that amount was Rs. 3,352-9-0 or less. Otherwise, they would have said that more than that sum was due to them even on the date the deposit was made. Under the principle embodied in Explanation IV of section 11 of the Civil Procedure Code the plaintiffs cannot now be heard to say that the amount deposited on the 5th of August 1919 was less than the sum due to them on the mortgage on that date.

In these circumstances, the plaintiffs are entitled to get a decree for Rs. 3,352-9 0 only, and that sum was deposited in Court for payment to them on the 5th of August 1919. This suit was, therefore, totally unnecessary, and the plaintiffs must pay all the costs incurred in it by the contesting defendants. The period allowed for redemption will be extended by another six months, that is, up to the 16th of December 1922. The decree of the lower Appellate Court has, therefore, to be modified by the substitution for Rs. 4,023-8 3, the amount declared due on account of principal, interest and costs on the date fixed for payment, of Rs. 3,352 9-0 *minus* the costs incurred by the defendants transferees (Nos. 8 to 12) in all three Courts in this litigation.

W. C. A. *Decree modified.*

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL No. 120 OF 1921.

January 26, 1922.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Coyajee.

VITHALDAS GULABDAS SETH —PLAINTIFF—APPELLANT

versus

THE HYDERABAD SPINNING & WEAVING CO., LTD.—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O VIII, r. 6—Set-off—Counter-claim—Difference—"Money due"—Unascertained damages.

Set-off and counter-claim are governed by rules of procedure which must be construed strictly. [p. 327, col. 2.]

A set-off can be pleaded as a defence and can only arise where the claim to be set-off one against the other whether by plaintiff or defendant exists in the same right. The principle on which an equitable set-off can be allowed is that the claim on which it is based must arise from the same transaction which is the subject-matter of the plaintiff's suit, and it is only when a claim for damages, for instance, forms the subject-matter of a counter-claim that it makes no difference whether damages are based on a claim arising on the subject-matter of the suit or are based on some transaction which is entirely outside the plaintiff's claim. [p. 327, col. 2; p. 328, col. 1.]

Though every set-off can be pleaded as a counter-claim, if a defendant so desires, every counter-claim cannot be pleaded as a set-off. It is, therefore, of the greatest importance to keep separate the questions of set-off and counter-claim when a defendant seeks to claim as a set-off not money due but an unascertained sum for damages. [p. 328, col. 1.]

A counter-claim is bad when it cannot form the subject-matter of a separate suit in the Court trying the suit in which it is pleaded [p. 328, col. 1.]

Where a defendant pleaded a set-off on the basis of an Article of Association, by which the plaintiff was bound and which ran as follows 'The directors may deduct from the dividend or bonus payable to any shareholder all sums of money due from him to the company":

Held, that, as the defendant wanted to set off an unascertained sum for damages, it could not be allowed as it was not money due within the meaning of the above article. [p. 327, col. 1.]

Griendtoveen v. *Hamlyn & Co.*, (1892) 8 T. L. R. 231, distinguished.

Appeal from an order of Mr. Justice Kajiji.

Mr *Inverarity*, for the Appellant.

Mr. *Kania*, for the Respondent.

JUDGMENT.—The plaintiff filed this suit against the defendant Company to recover the amount payable to him by way of dividends in respect of the 72nd and 73rd dividends payable on the 5th February 1920 and 19th April 1920, respectively.

In their written statement the defendants claimed that they were entitled to recover damages from the firms of Vithaldas Venkatlal and Trikamdas Purshottamdas in respect of certain cotton contracts. The joint family of Gulabdas Haridas, of which the plaintiff was the manager, was a partner in these two firms and was liable to pay these damages. Reference was then made in paragraph 7 to Articles 13, 130 and 131 of the Articles of Association. Articles 13 and 130 had nothing to do with plaintiff's claim; but Article 131, entitling the Directors to deduct from the devidend or bonus payable to any share holder all sums of money due from him to the Company, would be in point, if certain facts were proved. The defendant Company submitted that by reason of the said Articles the plaintiff was not entitled to claim the dividends referred to in paragraphs 3, 6 and 7 of the plaint, and submitted that the suit should be dismissed with costs. They, then, counter claimed, in the event of it being held that the amounts of the damages could not be set off against the claim in respect of the dividends, that the plaintiff as the head of the joint family firm of Gulabdas Haridas & Sons might be ordered to pay to the defendant Company a reasonable sum by way of damages on account of the premises mentioned in paragraph 6 of the written statement.

The plaintiff then took out a summons asking for an order that the counter claim of the defendant Company might be excluded, or that the Court should refuse permission to the defendants to avail themselves of the counter claim, and require them (if so advised) to file a separate suit in respect thereof. On the 11th June 1921, an order was made on the summons that it should be adjourned to the hearing of the suit, and it was further ordered by the Court that the suit should be put down on the board of the learned Judge peremptorily for the trial of an issue on demurrer. Accordingly, the suit came on for hearing before Mr. Justice Kajiji on the 29th July 1921.

Now, the order that was made on the 11th June 1921 is couched in somewhat unfortunate terms. In the first place, it is not desirable to use the word "demurrer", as demurrer in

English Practice has been abolished since the passing of the Judicature Act, while the term has never been recognised in India by any of the Codes of Civil Procedure. It can only be used in India by way of analogy to a bygone English form of procedure. The proper order to have made, following the provisions of the Code, was to direct the suit to be set down for settlement of issues, and when the issues had been settled, it could be seen whether any of the issues were sufficient for the division of the case under Order XV, rule 3.

There were two questions: (1) whether the counter claim should be struck out; (2) whether, if the counter-claim were struck out, the defendant Company would be entitled to set-off their claim. These were two entirely distinct issues, depending, for their decision, upon entirely different considerations; and the confusion which arose from not raising definite issues is apparent when we come to the judgment of the learned Judge because these two questions, which ought to be dealt with separately, are dealt with together, and the decision is that "this issue must be answered in the negative." On that finding an order was drawn up declaring not only that the defendants were entitled to plead by way of defence the facts set out in paragraphs 6, 7 and 8 of their written statement, but were also entitled to maintain the counter claim in the written statement of defence.

I will first deal with the question whether the counter-claim should be struck off. Now it is admitted that if the defendants were to file a separate suit on the subject matter of the counter claim, this Court would have no jurisdiction to try such a suit. Therefore, it is quite clear that the counter claim must be struck out.

Then, there is the question whether the defendant Company can set-off against the plaintiff's claim for dividends their claim for damages under the contracts referred to in paragraph 6 of the written statement. It is obvious that this question must be answered in the negative, because, under Article 131, the Directors can only deduct from the dividend or bonus payable to a share-holder sums of money due from him to the Company. The claim for damages on the contracts is not money due.

That would be sufficient to dispose of the question because in paragraph 8 of the written statement the defendant Company only claim to be entitled to set-off by reason of Article 131.

But I may also deal with the question whether, apart from Article 131 of the Articles of Association, the defendants can set-off the claim for damages. It could only be in the nature of an equitable set off, which is not permitted by Order VIII, rule 6, of the Civil Procedure Code. The learned Judge considered that the defendants could counter-claim for damages which could not form the basis of an equitable set off under rule 118 of the High Court Rules and referred to the case of *Griendtovsen* v. *Hanlyn & Co.* (1). But that case is only an authority for the proposition that, where a claim in damages is preferred by a defendant which arises out of the same contract as the one on which the plaintiff is suing, the defendant could be allowed to counter-claim for those damages although a separate suit could not lie for want of jurisdiction. Now, set-off and counter claim are governed by rules of procedure, and a plaintiff can only plead by way of set-off or counter-claim that which is permitted by those rules. A set off can be pleaded as a defence and can only arise where the claim to be set-off one against the other whether by the plaintiff or defendant exists in the same right. A set off can also be the subject-matter of a separate action or a counter-claim. And hence the confusion between the terms, as, though every set-off can be pleaded as a counter-claim if the defendant so desires, every counter claim cannot be pleaded as a set off. It would be much better if the two terms were kept distinct, and that if an equitable set-off is to be allowed, it should be provided for by rule, while rule 118 might be amended by omitting the mention of set off. But even assuming that rule 118 of the High Court Rules, although the marginal note is "counter claim by defendant," provides for an equitable set-off, then it is quite clear, under the decisions which lay down the principles on which an equitable set-off can be allowed, that the claim for damages must arise from the same transaction which is the subject-matter of

(1) (1892) 8 T. L. R. 231.

the plaintiff's suit, and it is only when the claim for damages forms the subject-matter of a counter-claim that it makes no difference whether damages are based on a claim arising on the subject-matter of the suit, or are based on some transaction which is entirely outside the plaintiff's claim. It is, therefore, of the greatest importance to keep separate the questions of set-off and counter-claim when the defendant seeks to claim as a set-off not money due but an unascertained sum for damages.

In any event, it is perfectly clear that in this case the counter-claim is bad because it could not form the subject-matter of a separate suit in this Court for the reason that the defendant, who is now plaintiff, resides outside the jurisdiction, and the whole of the cause of action arose outside the the jurisdiction.

It is also quite clear that the defendants' claim does not come within the definition of equitable set off.

Therefore, the defendants clearly have no answer to the plaintiff's claim for dividends, and as the issue which I have raised as the real issue argued in the lower Court must be found against the defendants, there must be a decree for the plaintiff for the amount claimed, that is to say, Rs. 10,800, the amount of the dividends, with interest at nine per cent. per annum from the 18th July 1920, when notice was given that interest would be charged, till judgment, and costs and interest on judgment at six per cent. per annum.

R. N.

Appea allowed.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 44 OF 1920.

April 26, 1922.

Present:—Mr. Justice Piggott and Mr. Justice Walsh.

GOSWAMI PURAN LALJI—PLAINTIFF—APPELLANT

versus

RAS BEHARI LAL AND ANOTHER—DEFENDANTS—RESPONDENTS.

Hindu Law—Endowment—Manager of trust refusing to act—Founder's widow taking up management—Appointment by widow of another manager under Will, validity of.

A Hindu by a Will created a trust in favour of an idol and appointed a manager for the purpose and assigned to the managers of another temple the right of interfering in case of a breach of trust. The manager appointed by the Will did not take upon himself the duties of that office, whereupon the widow of the founder took possession of the property and continued to manage it till her death; during her lifetime, however, she executed a Will whereby she appointed a relative of hers to succeed to the office of manager in her place. The reversioner of the original donor questioned the power of the widow to make the appointment:

Held, per *Walsh, J.*—The widow as the heir to her husband could not create an interest beyond her lifetime and consequently had no right to bind a reversioner by appointing a manager to act after her death. No special rights having been bestowed upon her by the original deed of endowment, she had no such right under either Hindu Law or custom. [p. 331, col. 2.]

Per *Piggott, J.*—Though the widow, as representing the estate of the deceased, could make an appointment to inure beyond her lifetime, she had no right virtually to appoint herself as manager and then to endeavour, by means of a testamentary disposition, to take effect after her death, to continue this management in favour of relatives of her own. [p. 334, col. 2; p. 335, col. 1.]

First appeal from a decree of the Subordinate Judge, Muttra.

Mr. *Narain Prasad Asthana*, for the Appellant.

Mr. *Girdharilal Agarwala*, for the Respondents.

JUDGMENT.

WALSH, J.—This is an appeal from a judgment dismissing the plaintiff's suit. The suit was decided by the Subordinate Judge of Muttra. As regards the Cawnpore property the appeal fails. As regards the Bindra-

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ban property I have come to the conclusion that the appellant is right and the plaintiff is entitled to succeed for the following reasons:—(I will, for the moment, disregard the reasons given by the lower Court for thinking otherwise).

The property was dealt with by a deceased virtuous man who wanted to dedicate it to a certain idol. The deed of dedication is contained in the document dated the 15th May 1871. So far as the property goes with which this judgment is concerned, and in regard to which in my opinion the plaintiff is entitled to succeed, the general intention of the donor to be gathered from the language of the deed which is extremely difficult to follow because it appears to contain provisions inconsistent with one another, was that one Sangam Lal, who was called the second donee, should make arrangements for the worship and service in a temple, collect the rent of the property and spend it on food, offering and entertainment and in no other way. His representative was to act in a similar manner, such provision seeming to imply a power to appoint a representative if he saw fit, but no one was to have the power to transfer the endowed property. Should anybody attempt to transfer the endowed property or to misappropriate the funds, a right was given to the *panches* and managers of the temple of Banke Bihariji Maharaj to take steps to prevent it. As I understand this provision, the latter persons were intended to be a kind of *cestui que trust*, or guardians of the corpus, who would be sufficiently interested to be recognized by law as persons entitled to interfere in the case of a breach of trust.

The first donee, the widow, to whom the deceased gave the remaining property, survived him for many years. The second donee, Sangam Lal, for some reason or another, which does not appear on the record of either this suit or of the previous suit to which I am about to refer, never took upon himself the office of manager and it is undisputed that the widow got into possession and retained possession, and if the recitals in the Will, the validity of which is raised in this suit, are to be accepted as true, enjoyed and executed in every way the office of manager or *mutwalli* in place of Sangam Lal.

In the year 1893 the father of the present plaintiff, one Goshain Makhan Lal brought, what appears to have been a foolish suit, and if he knew of the deed of endowment to which I have just referred, must have been a fraudulent suit, against the widow. He launched it in the guise of an innocent, plausible and natural claim by an ordinary reversionary heir against a widow who had acquired a life-interest in her deceased Hindu husband's property and was, therefore, prohibited by Hindu Law from dealing with the corpus, alleging that she had executed a Will in respect of this property in 1893 in favour of her relation Ram Lal to whom reference will be made in a moment, and sought to have the deed cancelled and declared void. That suit was decreed in favour of the then plaintiff though on what ground does not appear from the only judgment which we have on the record. The decree was set aside on the 23rd January 1897, by a Bench of this Court upon the ground that every allegation which had been alleged by the plaintiff in his plaint had failed and that he had no cause of action for asking for the Will to be set aside as a reversionary heir. It was at that date either common ground or pleaded against the then plaintiff that the property had been assigned by the deceased husband to the *panches* of Thakur Banke Behariji Maharaj and that the widow was given no interest or right of any kind in the property but that she was for the moment in possession in some way or another of the endowed property because the appointed manager Sangam Lal had not taken up his office and that the whole foundation, presumably fraudulent, on which the plaintiff had litigated did not exist in fact. The learned Judges threw out a suggestion that this lady in action as manager might be only a trespasser and that if she was, there might be a right in the heirs of Sangam Lal who may be presumed by this time to have been dead or the *panches* to put an end to her trespass, (questions which

must depend upon the interpretation of the deed of endowment and the rights of the managers as they are provided, but questions, which, in my opinion, did not and could not lawfully arise for decision in the plaintiff's suit and which this Court did not purport to determine.) They pointed out to the plaintiff that, so far as the management of the endowed property was concerned, he, at any rate, had no right to interfere, which was no doubt a correct but superfluous statement, it being sufficient for the decision of the appeal that he had no shadow of a claim as reversionary heir to set aside the Will of 1893. So far as I can gather from the evidence in the suit and from anything which has been suggested on behalf of the respondents before us, that is a correct and comprehensive statement of what happened in the prior litigation. In course of time, the former plaintiff having died and, finally, the widow herself, this suit has been brought by the present plaintiff who is admittedly the heir of the deceased donor. In order to make the matter clear, which I regret to say the judgment of the Court below fails to do, I do not think I can do better than quote from a statement which was made by the plaintiff's Pleader in the Court below, setting out correctly as a matter of form if reference is made to the plaint and also I think correctly in substance, the nature of the claim. Having referred to the *waqf* and the appointment of Sangam Lal and the widow as *mutwalli*, the Pleader goes on as follows:—"My claim is that Sangam Lal has never got possession over the property as *mutwalli* and *Musammat* Achamb Kuar remained in possession as *mutwalli*. She had, under the deed of endowment of 1871, no power to appoint a *mutwalli* in her place. The plaintiff as heir brings this claim under the Hindu Law."

The claim was to have it declared or decided that an alleged power of appointment which the deceased widow had made during her lifetime under a Will dated 1909 in favour of certain persons, to whom I will refer in a moment, had no legal authority, was not justified by the deed of endowment and in the absence of some legal authority, custom, or usage was not justified by the general rule of Hindu Law. I think it is clear that the plaintiff has successfully established the broad principle involved in that statement in this case. The authorities cited are not on all fours with the present case. Few cases are on all fours with one another. But it appears to have been laid down perfectly clearly by the Privy Council so long ago as 1889, [*Gossami Sri Gridharini* v. *Romanlal i Gossami* (1)] that "the office of a *shebait* is vested in the heir or heirs of the founder provided that there is no usage, course of dealing or circumstance showing a different mode of devolution". A different mode of devolution must, of course, mean some mode warranted by law. Obviously, a mode contained in an express condition of the endowment would be a mode warranted by law because every man has a right to do what he pleases with his own property and to indicate the limits within which the succession to the management or control or ownership of his property shall be continued after his death when he is no longer here to direct operations. The authority in question undoubtedly covers the position of the office of the *shebait*. The point specifically raised in this suit is the power of appointment to such office as is shown by the statement of the Pleader which I have quoted The plaintiff distinctly put in issue the power of appointment which the lady had endeavoured to exercise by her Will of 1909 and did not specifically raise the question of the succession to the office itself. That case has been followed by two or three Benches of this Court, particularly by a two Judge Bench, [*Chandranath Chakrabarti* v. *Jadabendra Chakrabarti* (2)], a case which would otherwise be on all fours but apparently is not on all fours with this suit inasmuch as the lady who had been appointed *pujari* under the Will of the original donor and who had made the Will seeking

(1) 17 C. 3; 16 I. A. 137; 13 Ind. Jur. 217; 5 Sar. P. C. 350; 8 Ind. Dec. (N. S.) 541 (P. C.).
(2) 28 A. 689; A. W. N. (1906) 173.

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to appoint the next manager which the heirs of the founder challenged by the suit, was not, or at any rate is not, shown by the report to have been the widow or heir of the deceased donor. If she had been, there would have been no distinction between this case and that. There is a further relevant decision in 1907 by the High Court of Calcutta *Rajeshwar Mullick* v. *Gopeshwar Mullick* (3) which lays down another cognate but somewhat narrower rule, namely, that a *shebait* cannot as such, by Will, alienate the office of *shebait*. The decision of the Privy Council has also been followed by this Court in *Sheoratan Kunwari* v. *Ram Pargash* (4) and *Sheo Prasad* v. *Aya Ram* (5) and, as I gather from the learned Subordinate Judge's judgment, was accepted by him in deciding the first issue in the suit, he basing himself in his judgment upon *Chandranath Chakrabarti* v *Jadabendra Chakrabarti* (2) to which I have already referred. So far as I was able to understand the observations addressed to us yesterday on behalf of the respondent, this legal position was accepted as correct by the respondent. That being so, it seems to me quite clear that the plaintiff at that stage had *prima facie* established a right to succeed in the suit, a state of affairs expressed by the learned Judge of the Court below that the plaintiff could maintain the suit if it did not "fail on the merits". Inasmuch as he dismissed the suit, it must be assumed that he came to the conclusion that it did fail on the merits. What were the merits which he intended to decide to be sufficient to justify its failure, is the problem which I am, on a perusal of his judgment, unable to solve. He finds that the widow was appointed to supervise over the management of Sangam Lal. I do not know where he gets that from, but it is not of very great importance because as Sangam Lal did not manage there was nothing to supervise, and he goes on to find that she remained in possession only as a trespasser. He had already found that the suit was not barred by the Statute of Limitation. It seems to me, therefore, that, having accepted the principle upon which the plaintiff based his claim, and having found that the position of the widow who made the Will was merely that of a trespasser, the logical consequence of these two propositions would be that her right to appoint a successor failed and that she had not discharged the onus cast upon her by the plaintiff's *prima facie* right. His final conclusion on Issue No. 7 is absolutely unintelligible. It looks to me as though he had been frightened by a dictum of this Court in the previous decision which had really no bearing on this suit, and, while expressly holding that the previous judgment of the High Court did not operate as *res judicata*, it was sufficient to justify him in saying that the plaintiff had absolutely no right to maintain the suit. The view pressed upon this Court on behalf of the respondent has been substantially this:—It may be put in more than one way—First, it was said, that the widow being the heir during her lifetime, she might reasonably be held to have the power of appointing a successor to Sangam Lal. Presumably she could, for what such an appointment would be worth, to the extent of her life, until, as the High Court said in its previous judgment, Sangam Lal or the *panches* attempted to interfere with her right, but whether she could do so by Will so as to bind the present plaintiff after her death which is really the question in this suit, must, I think, depend upon the terms of the deed of endowment. If the right to do so cannot be found there, in my opinion it cannot exist in law. To hold that she could do so on some general principle of law analogous to the right of the beneficial owner, would seem to me to give a higher right to a Hindu widow as heir of her deceased husband than has ever been recognized by Hindu law or custom, that is to say, although she is not in fact a beneficial owner, and the person deriving such benefit as would accrue from the appointment would not be beneficial owner of the corpus, nonetheless it would seem to me to recognize the right of a Hindu widow, who as heir has no more than a life-interest, to do more with endowed property than she can admittedly do with unendowed property. So far as I can

(3) 35 C. 226 12 C. W. N. 323; 7 C. L. J. 315.
(4) 18 A. 227; A. W. N. (1896) 37; 8 Ind. Dec. (N. S.) 858.
(5) 29 A. 633; 4 A. L. J. 535; A. W. N. (1907) 210.

speak with any confidence of the terms of the deed of endowment, I am satisfied that no power of appointment was ever contemplated by the deceased donor or intended to be conferred upon his widow.

The respondents' case was also put, as I understand it, in this way:—That if anybody had a power of appointment under the deed of endowment, it was the *panches* or manager referred to in the latter part of the deed. I do not think the deed is capable of that interpretation. I think the real meaning of the provision with regard to them is that they are persons who are given the right to interfere with the *de jure* manager and to correct and prevent any defalcations or other mismanagement by him while he is in office. But assuming that that right is conferred upon the *panches* and managers of the temple above referred to, I have been unable to see how that point can avail the defendants in this case. It is not universally true, but I think it is true in this class of cases, that a person claiming to be either in office, or in possession, or to resist a declaration or assertion of right by a person *prima facie* entitled, must stand upon his own right or on that of the persons through whom he claims. He cannot set up what is called a *jus tertii*. It does not seem to me that the defendant, even if he had relied upon that point, would have been entitled to succeed upon it, but I think for the purposes of this case it is sufficient to hold that it was never pleaded. It was not the ground on which the respondent succeeded in the Court below, and, so far as I was able to understand the argument addressed to the Court on behalf of respondents, was not relied upon by him before us.

It, therefore, comes back, as Mr. Durga Prasad rightly said, to a very simple question: Is the widow of the deceased donor justified by the power given by the deed of endowment of 1871 to make the Will of 1909? My answer to that question is, no. In conclusion, I may refer to certain passages in the Will itself which, although this cannot really be used as decisive against the present defendants, go very far to confirm me in the strong view I take of this defence. I think the person who was responsible for drafting or settling this Will on behalf of the deceased lady discreetly avoided referring to the power under which she was purporting to appoint. I am satisfied that the appointment was made by her *qua* manager and not as heir. If it had been made as heir there was no reason why she should not have said so, but in the somewhat portentious recital she distinctly alleges that she has been in exclusive possession merely as manager, and in the first operative clause appointing her minor relative she directs that "he shall like myself be the *mutwalli* and manager of every kind of movable and immovable property and shall as such have all sorts of power." She discreetly said in the recital "I have power to make a fresh arrangement." So far as a document can assert its own legal authority, I think this document was intended to assert that the power so conferred upon her was inherent in her as *de facto* manager and that it was as such that she sought to exercise it. In my opinion that is sufficient to dispose of the defence. I cannot part with the case without expressing, although it is really not necessary for the decision which I think we ought to arrive at, the very strong view which I take that this appointment in the Will was purely illusory, and if a general power in her favour were to be collected from the deed of endowment or could be, without doing violence to the principles of Hindu law, attributed to her as heir, I think there would be strong ground for holding that the appointment contained in clause 2 of the Will is, what is known in English law, as "a fraud upon the power." The appointment of Rai Behari, her daughter's son, who she says has been brought up as a begotten son and lives with her, is a mere sham. She appoints two persons, his mother *Musammat* Ram Dei, and Ram Lal, to be guardians of the said minor. So far so good. But she goes on to provide that when the minor attains majority, the two persons she has appointed as guardians during his minority shall continue to look after the property, and during their lifetime, the executor, in other words, the so-called manager of the endowment now being of full age whom she appointed, is to perform all works in conformity with the opinions of the said two persons. To my mind that provision left these two persons masters of the situation. It made the appointment by the deceased man of the *panches* and the representative

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of Sargam Lal as a sort of watch-dog over the corpus with a view to preventing breaches of trust, practically a dead letter. Under such a provision the so called manager, Ras Behari, could never be touched for any breach which he might commit because he would have an absolute answer under his own appointment, namely, that he was bound to comply with the directions of two other persons, and as far as I can see, it would be extremely difficult for anybody in a Court of Law to reach these two other persons, and it is not difficult to see how the whole of the endowment could be squandered and misappropriated, with very great difficulty in preventing, and almost insuperable obstacles in the way of punishing, such misfeasance. I take a very strong view, apart from any other question in this suit, that the alleged appointment made by the widow under this Will was as far from and as hostile to the intentions of the original donor as anything could be, and I am satisfied that our decision is in accordance with the merits as well as in accordance with the law. To that extent the plaintiffs' appeal must be allowed. It must be declared that the appointment is vested in him and that the Will so far as it purports to deal with the trusteeship or managership of the Bindraban property is void and of no effect and that the plaintiff is entitled to take possession. The parties will pay and receive costs in proportion to their failure and success in both Courts. Costs in this Court will include fees on the higher scale.

PIGGOTT, J.—We are dealing in this case with property held under a trust created by a deed of endowment, and the terms of that deed are necessarily the most important matter for consideration. This deed of the 15th of May 1871 is a singularly ill drafted document and it would be quite easy to take particular portions of it and show that their apparent meaning is contradicted by certain other portions. The most glaring example of this is to be found in the fact that what may be called the operative portion of the deed, where the donor, Sri Goshain Narsinghji, purports to make a gift of property in favour of his wife, *Musammat* Achamb Kunwar and of Sangam Lal, contains an exception excluding from the operation of the gift the immovable property specified at the foot of the deed which is the principal subject-matter of the present appeal. It is only inferentially, by means of words used in a later portion of the document, that one can understand that the executant intended to make a gift of this immovable property in favour of an idol. We must, however, take it as an admitted fact on the pleadings that a trust was created in favour of an idol. The questions remaining to be considered are, what this idol was and what directions the founder of the trust left regarding the management of the same. It is quite clear that the trust was to be mainly in favour of an idol described by the name and title of Sri Thakur Radha Behariji Maharaj whose image, if it was in existence at all at the date of the deed, had not yet been installed anywhere. It was left to the widow, Achamb Kunwar, to instal this idol in a particular shrine, described as amongst certain buildings which "have been built and are still under construction," in an earlier part of the deed. When this idol was so installed he, considered as a juristic personality, was to have the enjoyment of the income from the immoveable property specified at the foot of the deed, and the management of this property, with directions for the proper application of the income was conferred upon Sangam Lal. It may fairly be inferred from an expression used in the deed that this office of manager was intended to be hereditary in the family of Sangam Lal. It is by no means clear, however, whether the actual gift of the corpus of the property was in favour of the idol already mentioned from the date of its installation by the widow. The temple which Sri Goshain Narsinghji had built, or had begun to build, for the reception of this idol was evidently situated in close proximity to a larger temple dedicated to an idol described as Thakur Banke Behariji Maharaj, which temple was in charge of a managing committee of some sort referred to in this deed. According to the terms of the deed it was this idol installed in the larger temple, in the charge of this managing committee, which was "ultimately" to be the owner of the immovable property. The real and principal difficulty about the interpretation of the entire document is this word "ultimately". On the face of it

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the document is a deed of gift to take effect immediately from the date of its execution and, in so far as certain property, moveable and immoveable, was to be placed in the possession of Achamb Kunwar and of Sangam Lal respectively, the deed evidently did operate from the date of its execution. Those portions of the deed which relate to the application of the income could not come into force until the idol of Sri Thakur Radha Behariji Maharaj was installed in the small temple constructed by the executant, or commenced by the executant and finished by his widow after his death. There is nothing in the terms of the Will to suggest that the word "ultimately" which qualifies the gift in favour of the idol of Banke Behariji Maharaj, in the larger shrine, refers to any date subsequent to the installation of the less important idol in the small shrine. I think it must have been for some such reason as this that in the former litigation it was considered that the ultimate right to the management of the immoveable property specified at the foot of this deed of May the 15th, 1871, vested in the committee of management in charge of the larger shrine of Thakur Banke Behariji Maharaj. I agree, however, that these considerations cannot determine the result of the present suit. I do think that a defendant in possession of immoveable property is entitled to resist a plaintiff claiming possession of the same by setting up a *jus tertii*, and that there is nothing in the circumstances of the present suit to qualify that right. If, however, a defendant wishes to set up such a defence, he should certainly take the responsibility and submit to the possible consequences of doing so in plain language. After carefully studying the written statement filed by the defendant in the present suit it, does seem to me that the rights of the temple of Thakur Banke Behariji Maharaj or of the idol therein installed, or of the committee of management in charge of that temple, were not expressly pleaded or put in issue.

With regard to the other questions raised before us the position I would take up is a simple one. We must assume, as between the parties to this litigation, that Sangam Lal, the manager ppaointed under the deed of endowment, either refused to act, or in some other manner clearly indicated that he did not intend to take up the trusteeship offered him under the terms of this deed. There was then beyond all question a right to appoint a new trustee vested in some one or other. The widow, *Musammat* Achamb Kunwar, seems to me to have acted in good faith and to have done her best to carry out the wishes of her late husband. The first thing she had to do was to instal the idol in the small shrine referred to in the deed of endowment, and it is not denied that she did this. In the absence of another manager it seems to me that she was perfectly entitled, after her husband's death, to take up the management of the trust property herself. The only persons who could question her right to do so would be the committee in charge of the larger temple of Thakur Banke Behariji Maharaj, if they held that under the terms of the deed of gift Sri Ghoshain Narsinghji had so divested himself of this property as to deprive his heirs after him of any right of appointment, the ultimate management of the trust resting entirely in the said committee. Assuming, however, that this committee did not concern itself in the matter, the widow would be carrying out the intentions of her late husband in installing the idol and making arrangements for its due worship. As a matter of fact, she has gone a great deal further, because in the Will which was made the subject-matter of the present suit she has dedicated the entire balance of her property for the benefit of another idol to be installed somewhere at Cownpore. Now my own view regarding the question of law which has been principally adopted before us is this, that under the circumstances assumed by the parties to this litigation, and putting aside altogether the question of the *jus tertii* to which allusion has been made, if *Musammat* Achamb Kunwar had seen fit, upon the failure of Sangam Lal to take up the office conferred upon him by this deed, to make another appointment to take effect immediately, she had a right to do so as representing the estate of her deceased husband, and she had a right to make an appointment which would inure beyond her own lifetime. I think, however, on the authorities it cannot be held that she had a right virtually to appoint herself as

manager and then to endeavour, by means of a testamentary disposition to take effect after her death, to continue this right of management in favour of relatives of her own. For these reasons, I concur in the decree and order proposed.

R. N. & N. B.

Decree modified.

LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 223 OF 1920.

November 2, 1921.

Present :—Mr. Justice Scott Smith.

JHARIA COAL COMPANY OF DHANBAD, BIHAR—DEFENDANT—PETITIONER

versus

DIWAN CHAND AND COMPANY OF DELHI—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. VI, r. 17 —Amendment of pleadings—Interlocutory order—Revision.

Leave to amend should always be given unless the Court is satisfied that the party applying for leave is acting *mala fide*, or that, by his blunder he has done some injury to his opponent which cannot be compensated for by costs or otherwise. However negligent or careless may have been the omission, however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. [p. 336, cols. 1 & 2.]

The High Court should hesitate as a rule to interfere in revision with interlocutory orders of the lower Courts, but it should not hesitate in exceptional cases. [p. 336, col. 2.]

Defendants applied for leave to amend their written statement before issues were struck but the Trial Court refused to grant leave to amend. On an application to the High Court in revision:

Held, that this was an exceptional case in which the High Court would interfere with the interlocutory order of the Trial Court. [p. 336, col. 2.]

An interlocutory order passed by the presiding Judge of a Court is not binding on his successor and the latter can go behind the order if a case is made out for his doing so. [p. 336, col. 2.]

Petition, under section 44 of the Punjab Courts Act of 1919 for revision of the order of the Senior Subordinate Judge Delhi, dated the 10th February 1920.

Dr. *Gokul Chand Narang*, for the Petitioner.

Lala *Moti Sagar*, R. S., for the Respondent.

JUDGMENT.—This is an application by the defendant for revision of an order passed by the lower Court refusing to admit further pleas and to frame additional issues. The additional issues which the Court refused to frame were:—

(1) Whether the agreement in the letter of the 30th October 1916 was or became impossible of performance and completion? If so, what is its effect on the suit?

(2) Whether this Court has jurisdiction to try the case?

The Court refused to frame the first of these issues because no such plea was contained in the original written statement of the defendant which he filed on the 7th July 1919. The Court admitted that by supplementary application of the 31st July the defendant did raise this plea, but disallowed it on the ground that the leave of the Court for filing the supplementary pleas had never been obtained. It refused to frame the issue as to jurisdiction on the ground that the Judge's predecessor Mr. Tapp had already decided that the Court had jurisdiction, and it was of opinion that it could not go behind this. Mr. Tapp's order deciding the question of jurisdiction is dated 13th October 1919. He said: "As regards the jurisdiction the defendant Company admitted that this Court had jurisdiction in their written statement. They only questioned the jurisdiction of the Court in their additional written statement for the filing of which they have obtained no permission. Apart from this, the contract if there was one was entered into at Delhi."

On a reference to the record it appears that paragraph 11 of the plaint was as follows:—

"The valuation for the purpose of Court fee and jurisdiction is Rs. 71,625."

Paragraph 11 of the written pleas of the defendant was as follows:—"There is no objection to the Court-fee paid and to the jurisdiction of the Court,"

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In the supplementary pleas put in on the 31st July, it was explained that by inadvertence and accidental error in paragraph 11 of the written statement the words "and jurisdiction of the Court" have been written and that the jurisdiction of the Court was not admitted. It is quite clear that the defendant never intended to admit the jurisdiction of the Court. Reading paragraph 11 of the plaint and of the pleas together, it appears that what the defendant meant to say was that he did not object to the valuation of the suit for the purposes of Court-fee and jurisdiction. Mr. Tapp was clearly in error in his opinion that defendant admitted the jurisdiction of the Court, and Mr. Moti Sagar frankly admits that Mr. Tapp was mistaken. It, therefore, appears that the latter officer decided the point of jurisdiction through a mistaken impression that the defendant in his original pleas admitted the jurisdiction of the Court. Malik Ahmad Yar Khan was not right in his view that he could not go behind the decision of Mr. Tapp on this point. Mr. Tapp's order was merely an interlocutory one and did not therefore, bind him. On the 7th July 1919, when the original pleas were put in, the Court did not do anything except give a further date for the examination of the parties who were not then present in person. On the 31st July, the defendant not only put in supplementary pleas, but made a separate application for the leave of the Court to put in such pleas. Upon this the Court passed no formal order, and it appears to me that it must have overlooked the application. If it had carefully perused it together with the original written pleas, it would, I think, have come to the conclusion that the defendant never intended to admit the jurisdiction of the Court. The case was eminently one where the Court should have allowed the supplementary pleas which were in part necessary as they were explanatory of the original ones. At page 415 of Mulla's Civil Procedure Code the following dictum of Bramwell, L. J., is quoted:—"I have much to do in Chambers with applications for leave to amend and I may perhaps be allowed to say that this humble branch of learning is very familiar to me. My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting *malafide*, or that, by his blunder he had done some injury to his opponent which could not be compensated, for by costs or otherwise." He also said: "However negligent or careless may have been the omission, however late the proposed amendment, the amendment should be allowed if it could be made without injustice to the other side." There certainly was no *mala fides* on the part of the defendant in the present case and no damage could possibly have resulted to the other side by the admission of the supplementary pleas put in on the 31st July 1919. I am altogether in agreement with the view that this Court should hesitate as a rule to interfere in revision with interlocutory orders of the lower Courts, but the present is an exceptional case, and, I think, interference is clearly allowable. Mr. Moti Sagar says he has no objection to the additional issue 'whether the contract has become impossible of performance and completion' being framed but he urges that the issue as to jurisdiction should not be added. He says that if there was any agreement at all it took place at Delhi. Counsel for the defendant traverses this on the ground that according to the plaintiff the agreement was confirmed at Jharia and not at Delhi. In my opinion, there is not sufficient material on the record for the immediate determination of the question of jurisdiction, and I see no reason why there should not be an issue on the point. At the same time, I am not prepared to say that the question of jurisdiction should be decided before the evidence is recorded and findings come to on the other issues.

I allow the revision and direct that the two additional issues asked for by the petitioner be added. Costs of this Court will be costs in the cause.

S. D. & Z. K.

Revision allowed

KHUSHAL SINGH v. EMPEROR.

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 1417 OF 1919.

February 23, 1920.

Present: —Mr. Justice Broadway.

KHUSHAL SINGH—CONVICT—PETITIONER

versus

EMPEROR—RESPONDENT.

Defence of India Rules, 1915, r. 25 (1), (2)—*Non-cognisable offence—District Magistrate directing Superintendent of Police to take action*—Chalan *made by subordinate Police Officer on authorisation of Superintendent of Police*—Chalan, *whether can be treated as complaint.*

Where a District Magistrate in pursuance of authority conferred by a Government Notification authorises a Superintendent of Police to take action against a person for an offence under rule 25 (1) of the Defence of India Rules, of which offence the Police are not authorised to take cognisance, and on the authorisation of the Superintendent of Police, a Subordinate Officer makes a *chalan*, the *chalan* may be treated as a complaint.

Shamal Khan v. *Empress*, 16 P. R. 1890 Cr, *Kirpal Singh* v. *Empress*, 28 P. R. 1883 Cr, *Abdul Ghani* v. *Municipal Committee, Peshawar*, 2 P. R. 1892 Cr, *Nurdin* v. *Municipal Committee, Lahore*, 3 P. R. 1892 Cr, *Nahinya* v. *Empress*, 20 P. R. 1894 Cr, *Barindra Kumar Ghose* v. *Emperor*, 7 Ind. Cas. 359; 37 C. 467; 14 C. W. N. 1114; 11 Cr. L. J 453, *King-Emperor* v. *Sada*, 26 B. 150 (F. B.); 3 Bom. L. R. 586, referred to.

Petition, under section 439 of the Criminal Procedure Code, for revision of an order of the Sessions Judge, Jullundur, dated the 8th October 1919, modifying that of the Honorary Magistrate, First Class, Jullundur, dated the 28th August 1919.

Mr. *Mukand Lal Puri*, for the Petitioner.

Sardar *Mahtab Singh*, S. B., Public Prosecutor, for the Respondent.

JUDGMENT.—Khushal Singh, son of Maya Ram Singh, was convicted of an offence under rule 25 (1) of the Defence of India Rules of 1915, and was sentenced to rigorous imprisonment for nine months. In addition, he was sentenced to pay a fine of Rs. 20 or in default to undergo rigorous imprisonment for a further period of one month. He appealed to the Sessions Judge of Jullundur who maintained the conviction, but reduced the sentence to three months' rigorous imprisonment, remitting the fine. He has now come up to this Court under section 439, Criminal Procedure Code, through Mr. Mukand Lal Puri, and I have heard Sardar Mahtab Singh, Public Prosecutor, for the Crown. The facts are given in ample detail in the judgment of the lower Court and need not be here re-capitulated. Suffice it to say, that I am unable to see any reason to interfere on the merits. It is urged, however, by Mr. Mukand Lal that the conviction was bad in law, inasmuch as the Magistrate had taken cognisance of the case on a Police report or *chalan* and that rule 25 (2) of the Defence of India Rules of 1915 rendered it imperative that a complaint should be filed by some one duly authorised in that behalf. He referred me to *Shamal Khan* v. *Empress* (1), *Kirpal Singh* v. *Empress* (2), *Abdul Ghani* v. *Municipal Committee, Peshawar* (3), *Nurdin* v. *Municipal Committee, Lahore* (4), *Nahinya* v. *Empress* (5) and *Barindra Kumar Ghose* v. *Emperor* (6). I am, however, unable to see that these cases are really applicable to the present one. The Punjab Government Notification No. 10930 of the 22nd April 1919 shows that all District Magistrates in the Punjab were empowered to order, or authorise, complaints to be made in respect of such offences as came within the purview of rule 25 (1) committed within their jurisdiction. In the case before me the District Magistrate of Jullundur directed the Superintendent of Police to make an inquiry, complete the case and send it up for trial. In due course the Police put up a *chalan* before the District Magistrate who sent it to the Trying Magistrate who has disposed of it. It is clear that the Police were not authorised to take cognisance of the offence, inasmuch as it was not one which they had power to take up *suo motu*. They, therefore, were not authorised by any law to put up what is usually termed a *chalan*. *Chalans* by the Police are only possible in cases cognisable by them. Sardar Mehtab Singh contended that the so-called *chalan* in this case must be regarded as a complaint and that, therefore, the Magistrate was properly seized of the case. In support he referred me to *King-Emperor* v. *Sada* (7). In that case it was held "if the alleged offence is a non-cognizable one, there is no section in the Code which empowers a Police

(1) 16 P. R. 1890 Cr.
(2) 28 P. R. 1883 Cr.
(3) 2 P. R. 1892 Cr.
(4) 3 P. R. 1892 Cr.
(5) 20 P. R. 1894 Cr.
(6) 7 Ind. Cas. 359; 37 C. 467; 14 C. W. N. 1114; 11 Cr. L. J. 453.
(7) 26 B. 150 (F. B.); 3 Bom. L. R. 586.

Officer of his own motion to make any report to a Magistrate. A Police Officer, however, may lay information of any offence of which he cannot take cognisance and when he lays such information he must be regarded as having filed a complaint."

It was, therefore, held that a Police Officer, who had lodged information of a non cognisable offence, must be held to have filed a complaint and that, therefore, he was liable to pay the compensation provided by section 250, Criminal Procedure Code, if his information turned out to be false, frivolous or vexatious. It seems to me that that case is applicable to the facts before me. The District Magistrate undoubtedly had power under the Notification to order the filing of a complaint. He did actually pass such an order to the Police and in compliance with that order the Police after due inquiry placed an information before him. The mere fact that that information was prepared in the same form as a *chalan* does not to my mind render the information anything other than a complaint.

Mr. Mukand Lal then contended that, inasmuch as the District Magistrate had directed the Superintendent of Police to take action, it was the Superintendent of Police only who could make the complaint or lodge the information and had no power to authorise any of his subordinates to do so. This question was considered by Scott Smith, J., in Criminal Revision No. 778 of 1919, in which it was held that there was nothing in that Notification against such delegation. This is a revision and, in my opinion, substantial justice has been done, and I am not prepared to interfere.

It appears, however, that the petitioner had been released on bail by order of the learned Judge who admitted this petition before he had completed his sentence. The petitioner appears to have served over ⅔rds of his period of imprisonment, and, in the circumstances, I see no reason to send him back to jail. I accordingly reduce the sentence to that already undergone.

S. D.

Revision partly allowed.

ALLAHABAD HIGH COURT.

Criminal Appeal No. 851 of 1921.

January 13, 1922.

Present :—Mr. Justice Stuart.

KHUSHI RAM—Appellant

versus

EMPEROR—Respondent.

Penal Code (Act XLV of 1860), s. 411—Stolen property, possession of—Possession of wife, whether possession of husband.

Accused with several other males and females lived in a house as a joint family. During his absence from the house, a locked box containing stolen property was found therein, whose key was produced by accused's wife. Accused was convicted under section 411 of the Penal Code:

Held, that although the possession of a wife would frequently be the possession of the husband, yet this could not be presumed *per se* in every case: there must be something to connect the husband with the possession more than the mere fact that he is the husband, and that, in this case, the conclusion that the husband was in possession could not be justified.

Criminal appeal from an order of the Sessions Judge, Bulandshahr, dated the 24th November 1921.

Mr. *S. C. Mukerji*, for the Appellant.

Mr. *Sankar Saran*, Government Pleader, for the Crown.

JUDGMENT.—The facts may be stated briefly. A locked box was in a house in which Kehar Singh, other male members of his family and several women resided. The key of the box was produced by the wife of Khushi Ram, son of Kehar Singh. The box was opened. In the box was stolen property. Khushi Ram was not in the house. On this evidence Khushi Ram has been convicted under section 411 of the Indian Penal Code. The Sessions Judge considered that these facts justified a finding that the property was in Khushi Ram's possession. I do not think that such an inference can be drawn legally from the evidence. Actual possession was of course with the wife. Can it be presumed that in every case of this kind, the possession of the wife is "*per se*" the possession of the husband? I think not. Possession of the wife would frequently be the possession of the husband. In fact, it would usually be the possession of the husband, but there must be something to connect the husband with the possession more than the mere fact that he is the husband. In this particular case when the house was occupied by members of a joint family including several males and when the

husband was not actually on the premises, there is insufficient evidence to justify the conclusion that the husband was in possession of the property. For these reasons, I accept the appeal, set aside the conviction and sentence and direct that the appellant be released.

W. C. A. *Appeal accepted.*

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 432 OF 1922.

January 5, 1922.

Present :—Justice Sir William Ayling, Kt., and Mr. Justice Ramesam.

JOGI VENKIAH AND OTHERS—PETITIONERS

versus

STATION HOUSE OFFICER OF NARSAPUR AND ANOTHER—RESPONDENTS.

Criminal Procedure Code (Act V of 1898), ss. 517, 520—*Order by Stationary Sub-Magistrate under s.* 517—*Appeal, forum of.*

An appeal from an order passed under section 517 of the Criminal Procedure Code by a Stationary Sub-Magistrate directing the return of the subject-matter of a charge to the complainant, lies to a District Magistrate and not to a Sub-Divisional Magistrate inasmuch as the latter exercises appellate powers only on delegation by the former.

Khima Rukhad, In re, 45 Ind. Cas. 501; 42 B. 664; 20 Bom. L. R. 395; 19 Cr. L. J. 597 and *Queen-Empress* v. *Ahmed,* 9 M. 448; 2 Weir 672; 3 Ind. Dec. (N. S.) 707, referred to.

Petition, under sections 435 and 439, Criminal Procedure Code, praying the High Court to revise the order of the Sub-Divisional Magistrate, Bhimavram, in Criminal Appeal No. 116 of 1920, dated the 8th January 1921 against an order of the Stationary Sub-Magistrate, Narsapur, in Calendar Case No. 239 of 1920.

Mr. *G. Lakshmanna,* for the Petitioners.

The Public Prosecutor, for the Crown.

Mr. *P. Narayanamurthi,* for the Respondents.

JUDGMENT.—In this case the Stationary Sub-Magistrate of Narsapur, in acquitting a person charged with an offence under section 406, made an order under section 517, Criminal Procedure Code, that certain jewels which were the subject-matter of the charge should be returned to the complainant. An appeal against this order was preferred to the Sub Divisional Magistrate of Bhimavaram. He dismissed it on the ground that he had no jurisdiction to hear the case because the case ended in acquittal.

The jurisdiction of the Court to vary an order under section 517 is conferred by section 520 which speaks of 'any Court of Appeal, confirmation, reference or revision.' The meaning of these words has been differently interpreted by this Court and by the Bombay High Court. The latter has held in *Khima Rukhad, In re* (1) that the words "Court of Appeal" mean the Court to which an appeal lies in the particular case. This Court has held in *Queen-Empress* v. *Ahmed* (2) that they mean the Court to which appeals ordinarily lie from the Court which passed the order under section 517. It is on this latter ruling that petitioner depends in arguing his case before us, but, unfortunately, it is of no use to him because, in two subsequent cases, different Benches of this Court have held that the words "Court to which appeals ordinarily lie" cannot cover the case of a Sub-Divisional Magistrate whose power to hear appeals depends on a delegation by the District Magistrate under section 407, clause (2). Whatever view we might be inclined to take on this latter point, we do not feel justified in refusing to follow the two cases quoted to us, which are Criminal Revision Cases No. 525 of 1905 and No. 84 of 1908.

We must, therefore, hold that the Court which had power to modify the Stationary Sub-Magistrate's order in this case was the District Magistrate and not the Sub-Divisional Magistrate, and that the Sub-Divisional Magistrate's order dismissing the appeal was right. The Criminal Revision Petition is dismissed.

M. C. P. *Petition dismissed.*

W. C. A.

(1) 45 Ind. Cas. 501; 42 B. 664; 20 Bom. L. R. 395; 19 Cr. L. J. 597.

(2) 9 M. 448; 2 Weir 672; 3 Ind. Dec. (N. S.) 707.

UMAR DIN v. EMPEROR.

LAHORE HIGH COURT.
CRIMINAL APPEAL No. 15 OF 1921.
March 1, 1921
Present:—Mr. Justice Chevis and Mr. Justice Scott-Smith.
UMAR DIN *alias* UMBA—CONVICT—APPELLANT
versus
EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 164, 342—Confession—Duty of Magistrate recording confession—Memo. of enquiry—Cross-examination of accused, whether competent.

In all cases in which a confession is recorded by a Magistrate it is advisable that he should record a memorandum of enquiry showing what steps he has taken to fully satisfy himself that the accused person is confessing voluntarily. [p. 341, col. 1.]

The mere absence of such a memorandum, however, would not render a confession, otherwise duly recorded, inadmissible. [p. 341, col. 2.]

Nga Shwe Sin v. *Emperor*, 4 Cr. L. J. 385; 12 Bur. L. R. 237; 3 L. B. R. 213, *Queen-Empress* v. *Narayan*, 25 B. 543; 3 Bom. L. R. 122, distinguished.

Under section 342, Criminal Procedure Code, it is not competent to the Court to cross-examine the accused. [p. 342, col. 2.]

Appeal from an order of the Additional Sessions Judge, Lahore, dated the 1st/2nd December 1920.

Mr. *Ghulam Rasul*, for the Appellant.
Mr. *H. A. Herbert*, Government Advocate, for the Respondent.

JUDGMENT.—Umar Din *alias* Umba has been convicted by the Additional Sessions Judge of Lahore of the murder of Mangal of village Sahuke on the night between 17-18th July 1920. He has appealed to this Court, and his appeal has been argued before us by Mr. Ghulam Rasul, and the case is also before us for confirmation of sentence under section 374, Criminal Procedure Code. With Umar Din was tried Kaka *alias* Nizam Din but as there was very little evidence against him besides the retracted confession of Umar Din and the statement of *Musammat* Rahmate, widow of the murdered man, P. W. No. 19, which was not believed, he was acquitted.

The theory for the prosecution is that there were four murderers, Lal Singh, Imam Din, Kaka and the present appellant. The two first men are said to be absconding. It is clear from the facts stated in the judgment of the learned Sessions Judge that Kaka and the absconders had enmity against the deceased, and the theory is that they induced the present appellant who lives in the house of Mangal, who is his first cousin, to assist them in the murder. There are some grounds, as stated by the learned Sessions Judge, for supposing that *Musammat* Rahmate, the widow of Mangal, was an abettor of the murder. There is a good deal of evidence to the effect that immediately after the murder she cried out saying that Kaka and others had murdered her husband. The witnesses who give this evidence are P. W. Nos. 22, 18, 20, 21, 23, 24 and 25. The only one of these who says that the widow named all the four as the alleged murderers is Rahim Bakhsh P. W. No 21, and we may, therefore, take it as certain that she did not at that time name Umar Din appellant as one of the murderers. He was arrested on the 24th July 1920 and the Police applied to the Magistrate for his confession to be recorded on the following day. The Magistrate could not take it then and passed an order that the accused persons would remain in the judicial lock up. So from the 26th July onwards Umar Din was not in Police custody. His confession was recorded by Mr. Wace, Magistrate, First Class, on the 27th July 1920, and on the 5th August Mr. Keelan, the Committing Magistrate, examined some of the witnesses for the prosecution, and on the 7th of August he recorded Umar Din's statement in which he admitted the correctness of the confession made by him on the 27th July, and which was at that time read out to him. When he was again examined on the 19th August by the Committing Magistrate he retracted his confession and said that he had made it under the influence of Police torture.

Now, with regard to the confession, Counsel for the appellant has raised the objection that the Magistrate recorded no memorandum of the enquiry made from Umar Din before the confession was recorded. He based his objection upon section 164, Criminal Procedure Code which lays down that no Magistrate shall record any such confession unless upon questioning the person making it he has reason to believe that it was made voluntarily. Now the law which

makes this provision does not say that the Magistrate should make any memorandum of the enquiry which he makes at the time before recording the confession of an accused. No authority has been referred to which lays down that in the absence of any memorandum of enquiry the confession otherwise duly recorded shall be inadmissible in evidence. We note that a proper certificate as laid down in section 164 (3) has been appended by the Magistrate at the end of the confession. Counsel for the appellant referred to *Nga Shwa Sin* v. *Emperor* (1) where it was held that it is the imperative duty of the Magistrate, before recording a confession, to carefully examine the accused person and, to the best of his ability, ascertain that he is not wishing to speak owing to any inducement, threat or promise, but that his confession is purely voluntary. In that case it appears that each accused was asked once at the end of his statement whether he confessed voluntarily or was induced to do so, and it was held that it was not a sufficient compliance with the provisions of section 164 (3). In that case it will be noticed that stress was laid upon the necessity of the Magistrate making an enquiry, though it was not laid down that in the absence of a memorandum of the Magistrate's enquiry the confession is inadmissible. *Queen-Empress* v. *Narayan* (2) was also referred to but that too is not an authority for the proposition put forward by Counsel. We, therefore, are unable to hold that the confession of Umar Din is inadmissible. At the same time, we consider it to be most advisable that in all such cases a Magistrate should record a memorandum of enquiry showing what steps he has taken to fully satisfy himself that an accused person is confessing voluntarily. In view of the fact that on the 7th August, *i.e.*, 11 days later, Umar Din adhered to his confession before the Committing Magistrate, we see no reason to suppose that he did not make it voluntarily.

The evidence corroborative of the confession is said by the learned Sessions Judge to consist of the following facts:—

(1) that Umar Din was present when the murder took place;

(2) that he had cuts on his head obviously inflicted in order to give the false impression that he too had been attacked;

(3) that he himself had sharpened the *toka* (see the evidence of the *mochi* woman *Musammat* Rahmate, P. W. No. 10);

(4) that the *toka* was found in a pond a few yards from the scene of the murder, Umar Din himself having admitted in his confession that he had thrown it there;

(5) that the piece of rag in which Umar Din said he had wrapped the *toka* when he hid it in the courtyard under some bricks, was found in the place pointed out by him.

As to No. 1 it is not denied that Umar Din was sleeping alone in the courtyard, Mangal and his wife being on the roof at the time the murder was committed. It seems, therefore, highly probable that the murderers thought it necessary to get Umar Din on their side before committing the murder.

As to No. 2 the medical evidence shows that the appellant was examined by the Doctor on the 19th July. Three incised clean cuts, superficial ones, were found on his head. The skin was merely cut and only a little blood had come out of the wounds. The wounds were in the same line and level and superficial and seemed to be self inflicted. They were one day old and appeared to have been caused by a sharp edged weapon, such as a razor or a knife. The appellant in his confession said that after the murder Kaka got out a knife and made cuts on his head so as to make it seem as if he also had been attacked by the assailants. The explanation given by the appellant when he retracted his confession was that he received these injuries some 10 or 15 days before the occurrence when he was lifting some firewood. This explanation is absurd and is inconsistent with the medical evidence which shows that the wounds were on the 19th July only one day old. In fact the appearance of these wounds is, in our opinion, a strong corroboration of the explanation given by the appellant in his confession.

As to No. 3 we have the evidence of *Musammat* Rahmate, P. W. No. 10. She is only a low caste woman, but *prima facie* there is no ground for disbelieving her evidence to the effect that the appellant came

(1) 4 Cr. L. J. 385; 12 Bur. L. R. 237; 3 L. B. R. 213.
(2) 25 B. 543; 3 Bom. L. R. 122.

to her house and sharpened the *toka* there on the day preceding the night of the murder. The appellant in his confession said that he sharpened the *toka* two days before the night of the murder, but the discrepancy is unimportant because *Musammat* Rahmate could easily have forgotten the exact interval that had elapsed between the appellant's visit to her house and the time of the murder.

As to No. 4 it is an undoubted fact that a *toka* was found in the pond a few yards from the house where the appellant was sleeping on the night of the murder. He could have easily thrown it there after the murder.

We do not attach much importance to the fifth piece of evidence referred to by the learned Sessions Judge, because the appellant might have shown any piece of cloth and have stated that he had wrapped the *toka* in it.

The Assessors were unanimously of opinion that Umar Din's confession was true and that he was not threatened or tortured into making it, and that he might have been forced to join in the crime by the other accused persons, and that the cuts on his head had been caused by his accomplices. In his confession the appellant stated that he had joined in the murder under the influence of the threats of his companions. Now, even if we believe that the appellant had been compelled to join in the murder by reason of threats, it would not entitle him to the benefit of the exception contained in section 94 of the Indian Penal Code which lays down that, except murder and offences against the State punishable with death, nothing is an offence which is done by a person who is compelled to do it by threats, which, at the time of doing it, reasonably caused apprehension that instant death to that person would otherwise be the consequence. We do not, however, believe that Umar Din was compelled by threats to join in the murder. His confession shows that his companions spoke to him about the murder several times and that everything was arranged before-hand. It was perfectly easy for him to inform both Mangal and the authorities of what was intended to be done, but he did not do so. We, therefore, do not consider that he is entitled to be treated with any leniency.

We agree with the unanimous opinion of the Assessors and of the Sessions Judge that the guilt of the appellant has been established and dismiss his appeal and confirm the sentence of death.

Before we close we wish to draw the attention of the Committing Magistrate to the manner in which he cross examined the accused in recording his statement on the 19th August. Section 342, Criminal Procedure Code, allows a Court at any stage of any enquiry, or trial to put such questions to the accused as the Court considers necessary, and lays down that the Court shall, for the purpose of enabling the accused to explain any circumstances appearing in the evidence against him, question him on the case after the witnesses for the prosecution have been examined and before he is called for his defence. It is not competent to the Court under this section to cross-examine the accused, see the authorities in Henderson's Criminal Procedure Code, 8th Edition, page 681. The Magistrate, moreover, in the present case not only cross-examined the accused, but even after the latter had retracted his confession put certain questions to him which assumed that the accused was still confessing, for instance, after the appellant had denied having sharpened the *toka*, the Magistrate asked the following question:—

"Was any one there when you sharpened it?"

He put many other questions of like character which appear to have been put with the object of trapping the appellant into some sort of admission after he had resiled from his confession and had said that he had made it under the influence and ill-treatment of the Police. These questions were not, in our opinion, proper and should not have been put.

Z. K.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

ORIGINAL REVISION No. 154-B OF 1921.

May 6, 1922.

Present:—Mr Kotval, A. J. C.

KISAN RAGHUJI CHARJAN—APPLICANT

versus

EMPEROR—RESPONDENT.

Evidence Act (I of 1872)—Evidence of accomplice, corroboration of—Law in England and India—Corroborative evidence, nature of—High Court, powers of—Joint trial—Plea of accused in defence, effect of—Prosecution, failure of, to appreciate motive, effect of.

The law in India regarding corroboration of an accomplice's evidence does not differ from the English Law. [p 344, col. 1]

Confirmation of an accomplice's evidence does not mean that there should be independent evidence of that which the accomplice relates or his testimony would be unnecessary. The corroboration must be by some other evidence than that of an accomplice. One accomplice's evidence is not corroboration of the testimony of another accomplice. Evidence in corroboration must be evidence which implicates him, that is, which confirms, in some material particular, not only the evidence that the crime has been committed but also that the prisoner committed it. The nature of the corroboration will necessarily vary according to the particular circumstances of the offence charged. [p. 344, col. 1.]

The corroboration need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime. [p 344, col. 2.]

Rex v. *Baskerville*, (1916) 2 K. B. 658; 86 L. J. K. B. 2; 115 L. T 453; 80 J. P. 446; 60 S J. 646 *Reg*, *Mullins*, (1848) 3 Cox C. C. 526 at p. 531, followed.

The High Court has only to see whether there is any corroboration of the accomplice's evidence. Whether it is strong or slender need not be gone into in revision. [p. 345, col. 1.]

The plea that an accused is likely to make in defence has no bearing on the question whether a joint trial may legally be held or not [p 345, col 1.]

The failure of the prosecution to appreciate the motive which actuated the commission of an offence cannot affect the merits of the case, if it is otherwise sufficiently proved. [p. 345, col. 2.]

Revision of the judgment of the Sessions Judge, Amraoti, dated the 22nd November 1921, in Criminal Appeal No. 262 of 1921.

Messrs. *M. R. Dixit* and *K. V. Brahma*, for the Applicant.

Mr. *G. P. Dick*, for the Crown.

ORDER.—The applicants (1) Kisan Raghojee, (2) Bajirao Shewajee, (3) Gopal Rao Raghupat, (4) Shamji Ramji, (5) Govindo Sakharam, (6) Sheoram Raghojee, (7) Punjaji Narayanji, (8) Deoappa Bapunappa and (9) Laxman Manohar were convicted under section 467 read with section 34 or 114, Indian Penal Code, or both. Applicants Kisan and Bajirao were in addition convicted under section 471. Bajirao died after this application was filed. The hearing of these applications has been regrettably delayed. The first date fixed for hearing parties was the 25th January 1922. There were four hearings of the case at intervals, the last being on the 18th April 1922. The hearing was twice adjourned at the request of the Counsel for the Crown with the consent of the opposite parties, once at the joint request of both parties and twice on account of press of other work.

The case was fought out most strenuously before the Magistrate, the evidence of the three principal witnesses Nos. 1 to 3 extending over 142 pages of the record. The case against the accused which depends upon the evidence of the approvers Sonaji (P. W. No. 2) and Digambar (P. W. No. 3) is that they conspired to forge and helped in forging a Will purporting to be executed by Govinda Hiraman who died on the 17th December 1903. By the document Govinda purported to adopt one Motiram, a minor son of Punjaji Sakbram, and make him his heir. The applicant Kisan was made the guardian of the minor and was authorised to take possession and have full management of the estate which was worth Rs. 50,000 or more. The deed was scribed by the applicant Punjaji. Govinda's signature thereon was forged by Sonaji (P. W. No. 2) who was at the time Govinda's Munim. It was attested by, amongst others, Digambar, (P. W. No. 3), and the applicants Kisan, Sheoram, Govinda, Shamji Bajirao and Gopal. Laxman, a Registration Mohurrir, is said to have prepared the draft and he and Deoappa are said to have taken part in forcing Sonaji, who was then a boy of about 15 years, by threats to forge Govinda's signature, and otherwise aided in the commission of the forgery. The document was presented for registration by Kisan, and Bajirao identified Kisan before the Registrar.

Remarks have been made here about the conduct of the investigation by P. W. No. 1, the Circle Inspector. These, however, are irrelevant to the merits of the case if the evidence of the two approvers taken with other corroborative evidence is accepted as substantially true. Both the lower Courts

have held that the approvers' story has been sufficiently corroborated and have believed it. If the witnesses were not accomplices the conviction of the applicants would be justified on their evidence, for their stories not only harmonise with each other but are free from any inherent improbability or other serious defect.

The principal point for consideration amongst those raised on behalf of the applicants is, whether there is corroboration as regards each applicant. The law in this country regarding corroboration of an accomplice's evidence does not differ from the English Law. The latest English ruling on the point in which the previous case-law has been reviewed is *Rex* v. *Baskerville* (1) in which the judgment of the Court of Criminal Appeal was delivered by Lord Reading, C. J. As regards the nature and extent of the corroboration required, the proposition laid down in *Reg.* v. *Mullins* (2) by Maule, J., that "confirmation does not mean that there should be independent evidence of that which the accomplice relates, or his testimony would be unnecessary" was accepted as law. It was observed that if it were required that the accomplice should be confirmed in every detail of the crime, his evidence would not be essential to the case, it would be merely confirmatory of other and independent testimony. It was further held that the corroboration must be by some evidence other than that of an accomplice and, therefore, one accomplice's evidence is not corroboration of the testimony of another accomplice. At page 667 it was held that: "Evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it * * * * The nature of the corroboration will necessarily vary according to the particular circumstances of the offence charged. It would be in a high degree dangerous to attempt to formulate the kind of evidence which would be regarded as corroboration, except to say that corroborative evidence is evidence which shows or tends to show that the story of the accomplice that the accused committed the crime is true, not merely that the crime has been committed, but that it was committed by the accused.

"The corroboration need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime... Were the law otherwise many crimes which are usually committed between accomplices in secret, such as incest, offences with females, or the present case, could never be brought to justice"

Judging by the test laid down above it appears to me that there is sufficient corroboration on the record of the accomplice's evidence as regards each applicant. That the Will is a forgery is sufficiently proved, apart from the admission of Kisan and the evidence of the approvers, by P. W. No. 12 the handwriting expert. No attempt appears to have been made in the lower Courts to show that it was genuine. The document being a forged one apparently brought into existence after Govinda's death, a presumption may well be raised that the writer and the attesting witnesses are responsible for it and that they have combined and lent their aid to bring it into existence. The circumstances are strongly suggestive of a conspiracy to support a false claim by forgery. If they plead innocence they must prove it, I cannot take it for granted, as I am asked to do, that the writer Punjaji or the attesting witnesses Kisan, Govinda, Bajirao and Gopal wrote the Will or attested it in the circumstances alleged by them, namely, that some one else asked them to write or attest the document, or that the document already bore the signatures of other attesting witnesses. This is not the conduct of persons of ordinary prudence or of persons of the class to which the accused belong. Apart from other circumstances, the fact of their handwriting appearing on the Will is, in my opinion, corroboration connecting or tending to connect them with the crime.

Shamji's case is that the Will is genuine, that he saw Govinda sign it and that he attested it at Govinda's request. Sheoram

(1) (1916) 2 K. B. 658; 86 L. J. K. B. 28; 115 L. T. 453; 80 J. P. 446; 60 S. J. 696.

(2) (1848) 3 Cox C. C. 526 at p. 531.

too states that he attested the Will at the request of Govinda. No rebutting evidence to prove the genuineness of the Will has been called and it is difficult to see how these two can escape conviction if the Will is in fact forged.

The cases of Laxman and Decappa stand on a somewhat different footing. They have not attested the document, and it has to be seen what corroborative evidence exists in their case. As remarked above, such evidence may be merely circumstantial. Laxman and Decappa are friends of Kisan. Both have been under pecuniary obligation to him. They were living in Kisan's *bada* at the time the forgery was committed and the deed was attested by Kisan and others in their presence. They were examined as Kisan's witnesses in Kisan's civil suit to establish the forgery of the Will. There is some evidence that they were subsequently rewarded by Kisan. These are circumstances which tend to show their connection with the crime. I am now dealing with the case in revision, and I have only to see whether there is any corroboration. Whether the corroboration is strong or slender is not a matter into which I am inclined to go in revision. It is sufficient for me that both the lower Courts have accepted it as sufficient.

The case has been argued here more or less as an appeal. The main point, however, which, in my opinion, required consideration was the question of corroboration. Other minor points urged by some of the learned Pleaders who represented the accused may be briefly noticed.

It is argued that the joint trial of those accused who pleaded that the Will was genuine with the others who did not so plead or admitted that it was forged was bad. The Sessions Judge has dealt with this objection in paragraph 4 of his judgment. I need only add that the plea that the accused is likely to make in defence has no bearing on the question whether a joint trial may legally be held or not

On behalf of Gopala it is urged that the approvers' evidence does not show that Gopala had any knowledge of the conspiracy before the Will was brought to him for attestation. It is said that the forgery of the Will was complete as soon as the executant's signature was forged on it and nothing more was required to give the document the force of a Will, for no attestation is necessary in law for the Will of a Hindu The argument is plausible but opposed to probabilities. I have no doubt that a Will complete with attestation, whether legally required or not, was meant to be forged. One without the hall-mark of attestation would have been deemed by the parties interested as utterly valueless in a Court of Law. I have very little doubt that people of the class to which the deceased Govindrao and the accused belong would never think of an unattested Will as sufficient or valid in law, or likely to stand much chance of being held proved in a Court. Gopala was in my opinion fully cognisant when he wrote his signature that he was writing a part of the document intended to be forged. In any case the writing of Gopala's signature itself would, it seems, amount to a forgery.

It is pointed out that the main motive for the forgery was believed and put forward by the prosecution to be the creation of evidence to establish Kisan's adoption by Raghoji and that it is clear from the record that this forgery was by no means necessary as an aid to the proof of the adoption. It is contended that the alleged motive failing, Kisan and the accused who are said to have acted for his benefit must be held to be innocent. It is true that the Will is not the sole or even the main prop of Kisan's adoption by Raghoji and that the principal motive for the forgery appears to be to enable Kisan to get immediate possession and management of Govinda's property. Nevertheless, the Will in a secondary way goes to support Kisan's adoption by Ragho. Apart from this, however, the failure of the prosecution to appreciate the real motive cannot affect the merits of the case if it is otherwise sufficiently proved.

Bajirao's application abates. All the other applications fail and are dismissed.

N. K. & W. C. A.

Applications dismissed.

BAINES v. EMPEROR.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 90 OF 1922.
May 8, 1922.
Present:—Mr. Halifax, A. J. C.
H. F. BAINES—APPLICANT
versus
EMPEROR—NON-APPLICANT.

Criminal Procedure Code (Act V of 1898), ss. 107, 125, 406, 423—S. 107, applicability of—Bond for keeping the peace—Bond for good behaviour—Powers of District Magistrate in appeal—Instigating breach of peace—Direct evidence of specific incidents, relevancy of.

Section 107 of the Criminal Procedure Code applies to persons likely to commit a breach of the peace themselves as also to those who merely instigate a breach of the peace or disturbance of public tranquility by others. [p 347, col. 1.]

Under section 125, Criminal Procedure Code, a District Magistrate has power to cancel a bond for keeping the peace at any time, if he considers it ought never to have been taken at all, but he cannot alter or modify it. Under sections 406 and 4 3 of the Code he can alter or modify a bond for good behaviour only. [p. 346, col. 2.]

Emperor v. *Dalli*, 29 Ind. Cas. 827; 11 N. L. R 98; 16 Cr. L J. 555, followed.

Dewat Singh v. *Emperor*, 13 Ind. Cas. 752; 4 P. R. 1912 Cr.; 11 P W. R. 1912 Cr; 13 Cr. L. J 126; 125 P. L. R. 1912, dissented from.

Empress v. *Badhawa Singh*, 64 P. R. 1887 Cr. and *Ram Coomar Banerjee* v. *Rajah Gopal Singh Deb*, 17 W. R. 54 Cr., distinguished.

It is wrong to exclude from consideration direct evidence of specific incidents showing that the person to be bound down behaved as man of violent and aggressive temper. These are relevant to the question whether a man is likely to commit a breach of the peace or not and the evidence concerning those incidents is in no sense evidence of repute. [p. 347, cols. 1 & 2.]

Revision of an order against the District Magistrate, Nimar, dated the 16th February 1922.

Mr. *M. R. Dixit*, for the Applicant.

JUDGMENT.—The applicant for revision, H. F. Baines of Khandwa, was bound over to keep the peace for one year on the 9th of January 1922 by a Sub Divisional Magistrate. He applied to the District Magistrate to cancel the bond under section 125 of the Criminal Procedure Code and the learned District Magistrate, purporting to act under that section, reduced the period to six months, of which five have already expired. He has now applied to this Court to revise this order. The application is one of the common class of applications and appeals, both civil and criminal, that are made without the least thought of possible loss to the applicant. Under section 125 of the Code of Criminal Procedure all that a District Magistrate is empowered to do with a bond for keeping the peace is to cancel it or leave it alone, he cannot alter or modify it. Under sections 406 and 423 of the Code he can alter a bond for good behaviour but these sections apply only to that kind of bond. Unless, therefore, I can find reason for holding in revision that the bond ought never to have been taken at all, the District Magistrate's order will have to be set aside and that of the Sub-Divisional Magistrate restored.

(2). It might be suggested that the only logical result of the restoration of the order of the Sub Divisional Magistrate would be that a month hence, unless anything should happen in the meanwhile to make such a course inexpedient, the District Magistrate would cancel the bond for one year for the reasons stated in his order under consideration as reasons for holding that it never ought to have been taken for more than six months. It was held in *Emperor* v. *Dalli* (1) that he has power to cancel a bond if he considers that it ought never to have been taken at all and if he can do so immediately after the execution of the bond, he can equally do so six months later. But he did not find that this bond ought never to have been taken; he found that it was rightly taken, but he was of opinion that all likelihood of a breach of the peace would probably disappear in six months. He will be in a much better position to decide this matter at the end of the six months, and he can then cancel the bond or let it stand as may seem to him advisable; indeed, there is no reason why application in the matter should not be made to him at once before the end of the six months. I may, however, remark that the allegation of the disappearance of the probability of violence that existed in June 1921 and January 1922 would require more support than is to be found in merely technical objections to the finding that it did exist then.

(3) I have, however, to consider the applicant's contention that the order never ought to have been passed at all. In sup-

(1) 29 Ind. Cas 827; 11 N. L. R. 98; 16 Cr. L. J 5.

port of it his learned Counsel put forward two arguments. The first seems based on a misreading of the evidence. It is urged that Mujahid Khan, the person who practically confesses himself a professional "butly", says that Baines asked him to get Dr. Khisty beaten about May 1920, just after the incidents which he desired to avenge, and he informed Dr. Khisty of Baines' proposals to him about September 1920, and this cannot be regarded as evidence that there was any likelihood of a breach of the peace after the 15th of June 1921, when Dr. Khisty first complained to the Police in the matter. But what Mujahid Khan says is, that Baines approached him about four times between May 1920 and September of the same year, when he first told Dr Khisty about it, and again four or five times between September 1920 and June 1921; and he again warned Dr. Khisty six or seven days before *Id-ul-fitr*, which fell on the 8th of June 1921. It seems beyond doubt that the likelihood of a breach of the peace was considerably greater in June 1921 than it was in May 1920, and not less. But in a case of this character the view of this Court of the effect of the evidence is of little consequence; there is evidence on which both the lower Courts could legally and reasonably base their finding and I cannot disturb that finding.

(4) But the main argument advanced for the applicant is that section 107 of the Criminal Procedure Code applies only to persons likely to commit a breach of the peace themselves, not to one who merely instigates a breach of the peace or disturbance of the public tranquility by others. The section itself speaks of a person who "is likely to commit a breach of the peace or disturb the public tranquility or to do any wrongful act that may probably occasion a breach of the peace or disturb the public tranquility" Now, abetment by instigation or conspiracy of the offence of voluntarily causing hurt is undoubtedly a wrongful act, and I can imagine nothing more likely to occasion a breach of the peace than instigating the infliction of a public thrashing such as was contemplated here. The view for which the learned Counsel contends is, however, supported by the judgment of the Chief Court of the Punjab in *Dewat Singh* v. *Emperor* (2) in which Mr. Justice Johnstone held that a finding that a preson is not likely to commit a breach of the peace himself but may very likely induce his partisans to do so does not warrant the taking of security from him under section 107 of the Criminal Procedure Code and that such security should not be taken in order to prevent a person from inducing another person to break the peace. With all due respect, I feel bound to take the exactly contrary view, which appears to me the only possible meaning of the very plain words of section 107 that are quoted above.

(5) The learned Judge states no reasons for the view he takes but cites as exactly in point and follows without discussion the rulings in *Empress* v. *Badhawa Singh* (3) and *Ram Coomar Banerjee* v. *Rajah Gopal Singh Deb* (4). In the former case the Chief Court of the Punjab (Powell and Roe, JJ.) held that the acts found proved against the accused were not likely to cause a breach of the peace and went on to say that section 07 of the Criminal Procedure Code "clearly contemplates that the Magistrate should have some tangible evidence that some definite act is contemplated, which act, if committed, is likely to cause a breach of the peace." That is surely a plain expression of the view that incitement to a breach of the peace is within the contemplation of section 107. In the second case quoted the Calcutta High Court held in 1872 that it was illegal to take security from a person to prevent his over zealous friends from committing a breach of the peace out of sympathy with him but entirely without his incitement or instigation. That is as clearly outside the words of section 107 of the present Criminal Procedure Code as it is outside those of section 282 of Act XXV of 1861 then in force or section 491 of Act X of 1872 which followed it, and also outside the natural justice and common sense of the matter.

(2) 13 Ind. Cas. 782; 4 P. R. 1912 Cr.; 11 P. W. R. 1912 Cr.; 13 Cr. L. J. 126; 125 P. L. R. 1912.
(3) 64 P. R. 1887 Cr.
(4) 17 W. R. 54 Cr.

SHEOBARAN LUBE v. EMPEROR.

(6) It is perhaps necessary to mention that the learned District Magistrate was wrong in excluding from consideration direct evidence of specific incidents in which Baines behaved as a man of violent and aggressive temper. Those incidents are very relevant to the question whether he was likely to commit a breach of the peace or not, and the evidence is in no sense evidence of repute. That consists of the statements of witnesses that a person is very generally regarded as being of a particular character or as being in the habit of doing certain acts. No evidence of that kind is to be found in this case. The rejection of the evidence has not, however, varied the decision. The order of the District Magistrate reducing the terms for which the bond for keeping the peace was to be taken to six months is set aside, and that of the Sub Divisional Magistrate's to the effect that a bond for one year is to be executed is restored.

N. K.

Order set aside.

ALLAHABAD HIGH COURT,
CRIMINAL REVISION No. 166 OF 1922.
May 11, 1922.
Present :—Mr. Justice Stuart.
SHEOBARAN DUBE AND OTHERS
ACCUSED-APPLICANTS
versus
EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 107 (2)—Security for breach of the peace—District Magistrate's power to proceed against a person outside his territorial jurisdiction.

A District Magistrate acting in the exercise of his powers under section 107, Criminal Procedure Code, can pass an order against an accused person, residing outside the local limits of his jurisdiction, when the breach of the peace or disturbance is apprehended within the local limits of his jurisdiction.

Criminal revision from an order of the Officiating District Magistrate, Jaunpur.

Messrs. *Nihal Chand* and *H. Mushtaq Ahmad*, for the Applicants.

Mr. *R. Malcomson* (Assistant Government Advocate), for the Crown.

JUDGMENT.—The evidence on the record shows that all the applicants have threatened the complainant, Parsotam, so as to cause a reasonable belief that any one of them might commit a breach of the peace or disturb the public tranquility. The evidence brings this fact home to every one. There can be no objection to the legality of the order on the ground that there is no evidence on the record to justify it, for there is evidence on the record to justify it. The remaining point taken is that Jagannath is a resident of the Benares State. The argument is that, in these circumstances, no order can be passed against him under section 107. There is no force in this argument. Section 107, sub-section (2) of Act V of 1898 lays down very clearly that no proceedings can take place under section 107 unless either the person informed against or the place where the breach of the peace or disturbance is apprehended is within the local limits of the jurisdiction of the Magistrate determining the matter. Jagannath is not a resident of the Jaunpur district and it may be that when the notice was issued upon him he was not within the Jaunpur district but in Benares State. It is immaterial whether he was or was not in the Jaunpur district at the time that the notice was issued, for the place where the breach of the peace is apprehended is within the Jaunpur district and the second proviso of section 107, which lays down that no proceedings shall be taken before any Magistrate other than a Chief Presidency or District Magistrate unless both the persons informed against and the place where the breach of the peace is apprehended are within the local limits of the Magistrate's jurisdiction, has been complied with, for these proceedings were taken before the District Magistrate. I can find no errors or irregularities in the procedure, and on the merits I consider the order abundantly justifiable.

I reject this application.

R. N.

Application rejected.

KRIPASINGH v. EMPEROR.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 16 B OF 1922.

May 6, 1922.

Present:—Mr. Ketval, A. J. C.

KRIPASINGH—APPLICANT

versus

EMPEROR—NON APPLICANT.

Criminal Procedure Code (Act V of 1898), s. 197—Forest Ranger removable from office by Conservator, sanction under s. 197 for prosecution of, if necessary.

A Forest Ranger in the Central Provinces is not a public servant not removable from his office without the sanction of the Government of India or the Local Government. Consequently the previous sanction of the Government to prosecute a Forest Ranger for an offence committed by him in his official capacity is not necessary under section 197, Criminal Procedure Code. [p. 350, col. 1.]

Revision against an order of the Magistrate, First Class, Amraoti, dated the 12th January 1922, in Criminal Case No. 111 of 1921.

Mr. *R. R. Joyswint*, for the Applicant.

Mr. *G. P. Dick*, for the Crown.

ORDER.—The applicant, Kripasingh, a Forest Ranger, was challaned by the Police under section 347, Indian Penal Code, for wrongfully confining a boy named Kachria for the purpose of extorting money from him or from some person interested in him. The facts on which the prosecution relied are briefly these. Kachria, his father and brother were said to have removed each a bundle of grass from the forest without passes. Kachria was seized by Mahabhik, forest guard, and produced before the applicant. He was tied to a post about mid-day by the applicant's order and was not released till his mother came about sunset and paid Rs. 3, Re. 1 for the bundle of grass taken by him and Rs. 2 for the bundles said to have been taken by his father and brother who had escaped seizure.

After the prosecution case was closed, an objection was raised on behalf of the applicant that under section 197, Criminal Procedure Code, the Court had no power to take cognizance of the case without the sanction of the Conservator of Forests. This objection was overruled by the Trying Magistrate and the present application in revision is filed against the order of the Magistrate disallowing the objection.

Two points require decision in this case: first, whether the applicant is a public servant not removable from his office without the sanction of the Government of India or the Local Government; and second, whether he is accused of the offence charged as a public servant.

With regard to the first point, it is not contended that a Ranger is a public servant not removable from his office without the sanction of the Government of India. The only question, therefore, is whether a Ranger is one not removable from his office without the sanction of the Local Government. It is contended for the Crown that he is not such. Under Article 37 of the Forest Department Code, 7th edition, which came into effect from the 1st April 1913, the removal from service of a Ranger, who is an officer of the Subordinate Forest Service, is to be regulated by the orders of the Local Government. I understand the effect of this Article to be, that it is left to the Local Government to decide whether a Ranger shall be an officer not removable from office without its own sanction. It appears that the Local Government has decided that he is not: *vide* paragraph 28 (2), Part I, Central Provinces Forest Manual, 4th Edition, 1921, which provides that the dismissal of Rangers will be ordered by Conservators.

Reference is made by the learned Pleader for the applicant to letter No. 1214/XIV-1-75, dated the 25th November 1914, from the Under-Secretary to the Chief Commissioner, to the Chief Conservator of Forests, Central Provinces. In this letter the Chief Commissioner, accepts the proposal of the Conservators' Conference relating to the delegation to Conservators of power to dismiss Rangers. It is contended that this letter shows that the power to dismiss a Ranger was in the hands of the Government and must be deemed to continue still in its hands though now exercised by the Conservators by delegation. I am not prepared to accept the latter part of this contention. The Government has decided that a Ranger can be dismissed by the Conservator. The order of dismissal by the Conservator does not require confirmation by the Government and is effective without it. The power has in fact been transferred to the Conservator without any reservation. In a sense every officer of the Government exercises his power by delegation. The Government has general control over his actions and the power to undo what he has done. The Ranger dismissed by the Conservator may be restored to office by the

Government, but that does not mean that the order of dismissal by the Conservator is invalid and *ultra vires* for want of its sanction, or in other words, that the Ranger is not removable from his office without its sanction.

The applicant not being a public servant not removable from his office without the sanction of the Government of India or the Local Government, no sanction under section 197 is necessary before a Court can take cognizance of the offence. In this view, it is unnecessary to consider whether the applicant is accused as a public servant. The application fails and is dismissed.

R. N.

Application dismissed.

ALLAHABAD HIGH COURT.
CRIMINAL REVISION NOS 93 AND 94 OF 1922.
May 3, 1922.
Present:—Mr. Justice Lindsay.
NIZAMUDDIN KHAN—
versus
MUHAMMAD ZIA-UL-NABI KHAN—

Criminal Procedure Code (Act V of 1898), s. 125—District Magistrate, power of, to cancel a bond for keeping the peace—Grounds for cancellation.

The only ground on which a District Magistrate can cancel a bond for keeping the peace or for good behaviour is that something has supervened since the date of the First Court's order which satisfies the District Magistrate that, in view of the facts since come to light, there is no longer any necessity for keeping the accused person under bond. [p. 351, col. 1.]

A District Magistrate taking action under section 125 of the Code of Criminal Procedure cannot treat an application made under that section as an appeal and reverse the order of the First Class Magistrate on the facts. If he considers the order to be wrong on the merits, he can exercise his revisional powers and submit the record to the High Court. But the cancellation of bonds contemplated by section 125 can only be on the ground that the bonds are no longer necessary. [p. 351, col. 1.]

Banarsi Das v. *Partab Singh*, 18 Ind. Cas. 351; 35 A. 108; 11 A. L. J. 16; 14 Cr. L. J. 63 and *Shanker Lal* v. *Emperor*, 51 Ind. Cas. 473; 17 A. L. J. 830; 1 U. P. L. R. (A.) 125; 41 A. 651; 20 Cr. L. J. 489, followed.

Criminal revision from an order of the Officiating District Magistrate, Agra.

Mr. *J. M. Banerji*, for the Applicant.

Mr. *R. Malcomson* (Assistant Government Advocate), for the Crown.

JUDGMENT.—These two applications in revision arise out of certain proceedings which were taken in the Court of an Assistant Magistrate of the Agra District under section 107 of the Code of Criminal Procedure. It was apparently reported to the Magistrate that two parsons, namely, Nizamuddin Khan and Muhammad Zia-ul-Nabi Khan were on very bad terms and were likely to commit a breach of the peace. The report was made to the Magistrate with a view to both parties being bound over to keep the peace. The parties, it appears, are relations.

Separate proceedings were instituted against each of the parties, and in the result the Assistant Magistrate bound over both parties for a period of one year.

Zia-ul-Nabi Khan made an application to the Officiating District Magistrate of Agra under section 125 of the Criminal Procedure Code and that officer passed an order cancelling the order of the Assistant Magistrate by which Zia-ul Nabi Khan was bound over to keep the peace.

The case of Nizamuddin Khan, the other accused, came up before the permanent District Magistrate at a later stage under section 125 of the Code of Criminal Procedure. So far as Nizamuddin Khan was concerned, the District Magistrate passed an order refusing to interfere with the order passed by the Assistant Magistrate.

I have now before me two applications in revision both presented on behalf of Nizamuddin Khan. As regards his own case Nizamuddin Khan contends that he was not liable on the evidence offered at the Trial Court to be bound over to keep the peace. As regards the case of Zia-ul-Nabi Khan the contention is that the order passed by the Officiating District Magistrate cancelling the bond under the provisions of section 125 of the Code of Criminal Procedure was an illegal order. Notice has been issued to Zia-ul Nabi Khan in this case to show cause why the order under section 125 should not be set aside.

Dealing, first, with the case of Nizamuddin Khan, which is Case No. 94 of 1922, I have examined the evidence which was led in the Court of the Magistrate, and,

after perusal of that evidence which was not rebutted by any evidence on the part of Nizamuddin Khan himself, I am satisfied that there was ample ground justifying the order passed by the Magistrate. I may further observe that, when Nizamuddin Khan was called upon to show cause, he expressed his willingness to be subjected to a bond. So much for the case No. 94. The application of Nizamuddin is dismissed.

As regards the other case in which Zia-ul Nabi Khan is the accused (Case No. 93 of 1922), it appears to me that on the authorities of this Court the order passed by the Officiating District Magistrate is an illegal order. I may refer to two cases one of which is to be found as *Banarsi Das* v. *Partab Singh* (1). In that case it was held that a District Magistrate taking action under section 125 of the Code of Criminal Procedure cannot treat an application made under that section as an appeal and reverse the order of the first class Magistrate on the facts. If he considers the order to be wrong on the merits, he can exercise his revisional powers and submit the record to the High Court. But the cancellation of bonds contemplated by section 125 can only be on the ground that the bonds are no longer necessary. This case was followed in another case reported as *Shankar Lal* v. *Emperor* (2). I agree with this interpretation of section 125 of the Criminal Procedure Code It appears to me that the only ground on which a District Magistrate can cancel a bond for keeping the peace and to be of good behaviour is that something has supervened since the date of the First Court's order which satisfies the District Magistrate that, in view of the facts since come to light, there is no longer any necessity for keeping the accused person under bond. I do not think section 125 can be used by a District Magistrate as if he were sitting as a Court of Appeal or that he is justified in passing an order under the section merely because he takes a different view of the evidence which has been submitted to the Court of first instance. If he thinks that the order of the First Court is not maintainable on the evidence as presented, his duty is not to pass an order under section 125 but to refer the case to the High Court on its revisional side. I, therefore, set aside the order of the Officiating District Magistrate dated the 24th and restore the order of the Assistant Magistrate which bears the date, 17th of September 1921.

W. C. A.

Appeal dismissed.

(1) 18 Ind. Cas. 351; 35 A. 103; 11 A. L. J. 16; 14 Cr. L. J. 68.
(2) 51 Ind. Cas. 473; 17 A. L. J. 830; 1 U. P. L. R. (A.) 125; 41 A. 651; 20 Cr. L. J. 489.

LAHORE HIGH COURT.
CRIMINAL MISCELLANEOUS No. 103 OF 1921.
January 3, 192 .
Present:—Mr. Justice Martineau.
GHULAM MUHAMMAD AND OTHERS—ACCUSED—PETITIONERS
versus
EMPEROR RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 342 (4), 526—*Application by accused for transfer—Affidavit of accused, whether competent.*

When an accused person makes an application for the transfer of a case against him, he is not precluded by section 342 of the Criminal Procedure Code from making an affidavit in support of such application, nor would there be any bar to his being prosecuted under section 195 of the Penal Code for making a false statement in such an affidavit. [p. 352, col. 1.]

Queen-Empress v. *Subbaya*, 12 M. 451; 1 Weir 113; 4 Ind. Dec. (N. S.) 664; *Barkat, In the matter of the Petition of* 19 A. 200; A. W. N. (1897) 24; 9 Ind. Dec. (N. S.) 152; *Emperor* v. *Bindeshri Singh*, 28 A. 331; 3 A. L. J. 98; A. W. N. (1906) 42; 3 Cr. L. J. 225, not followed.

Semble:—The provisions of section 342 (4) of the Criminal Procedure Code that no oath shall be administered to an accused person evidently have reference only to the statement made by him in answer to questions put by the Court in accordance with sub-section (1) of that section. [p. 352, col. 1.]

Petition for transfer of the case from the Court of the Magistrate, First Class, Khushab, District Shahpur.

Mr. *Sleem*, for the Petitioners.

Mr. *Jai Lal*, (Assistant Legal Remembrancer), for the Respondent.

RAGHUNANDAN PRASAD v. EMPEROR.

JUDGMENT.—A preliminary objection is taken by Mr. Jai Lal on behalf of the Crown that the *affidavit* of the accused Ali Ahmad which has been filed in support of the application for transfer is not a proper *affidavit*, on the ground that the accused could not be prosecuted in respect of any false statements that it may contain. Mr. Jai Lal has cited *Queen-Empress* v. *Subbayya* (1), *Barkat, In the matter of the Petition of* (2) and *Emperor* v. *Bindeshri Singh* (3), and he relies mainly on the last of these rulings, in which it was held that, when an accused person applies for the transfer of a case pending against him, supporting his application by an *affidavit*, he cannot, or at least ought not to, be prosecuted under section 193, Indian Penal Code, in respect of statements made therein. I cannot agree with the contention. The provision in section 342 (4) of the Criminal Procedure Code that no oath shall be administered to the accused evidently has reference only to the statement made by him in answer to questions put by the Court in accordance with sub-section (1) of that section. It does not preclude him from making an *affidavit* in support of an application for transfer under section 526, and I do not see that there would be any bar to his being prosecuted under section 193, Indian Penal Code, for making a false statement in such an *affidavit*. I hold, therefore, that the *affidavit* is one that satisfies the requirements of section 526.

No sufficient reason, however, has been shown for transferring the case from the Sub-Divisional Magistrate's Court. The only material portions of the *affidavit* are paragraphs 3 and 7, and the report received from the Magistrate is a sufficient answer to the allegations made. I dismiss the application.

W. C. A. *Application dismissed.*

(1) 12 M. 451; 1 Weir 113; 4 Ind. Dec. (N. S.) 661.
(2) 19 A. 200; A. W. N. (1897) 23; 9 Ind. Dec. (N. S.) 132.
(3) 28 A. 331; 3 A. L. J. 98; A. W. N. (1903) 4?; 3 Cr. L. J. 225.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 156 OF 1922.

May 3, 1922.

Present:—Mr. Justice Lindsay.

RAGHUNANDAN PRASAD

versus

EMPEROR.

Criminal Procedure Code (Act V of 1898), Ch. VIII—Order to produce sureties from within certain limits, legality of.

In directing an accused person to produce sureties, a Magistrate has no authority to lay down any limits within which the sureties must reside.

Criminal revision from an order of the District Magistrate, Shahjahanpur.

Mr. *Satya Chandra Mukerjee*, for the Applicant.

Mr. *R. Malcomson* (Assistant Government Advocate), for the Crown.

JUDGMENT.—This case has been admitted on one ground only, namely, the propriety of the order passed by the Magistrate directing the accused to produce sureties who reside within a radius of five miles of the village of Omraha.

This order of the Magistrate's is illegal. He has no authority to lay down any limits within which the sureties must reside. So much of the order, therefore, is set aside, and the Magistrate will be directed to receive and accept any proper sureties who may offer themselves on behalf of the accused. Let the record be returned.

W. C. A. *Application allowed.*

CHETARPAL SHARMA v. JAGANNATH DAS.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 38 OF 1920.

May 3, 1922.

Present :—Sir Grimwood Mears, Kt., Chief Justice, and Justice Sir P. C. Banerji, Kt.

CHETARPAL SHARMA—PLAINTIFF—APPELLANT

versus

JAGANNATH DAS—DEFENDANT—RESPONDENT.

Patent medicine, imitation of—Suit for injunction—Specific Relief Act (I of 1877), s. 54—Test of imitation—Protection of Court, when to be given.

A customer is generally and to a great extent guided by first impressions of general similarity. Consequently in a suit for injunction against the imitation of a patent medicine, its label and general get-up, the true test is to consider the number of similarities, not to calculate the points of difference. Minor points of distinction here and there which are not likely to attract a customer's eye on first sight, should not be magnified. [p. 355, col. 1.]

Though a Court of Law will not assist in the perpetration of a fraud, yet, where a particular business cannot be shown to be fraudulent, forbidden by law or even harmful to the public interest, the person whose trade is being captured and patent right infringed is entitled to its protection. [p. 355, cols. 1 & 2.]

First appeal from a decree of the Subordinate Judge, Muttra.

Messrs. *B. E. O'Conor* and *Narain Prasad Asthana*, for the Appellant.

Dr. *Surendro Nath Sen* and Dr. *Kailas Nath Katju*, for the Respondent

JUDGMENT.—On the 19th of February 1918, the plaintiff, Chetarpal Sharma, a tradesman in Muttra, brought a suit against Lala Jagannath Das, also a tradesman, and also in Muttra. The plaintiff set out that for more than twenty years he had been selling medicine under the name of Sukh Sancharak Co., and that he had put upon the market a medicine by the name of "Sudha Sindhu," that the medicine had borne that name for more than twenty years, and that for more than eight years the medicine had been sold in an uniform get up, that is to say, the bottle had always been the same size, there had been the same inner label on the phial, there had been the same external label, being the outer wrapper on the packet. Enclosed in the packet were directions and 'puff' advertisements and description of diseases. He also said that in the year 1908 he had registered the labels as his trade-mark. He further said in his plaint that he had what he described as "Agents" in the villages in India, Burma, Ceylon and elsewhere, to the number of 15,000. He gave evidence in support of all these matters, and he showed that for some years, at all events, about 100,000 bottles of this medicine had been distributed throughout this country every year. He complains of the conduct of the defendant who, he said, had imitated his labels and get-up of his medicine with a view, no doubt, to cut into and enjoy some part of this very prosperous trade of the plaintiff, which a year or two ago had brought him in some Rs. 14,000 profit annually. The plaintiff alleged that by reason of the similarity of the labels, of the wording on the labels, of the colouring, of the spacing, in fact which in general is called "the get-up," the defendant had put upon the market an article so like that which the plaintiff was selling and which had become associated with his name that it was calculated to mislead, and could be passed off as and for the goods of the plaintiff. He alleged that that conduct constituted an actionable wrong and entitled him to an injunction.

Taking the article as it is handed over from the seller to the buyer, one finds that in both instances the packet is cylindrical and approximately, indeed almost identically, of the same size. In each case the foundation of the paper of the outer cover is white. The registered label of the plaintiff has a peacock blue back ground. The label of the defendant is green and there is thus a distinct and most appreciable difference in the general background colours. At the end of each packet and acting as seals for the fastening, the plaintiff has at one end the name of the medicine "Sudha Sindhu" in English. The defendant also has a label similar in appearance but with a green background and with the name of his medicine "Piyus Sindhu." Both have at the other end the name of the medicine in Hindi. Samples of other medicines sold by the defendant have been produced and at the bottom of such packets there is not the name of the medicine but the representation of a rising sun which is said to be the trade-mark of the defendant.

Turning now to the text and the general conformation of the outer labels, we find in both cases they are the same size and have ornamental tracery running all round the

outside along the outer edge. Both labels give prominence to the name of the medicine. Both names are printed in red ink with an outline of white, and on the right hand side the medicine of the plaintiff is described as "a good remedy for cholera, asthma, cough and diarrhœa." On the left hand side of the defendant's label the description is "an invaluable remedy for cough, cholera, diarrhœa and asthma." In the centre of each label there appears what is said to be photographs of the plaintiff's and defendant's respectively. The background of the plaintiff's (in the copy furnished to us) is very dark. The background of the defendant's is white. Transversely across the chest, in each case, is the signature of the plaintiff and the defendant. In tablets below there is white printing on a red ground in each, and underneath it white printing on a dark blue ground and the dark blue is precisely the same colour in each case. Inside the red tablet with the blue printing of the word "Sudha Sindhu" there appears an unnecessary white dot, probably a printer's error. It is clearly marked and clearly defined. In the big label of the defendant's that dot is not reproduced, but when we come to examine the similar inside labels we find that that dot in the "Sudha Sindhu" label has by some extraordinary coincidence been incorporated into the defendant's label. Wrapped round each bottle is a smaller but similar label. At the top of the plaintiff's label are the words "this whole label is our trade mark, registered No. 13." At the top of the defendant's is "this whole design is our registered trade mark No. 16."

We have already pointed out the singular circumstance that the misprint which occurs in the "Sudha Sindhu" is reproduced in the "Piyus Sindhu". "Sudha Sindhu" is described as "good remedy for cholera, asthma, cough and diarrhœa." "Piyus Sindhu" is described as "good remedy for cough, cholera, colic, asthma and diarrhœa." We attach importance to the fact that the defendant a year or two before the action used the very words "good remedy for" which had been on many thousands of the plaintiff's bottles for many years past. Immediately under those words in the plaintiff's label is the name of the firm "Sukh Sancharak Co., Muttra," and in the same place are to be found in the defendant's labels the name of the defendant's firm. In each case are words in Hindi, again showing the same characteristics of colouring, red, white and blue as are in the plaintiff's label. No one comparing these two sets of labels can have any reasonable doubt that the person, who a year before the commencement of this action brought the defendant's labels into existence, had the plaintiff's labels before him and copied them as accurately as he dared to do.

The question is whether these labels, connected as they are with certain literature, to which we shall refer in a moment, constituate so close an imitation of the well-known get-up of the plaintiff's as to be calculated to deceive purchasers into the belief that the defendant's goods are those of the plaintiff's. Inside the outer covering of each of these medicines, there are directions and advertisements. They are of the usual florid character which are used in patent medicines. But the point of importance is this, that when the defendant is describing all the virtues which his medicine possesses, we find that he is taking in many cases word for word the advertisements which the plaintiff had previously drafted years before. The actual text of the two has been transcribed for our use into the Roman character and has been read to us. Two persons sitting down independently to describe coughs, asthma, diarrhœa, etc., would no doubt, give a generally similar description but a comparsion of the text shows beyond doubt that the defendant copied the text of the plaintiff, being careful, however, to make occasional transpositions. Now what, in our view, would be the effect of all these similarities amongst the purchasers to whom the plaintiff's medicine is usually sold? The bulk are illiterate. Indeed, it is said that certainly not one person in twenty who is a customer of the plantiff's would be able to read that which is upon the labels. Therefore, he must necessarily go by the general comparison of the labels, of the contents and of the size of the bottle. As regards the size of the bottle, it is of a usual size and one in which neither the plaintiff nor the defendant can claim any special property. Many of these kinds of medicines are sold in bottles of this size and Mr. O'Conor does

not contend that he can require the defendant to alter the size of his bottle.

We are of opinion that this medicine of the defendant, encased as it is in the way we have described, could be readily passed off so as to deceive the ordinary village customer into the belief that he was purchasing the medicine of the plaintiff. We have no doubt that it was with that very object that the defendant arranged for the get up of his goods and came into the market as against the plaintiff. The defendant did not go into the witness-box. He preferred to take his chance that the plaintiff would not give sufficient evidence to bring this matter within the recognised standards by which these cases have to be decided. Singularly enough, he succeeded before the Subordinate Judge who did not give to this case that degree of thought and care which he should have done. The learned Judge looked at the matter from the wrong point of view—he focussed attention on the points of difference. He did not consider the number of similarities, nor did he consider that in passing off you must be guided very greatly by first impressions as to general similarity. The Judge enumerated the points of difference and then said the points of resemblance were quite immaterial. We think, on the contrary, that the points of resemblance are the principal matters, and had they been carefully considered in relation to the facts as to the trading of the plaintiff and defendant, no one could have come to any other conclusion than that the defendant deliberately copied the labels of the plaintiff and the get-up of his goods. We think that the copyist was so successful in his attempt as to bring the defendant's goods within that class of cases in which the proper remedy of the plantiff is an injunction.

Dr. Katju has referred us to the 20th paragraph of the written statement in which the point is taken that, inasmuch as this medicine does not do all that is claimed for it and is of an ordinary alopathic nature, passed off under a Sanskrit name, that the plaintiff is entitled to no protection. Now, there is no doubt that the Court must not assist in the perpetration of a fraud. There is equally no doubt that if any particular business could be shown to be a fraudulent business or one forbidden by law, or on which the public policy of the law was to prevent, then in those cases the proprietor could not claim the protection of the Court. All patent medicine vendors puff their goods extravagantly. No one believes that these advertisements and claims are literally true, but at all events there is proof that this medicine of the plaintiff has been in the market for twenty years and is used by many thousands of people. The defendant went to the expense of calling an eminent Civil Surgeon who spoke about the properties and proportions of the various compounds which this medicine is said to contain, and, although he thought that the strength of a particular dose was such as to be of very little medicinal value, there certainly is no condemnation of the preparation such as would justify one in thinking that the preparation was harmful. In these circumstances, we are of opinion that the business carried on by the plaintiff which he seeks to have protected cannot come within that passage from the Laws of England which Dr. Katju has read to us.

The question is, in what form the injunction is to go. Mr. O'Conor has said that, assuming the labels were entirely distinct from that of the plaintiff's, as, for instance, black printing on a white ground, he could not object nor could he lay claim to restraining the defendant from the use of the words "Piyus Sindhu", and if the defendant honestly wishes to put this preparation on the market and at the same time to be free from the suspicion of wishing to capture the plaintiff's trade by unfair means, that is the easiest way out of the matter, but at all events he must be restrained by an injunction and he must understand that if he disobeys the injunction, he must be committed to prison for contempt of Court. It is, therefore, ordered that the defendant be restrained from selling or offering for sale his medicine "Piyus Sindhu" in any outside wrapper or inside label or with any instructions for use or advertisements in any form calculated or intended to pass off or enable others to pass off such medicine as and for the medicine of the plaintiff.

This appeal, therefore, must be allowed with costs and fees on the higher scale, and an injunction must issue to the defendant in the above terms. We make no order for an account.

R. N.

Appeal allowed.

THAKRI v. SADHU SINGH.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2100 OF 1918.

December 2, 1921.

Present :—Mr. Justice Abdul Raoof and Mr. Justice Martineau.

Musammat THAKRI—PLAINTIFF—APPELLANT

versus

SADHU SINGH, MINOR, SON AND REPRESENTATIVE OF WADHAWA SINGH, DECEASED, THROUGH *Musammat* LACHHMI, HIS MOTHER—DEFENDANT—RESPONDENT.

Partition—Widow of deceased co-sharer, whether can claim partition—Maintenance, agreement to receive, whether bars claim.

The widow of a deceased co-sharer in a joint holding has a statutory right to demand partition. *Bhag Bhari* v. *Wazir Khan*, 14 Ind. Cas. 45; 70 P. R. 1912; 91 P. W. R. 1912; 124 P. L. R. 1912, followed.

The mere fact that she once agreed to receive a certain amount as maintenance from the co-sharers of her deceased husband would not debar her for all time from seeking to have her share in the holding partitioned off.

Second appeal from a decree of the District Judge, Amritsar, dated the 9th April 1918, affirming that of the Subordinate Judge, Second Class, Amritsar, dated the 31st January 1918.

Lala *Harbhagwan Das*, for the Appellant.

Mr. *Badri Nath Kapur*, for the Respondent.

JUDGMENT.—The plaintiff, who is the widow of Wasawa Singh, is a co sharer with her husband's brother and uncle in a holding. She was receiving Rs. 24 and 24 *kccha* maunds of wheat a year from the brother in-law but finding this insufficient she applied to the Revenue Authorities for a partition of the holding. The application was rejected and she then brought the present suit for a declaration that she was entitled to have her share partitioned off.

The Courts below have concurred in dismissing the suit, holding that the plaintiff's remedy is to take steps to have her maintenance allowance increased. The First Court said that when the maintenance had once been fixed the plaintiff could not get the land partitioned, it being proved by the defendants' evidence that there was no custom by which she could do so. The lower Appellate Court held that the plaintiff should have proved a custom by which she is entitled to the right which she claims.

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The plaintiff has preferred a second appeal, and we think it should be accepted. Not only is there no evidence on the record on the question of custom, but there was no issue framed on the point, so that the lower Courts were not justified in going into that matter. Moreover, the question of custom never arose on the pleadings, so that no issue in regard to it was necessary.

It was held in *Bhag Bhari* v. *Wazir Khan* (1) that the widow of a deceased co sharer in a joint holding has a statutory right to demand partition and as the question of custom is eliminated we fail to see why the plaintiff should not obtain partition. The fact of her having agreed to receive a certain quantity of money and grain annually from her brother in law does not debar her for all time from seeking to have her share in the holding partitioned off.

We, therefore, accept the appeal, reverse the decrees of the Courts below, and give the plaintiff a decree declaring her to be entitled to have her share in the joint holding partitioned off. The first defendant, who resisted the claim, will pay the plaintiff's costs throughout.

Z. K. *Appeal accepted.*

(1) 14 Ind. Cas 45; 70 P. R. 1912; 91 P. W. R. 1912; 124 P. L. R 1912.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 331 OF 1921.

January 11, 1922.

Present :—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Coyajee.

KASHIBHAI KALIDAS PATEL—PLAINTIFF—APPELLANT

versus

VALLAVBHAI WAGJIBHAI PATEL—DEFENDANT—RESPONDENT.

Easement—Eaves, projection of, over another's land—Title to land, if acquired—Easement if established within 20 years—Injunction, when to be refused.

Where the plaintiff had allowed the defendant's eaves to project and rain-water to be discharged over his land for twenty years, all that the defendant could acquire by prescription would be an easement imposing the burden on the servient tenement of

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having that projection over it; he could not acquire a title to the plaintiff's land even up to the line of his projections.

A plaintiff is entitled to seek relief by means of an injunction against a party seeking to establish an easement against him within 20 years and his acquiescence would not, as a rule, disentitle him to the grant of an injunction. But where on account of the acquiescence the cost of obeying the injunction would be very much greater than it otherwise would have been, or even prohibitive, the Court ought to refuse it.

Second appeal from the decision of the Assistant Judge, Ahmedabad, in Appeal No. 556 of 1917, varying the decree passed by the Subordinate Judge at Nadiad, in Civil Suit No. 248 of 19.6.

Mr. *G. N. Thakor*, for the Appellant.

Mr. *G. S. Rao*, for the Respondent.

JUDGMENT.—The plaintiff sued to obtain various perpetual injunctions against the defendant. The first was to restrain the defendant from discharging rain water on to plaintiff's land at a particular place. The second was an injunction to the defendant to remove the projection over the *khadki* wall and the suit land. The third was to restrain the defendant from making the intended *dattan* (cess-pool).

The plaintiff succeeded in both the Courts in getting an injunction restraining the defendant from making the intended *dattan*, the remaining portions of the claim being rejected. The lower Court had come to the conclusion that, because the plaintiff had allowed the defendant's eaves to project and rain water to be discharged over his land for nearly twenty years, he was thereby barred from coming to a Court of Equity for relief. The learned Appellate Judge went further than this and held that the plaintiff had lost his title to the land up to the line of the defendant's projections, which had existed over twenty years. That would be a very startling decision and it was obviously wrong.

All that the defendant could acquire by prescription would be an easement imposing the burden on the servient tenement of having that projection over it. Even if he acquired the right to project his roof over the plaintiff's land and to discharge rain-water over the plaintiff's land, he could not acquire a title to the plaintiff's land. His rights would be in the nature of an easement, which he could only acquire either by grant or by prescription, and it is admitted by the defendant that he had not acquired any easement.

It has been argued before us that owing to the long acquiescence by the plaintiff of this trespass against his rights, although it had not continued for twenty years, the Court will not grant an injunction. Reliance is placed on a decision of this Court in *Vithoba Raghunath Sonar* v. *D. Anna Rozario Mendosa* (1). In that case the Court said :—

"However, it appears that the plaintiff has acquiesced in the falling of the water on his land for many years ; and under these circumstances, we think that, having regard to section 56, clause (4) of the Specific Relief Act, an injunction restraining the defendant from allowing it to fall ought not now to be granted."

Clause (*h*), if that was referred to, relates to the prevention of a continuing breach in which the applicant has acquiesced ; clause (*j*) is applicable when the conduct of the applicant or his agents has been such as to disentitle him to the assistance of the Court. We do not think that any general rule can be laid down in such cases. The Statute of Limitation entitles the plaintiff to seek relief by means of an injunction against a party seeking to establish an easement against him within twenty years. Admittedly, there may be cases where it would be inequitable on account of the plaintiff's acquiescence over a period of less than twenty years to grant the relief. If on account of the acquiescence the cost of obeying the injunction would be very much greater than it otherwise would have been or even prohibitive, then I agree that the Court ought to penalise the plaintiff for his neglect to assert his right earlier. But there is no such equity in this case. It does not appear that there will be any more expense to the defendant in obeying the injunction than there would have been if the application had been made shortly after the defendant erected his building. The defendant must have erected his building in defiance of the plaintiff's rights and he did so at his own risk.

We think, therefore, that the appeal must be allowed and there must be in addition to the injunction already granted by the

(1) (1888) P. J. 212.

JAI CHAND v. SHAHZADA.

Trial Court, an injunction restraining defendant from projecting his roof over the plaintiff's land and from discharging rain-water from it on to the plaintiff's land.

The appellant to get his costs.

N. K.

Appeal allowed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 908 OF 1913.

May 21, 1919.

Present :—Mr. Justice Broadway and Mr. Justice Abdul Raoof.

JAI CHAND—PLAINTIFF—APPELLANT

versus

SHAHZADA AND OTHERS—DEFENDANTS—RESPONDENTS.

Punjab Courts Act (XVIII of 1884), ss. 40, 70 (1), (a), (b)—Divisional Court confirming decree of lower Court—Revision to the Chief Court—Revision converted into appeal under s 70—Punjab Courts Act I of 1912 passed before this conversion giving right of appeal—Appeal whether valid.

A petition for revision, under section 70 (1) (*a*) of the Punjab Courts Act XVIII of 1884, was presented to the Chief Court on 20th January 1920. Before the petition came up for admission, that section was repealed by Act I of 1912 but the admitting Judge by a mere inadvertance and probably not having before his mind the Act I of 1912, admitted it as an appeal under clause (1) (*b*) of the repealed section At the hearing of the appeal it was objected that as the power of converting a revision into a further appeal had been taken away by the new Act, the order of the Judge was made without authority:

Held, that although the Act of 1912 had taken away from the Chief Court the power of converting a revision into a further appeal, yet under section 40 of the Act of 1884, as amended by the Act of 1912, the petitioner had acquired an independent right of appeal when the appeal was admitted, and that as that right was subsisting on that date, the appeal could be treated as properly admitted under that section. [p. 359, col. 2.]

Nur Din v. *Musammat Jhando*, 23 Ind. Cas. 85: 44 P. L. R. 1914; 89 P. W. R. 1914, *Hukam Chand* v. *Jindo Bai*, 23 Ind. Cas. 109 129*a* P. L. R. 1914; 90 P. W. R. 1914 and *Surju Mal* v *Asram*, 23 Ind. Cas. 451: 160 P. L. R. 1914 150 P. W. R. 1914, distinguished.

Second appeal from the decree of the Divisional Judge, Hoshiarpur, dated the 24th November 1911, affirming that of the District Judge, Kangra, dated the 31st July 1911.

The Hon'ble Pandit *Sheo Narain*, R. B., for the Appellant.

Bakhshi *Tek Chand*, for the Respondents.

JUDGMENT.—This was a suit for the recovery of possession over 522 *kanals* and 4 *marlas* of land situated in Mahal Nagban belonging to Lamba Gaun Jagir. At one time it was in the possession of Balabia Gujars under a peculiar tenure known as *menhara*. In *Sambat* 1918 His Highness Maharaja Partab Chand made a grant of the tenure (*menhara*) to Mian Dalipa. The document creating the grant is not available but a copy of the *khewat* prepared at the revised Settlement of 1868 relating to *Mauza* Mahal Nagban has been filed in which the words contained in the grant are reproduced. Below the usual entries of the *khewat* the following statement is found appended:—

No rent is paid to the Raja Sahib. In other words it is *muaf* "free" to the *menharadar* under the following *patta* :—

"Gonja, Negi of the Nagban is hereby informed under the orders of His Highness Maharaja Partab Chand that a Bagban Khola which is a *menhara* and which was formerly in possession of Balabia Gujars but now unoccupied has been granted to Mian Dalipa. The said *menhara* in which the Balabia Gujars used to graze their cattle has been granted to Dalipa and shall now be used by his she-buffaloes.

Written on the 22nd *Sawan Sambat* 1918, by order of Mian Kehr Chand."

The plaintiff Raja Jai Chand is now the owner of the Mahal having succeeded to the Jagir Lamba Gaun on the death of his father-

The *menharadar* Mian Dalipa is also dead and as his successors, his sons and nephews, have come into the possession of the land in dispute claiming the right to remain in possession as *menharadars*.

The plaintiff sued to eject them on the ground that they had taken possession as usurpers. The defendants contested the suit with the allegation that the grant in favour of Dalipa created a heritable and irrevocable right which had descended to them as such and that the plaintiff was not entitled to eject them. Both oral and documentary evidence was produced by the parties in support of their respective contentions and the Court of first instance after a careful analysis and consideration thereof decided in favour of the defense and dismissed the suit.

The plaintiff preferred an appeal to the lower Appellate Court which also took the same view and dismissed the appeal. The plaintiff then came up to the Chief Court and presented a petition for revision under section 70, sub-section (1), clause (*a*) of Act XVIII of 1884, as no further appeal lay against the decree of the Divisional Court under the provisions of section 40 of the Act. The judgment of the Divisional Judge was dated the 24th November 1911. The petition for revision was filed in the Chief Court on the 20th of January 1912 but before it was admitted, Punjab Act No. I of 1912 was passed by which section 70 of Act XVIII of 1884 was repealed and the provisions of section 40 of the Act were materially altered. The petition came up for admission on the 13th of February 1912 before a learned Judge of the Chief Court. The learned Judge by a mere inadvertence, and probably not having present before his mind the Act I of 1912 which had repealed section 70 of the old Act, made the following order: "Courts have concurred, but the case is of some importance and the decision may govern other grants of the kind, and the material for establishing so sweeping a custom seems to be meagre.

"Admitted as an appeal under section 70, sub section (1), clause (*b*) and referred to a Division Bench." This appeal has now come up for decision before us and Mr. Tek Chand for the respondents has raised a preliminary objection to its hearing. His contention is that the valuation of the suit being only Rs. 522 no further appeal lay against the concurrent judgments of the lower Appellate Court and therefore a petition for revision was filed on behalf of the plaintiff under section 70 (1), (*a*). The power of converting a revision into a further appeal under clause (*b*) of sub-section (1) of the above mentioned section had been taken away by Punjab Act I of 1912, therefore, the learned Judge who admitted the appeal on the 13th of February 1912 had no power to do so. In support of his contention the learned Vakil has relied upon three decisions of the Chief Court reported as *Nur Din* v. *Musammat Jhanlo* (1), *Hukam Chand* v. *Jindo Bai* (2) and *Surju Mal* v. *Asram* (3).

The facts of this case, however, are somewhat different from the facts of the cases relied upon. The petition for revision in this case was filed within 90 days from the decree of the lower Appellate Court and when the present appeal was admitted the period of 90 days had not expired. Section 40 of the Punjab Courts Act provides that: "An appeal shall lie to the Chief Court from every decree passed in appeal by any Court subordinate to the Chief Court on any of the grounds" mentioned in clauses (*a*), (*b*) and (*c*). Therefore, an appeal could have been admitted in the case on the 13th of February 1912 when this appeal was admitted. Mr. Tek Chand, however, argues that only those appeals will be governed by the present section which relate to decrees passed after the coming into force of the present Act I of 1912. This contention is opposed to the plain wording of the section and in order to give effect to this contention it will be necessary to add to the section the words: "After coming into force of this Act" and this cannot be done. The preliminary objection, therefore, cannot prevail and we overrule it. We treat the appeal as having been properly admitted under section 40 of Act I of 1912 and proceed to decide it.

The question to be decided is, whether the grant in favour of Dalipa conferred a heritable right upon him or not. In the grant the tenure is described as *menhara*

(1) 23 Ind. Cas. 85; 44 P. L. R. 1914; 89 P. W. R. 1914.

(2) 23 Ind. Cas. 109; 129*a* P. L. R. 1914; 90 P. W. R. 1914.

(3) 23 Ind. Cas. 451; 160 P. L. R. 1914; 150 P. W. R. 1914.

tenure and Dalipa is mentioned as *menharadar*. A description of this class of tenure is to be found in the Punjab Gazetteer and they are also found entered in the Settlement papers. In order to determine the nature of these tenures it is necessary, therefore, to examine closely the evidence to be found in those records. In the Settlement of 1868 the Settlement Officer, after making necessary enquiry, made a detailed entry as to this tenure in the *wajib-ul-arz* relating to Mahal Nagban Jagir Lamba Gaun. The *wajib-ul-arz* is translated and printed at pages 2 and 3 of the supplementary paper-book printed in this case. In clause 8 dealing with *menhara* and *Soana* tenures, the result of the inquiry, made by the Settlement Officer, is given in detail, and it is recorded therein that: "The right of *menharadars* is heritable. The Jagir is not competent to oust one and bestow the right on other." But it is contended on behalf of the plaintiff that the *wajib ul-arz* refers only to those *menharadars* who pay dues and whereas it is admitted in this case that no dues are either fixed or are payable with respect to the *menhara* in dispute the *wajib-ul-arz* cannot apply to this *menhara* tenure.

In our opinion the circumstance of the non-payment of any dues cannot affect the question. For if it is a *menhara* tenure and as such it was granted to Mian Dalipa it must carry with it all the incidents attached to such tenures. The question is a question of fact which had to be determined on the evidence in the case and both the Courts below have come to a concurrent finding on the evidence that the tenure was intended to be hereditary and that, according to the custom relating to this tenure, the grant was irrevocable. There was some oral evidence also given in the case which has been believed by the lower Appellate Court. It is not possible for us in second appeal to hold that the Courts below have recorded a wrong finding on the evidence. These findings are binding upon this Court and cannot be interfered with. No question of law arises.

The appeal must necessarily fail and we dismiss it with costs.

W. C. A.

Appeal dismissed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 392 OF 1921.

January 11, 1922.

Present:—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Coyajee.

BALVANT RANGNATH—PLAINTIFF—APPELLANT

versus

BALA MALU AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 91—Execution of decree—Sale—Purchase-money, refund of, when can be obtained.

Where after a sale in execution of a decree, the auction-purchaser discovers that the judgment-debtor had no saleable interest in the property sold, he must get the sale set aside under O. XXI, r. 91 of the Civil Procedure Code, before he can obtain the right to ask for a refund of the purchase-money. [p. 362, col. 2.]

Nannu Lal v. *Bhagwan Das*, 37 Ind. Cas. 9; 39 A. 114; 14 A. L. J. 1216, *Parvathi Ammal* v. *Govindasami Pillai*, 30 Ind. Cas. 827; 39 M. 803 at p. 805; 2 L. W. 861; 29 M. L. J. 467; (1915) M. W. N. 797, followed.

Rustomji Ardeshir v. *Vinayak Gangadhar*, 7 Ind. Cas. 955; 35 B. 29; 12 Bom. L. R. 723, *Dorab Ally Khan* v. *Abdool Azeez*, 5 I. A. 116; 3 C. 806. 2 C. L. R. 529; 3 Suth. P. C. J. 519, 3 Sar. P. C. J. 818; 2 Ind. Jur. 426; 1 Ind Dec. (N. S.) 1097 (P. C.) and *Sundara Gopalan* v. *Venkatavarada Ayyangar*, 17 M. 228; 3 M. L. J. 293; 6 Ind. Dec. (N. S.) 158, referred to.

Second appeal from the decision of the District Judge, Ahmednagar, in Appeal No. 95 of 1920, reversing the decree passed by the Subordinate Judge at Newasa, in Civil Suit No. 153 of 1918.

Mr. *J. G. Rele*, for the Appellant.

Mr. *A. G. Desai*, for Respondent No. 4.

JUDGMENT.

MACLEOD, C. J.—The plaintiff brought this suit to recover possession of the suit land from the first three defendants, or, in the alternative, to recover Rs. 417-9-0 from the fourth defendant. The fourth defendant had obtained a mortgage-decree on the 15th August 1913 in Suit No. 696 of 1910 against defendants Nos. 5 and 6 Sakharam and Tukaram. In the execution of that decree, the suit land was sold by auction on the 3rd March 1917. The plaintiff purchased it for Rs. 401 and his sale was confirmed on the 23rd May 1917. He says that he got possession of the land unobstructed, but the defendants allege that only symbolical possession was obtained and the plaintiff was never in actual possession or *Vahivat*

of the land. On the 28th August 1917, defendants Nos. 1 and 2 asserted their right to be in possession of the land, whereupon the plaintiff filed Suit No. 28 of 1917 in the Mamlatdar's Court which he lost. So he had to bring this suit.

In the Trial Court it was found that defendants Nos. 1 to 3 had been in possession as owners for more than twelve years and, therefore, the plaintiff could not succeed as against them. The learned Judge passed a decree for Rs. 407-6-0 and costs against the fourth defendant relying on the decision in *Rustomji Ardeshir* v. *Vinayak Gangadhar* (1).

In appeal this decision was reversed by the District Judge who considered that the rule laid down in *Rustomji Ardeshir* v. *Vinayak Gangadhar* (1) had no application to a sale in pursuance of a mortgage decree under O. XXXIV, that there was no allegation of fraud, and that, therefore, there was no basis for the claim to recover the purchase-money.

Now, under O. XXI, r. 91, an auction-purchaser at a Court sale in execution of a decree may apply to the Court to set aside the sale on the ground that the judgment-debtor had no saleable interest in the property sold, and the period of limitation for such application is thirty days. If the order is made to set aside the sale, then the purchaser under r. 93 is entitled to an order for re-payment of his purchase-money, with or without interest as the Court may direct, against any person to whom it has been paid. The corresponding section in the Code of 1882 to O. XXI, r. 93, was section 315 which directed :—

"When a sale of immoveable property is set aside under section 310A, 312 or 313 or when it is found that the judgment debtor had no saleable interest in the property which purported to be sold and the purchaser is for that reason deprived of it, the purchaser shall be entitled to recieve back his purchase-money (with or without interest as the Court may direct) from any person to whom the purchase-money has been paid."

It will, therefore, be noticed that a considerable change has been made in the law by the Code of 1908, for the statutory right to file a suit for recovery of the purchase-money has been taken away. If it is found that the judgment-debtor had no saleable interest when the property was sold, the purchase-money cannot be recovered until or unless the sale is set aside. That is the construction placed on O. XXI, rr. 91 and 93 by the decision of the Allahabad High Court in *Nannu Lal* v. *Bhagwan Das* (2). The learned Judges remarked at page 119* :—

"It is only necessary to point out that there is a marked difference in the terms of the present Code of Civil Procedure and the Civil Procedure Code of 1882. Section 315 of the latter Act provided that the purchaser might get back the purchase-money when a sale had been set aside under sections 310A, 312 or 313, or when it was found that the judgment-debtor had no saleable interest in the property which is purported to be sold and the purchaser was for that reason deprived of it. We have already pointed out that, under the provisions of the present Code, it is only when the sale has been set aside that the purchase-money can be returned... 'As regards sales under a decree of a Court, there is no warranty of title either by the decree holder or by the Court.' In the case of *Dorab Ally Khan* v. *Abdool Azeez* (3) their Lordships remarked :—'Now it is, of course, perfectly clear that when the property has been sold under a regular execution, and the purchaser is afterwards evicted under a title paramount to that of the judgment-debtor, he has no remedy against either the Sheriff or the judgment-creditor.'"

The same point was dealt with in *Parvathi Ammal* v. *Govindasami Pillai* (4). In that case the Court-sale was set aside on account of irregularities in its conduct perpetrated by the decree-holder. The purchaser thereupon filed a suit for a return of the poundage-fees not returned to him and interest on the purchase-money paid by him. It was held that a suit

(1) 7 Ind. Cas. 955; 35 B. 29; 12 Bom. L. R. 723.

(2) 37 Ind. Cas. 9; 39 A. 114; 14 A. L. J. 1216.

(3) 5 I. A. 116; 3 C. 806; 2 C. L. R. 529; 3 Suth. P. C. J. 519; 3 Sar. P. C. J. 818; 2 Ind. Jur. 426; 1 Ind. Dec. (N. S.) 1097 (P. C.).

(4) 30 Ind. Cas. 827; 39 M. 803 at p. 805; 2 L. W. 861; 29 M. L. J. 467; (1915) M. W. N. 797.

*Page of 39 A.—[*Ed.*]

was maintainable for the recovery of the same. The argument for the appellant was that the plaintiff should have sought redress in execution and that a separate suit did not lie. Their Lordships said:—

"The present Code contains no provision regarding the right of the purchaser to obtain a refund of his purchase-money without applying to set aside the sale when it is subsequently found that the judgment-debtor had no saleable interest in the property. It may be, as suggested by Mr. Ramachandra Ayyar for the respondent, that unless the purchaser seeks the aid of the Court to set aside the sale, he has no remedy against the decree-holder. It was laid down by the Judicial Committee in *Dorab Ally Khan* v. *Abdool Azeez* (3) that there was no warranty of title in Court-sales: see also *Sundara Gopalan* v. *Venkatavarada Ayyangar* (5). The right of action to obtain a refund consequent on the want of saleable interest in the judgment debtor is not a right inhering in a purchaser, but is the creature of a Statute, and the right thus conferred can only be exercised within the limitations prescribed. Consequently, without getting the sale set aside through Court, the purchaser has no right of action."

The case relied upon by the appellant, *Rustomji Ardeshir* v. *Vinayak Gangadhar* (1) was a case under the Code of 1882 being Second Appeal No. 472 of 1909. His Lordship the Chief Justice said:—

"We think, however, that the right of the plaintiff to maintain a suit is made clear by the provisions of the Civil Procedure Code in the manner indicated in *Sundara Gopalan* v. *Venkatavarada Ayyangar* (5). Under the Civil Procedure Code an implied warranty of some saleable interest when the right, title and interest of a judgment-debtor is put up for sale is implied, and the purchaser's right based thereon to a return under certain conditions of the purchase-money which has been received by the judgment-creditor is recognized."

I doubt very much whether there was any necessity to base the right given by the Legislature under the old Code of 1882 to a purchaser to file a suit to recover his purchase-money on a warranty. But for the purpose of this case we are bound by the provisions of the Code of 1908, and it seems to me we should follow the cases of *Nannu Lal* v. *Bhagwan Das* (2) and *Parvathi Ammal* v. *Govindasami Pillai* (4), which decide that an auction-purchaser at a Court sale, should he get nothing from his purchase, must get the sale set aside under r. 91 before he can obtain the right to ask for a refund of the purchase money. He can undoubtedly maintain a suit against the judgment debtor on any ground which is open to him in law, such as fraud or misrepresentation; but such a claim would depend on different evidence, and would be entirely of a different character to the present suit. No fraud or misrepresentation was alleged in the plaint, and the only ground on which the plaintiff sought relief was that, after he purchased the property, he discovered that other persons were entitled to it. Therefore, the decision of the District Judge is right and the appeal must be dismissed with costs.

COYAJEE, J.—I agree.

W. C. A

Appeal dismissed

(5) 17 M. 227; 3 M. L. J. 298; 6 Ind. Dec. (N. S.) 158.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2468 OF 1915.
May 24, 1919.

Present:—Mr. Justice Broadway and Mr. Justice Abdul Raoof.

JAI RAM AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

TELU AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Alienation by widow—Compromise by husband's collateral — Consideration — Compromise, whether binding on successors of collateral.

When doubtful questions of law or of fact have arisen between two parties and each of them has agreed to waive what he honestly believes to be his lawful claim in whole or in part, the transaction

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amounts to a compromise, the waiver or abandonment on either side furnishing the consideration, provided, of course, that both parties had equal knowledge of the facts and equal opportunities of ascertaining their rights. [p 364, col 1.]

Consequently, where a collateral entitled to object to an alienation enters into a compromise in good faith believing it to be the best in the circumstances and for the protection of the estate, the compromise is binding on his successors-in-interest. [p. 364, cols. 1 & 2.]

Buta v *Khuda Bakhsh*, 97 P. R. 1906; 134 P. L. R. 1906; 102 P. W. R. 1906, referred to.

Second appeal from the decree of the District Judge, Ambala, dated the 26th July 1915, reversing that of the Subordinate Judge, Ambala, datedthe 22nd March 1915.

Dr. *Muhammad Iqbal*, for the Appellants.

Lala *Shamsir Chand* for Lala *Fakir Chand*, for Respondents Nos. 1 and 2.

JUDGMENT.—The facts of this case are these. One Nand Ram died on the 28th of November 1904 leaving him surviving a widow named *Musammat* Lachhmi but no issue. *Musammat* Lachhmi succeeded to her deceased husband's estate and mutation was effected in her name on the 21st of December 1904.

On the 7th of August 1907 one Ram Rattan filed an application before the Revenue Authorities asking that *Musammat* Lachhmi's name should be struck off and that he, as a collateral of Nand Ram, should be brought on to the Revenue Records as owner. It was alleged that *Musammat* Lachhmi had forfeited her life-interest as she had married one Daya Ram by *Karewa*. The *Karewa* marriage was denied and Ram Rattan's application was dismissed. He thereupon instituted a civil suit on the 29th August 1907 claiming to be entitled to succeed to Nand Ram's property on the ground that *Musammat* Lachhmi had re married. He obtained a decree which was, however, reversed on appeal and his suit dismissed, it being held that the *Karewa* marriage had not been proved.

A couple of years later *Musammat* Lachhmi sold 129 *bighas* 1 *biswa* of land to Telu, son of Daya Ram above-named, and mortgaged 9 *bighas* 14 *biswas* to Kapuria. These transactions were oral ones and, when it was sought to have the lands mutated in accordance with them, Ram Rattan again came forward and protested alleging that these alienations were fictitious and without necessity and threatening to institute proceedings. In the course of the mutation proceedings the parties came to terms and a compromise was entered into. There is no deed of compromise but the terms are entered in an order passed by the Revenue Authorities. According to this arrangement Ram Rattan undertook to recognize the two alienations while *Musammat* Lachhmi, admitting the *Karewa*, made over all the remaining property of the deceased Nand Ram to Ram Rattan. This arrangement was given effect to and Ram Rattan by virtue of it came into possession of practically half of Nand Ram's estate.

On the 28th of May 1913 Puran and Jai Ram, grandsons of Ram Rattan, instituted the present suit claiming possession of 138 *bighas* 15 *biswas* of land sold and mortgaged by *Musammat* Lachhmi as stated above. It was alleged that *Musammat* Lachhmi had no right to alienate this property, which was ancestral, without legal necessity, and that they, as collaterals of the deceased Nand Ram, were entitled to possession, *Musammat* Lachhmi having married Daya Ram by *Karewa*. The principal defendants, who were Telu and Kapuria, while admitting the *Karewa* marriage, pleaded the compromise entered into by Ram Rattan and contended that his grandsons, plaintiffs, were bound by it. The primary Court granted the plaintiffs a decree holding that the two transactions were without necessity and that the plaintiffs were not bound by the compromise entered into by their grandfather. On appeal the learned District Judge took a different view and, holding that the plaintiffs were bound by the compromise, dismissed their suit. They have thereupon come up to this Court in second appeal through Dr. Muhammad Iqbal and we have heard Mr. Shamsir Chand on behalf of the respondents.

The point for determination is, whether or not the plaintiffs-appellants are bound by the compromise entered into by their grandfather Ram Rattan. Dr. Muhammad Iqbal contended that, inasmuch as *Musammat* Lachhmi by her marriage with Daya Ram had forfeited all her claims to Nand Ram's estate the compromise entered into by Ram Rattan was wholly without consideration and was, therefore, not binding on his clients. It seems to us, however, that this contention cannot prevail. It has to be borne in mind that, at the time when the compromise was

entered into Ram Rattan had already attempted unsuccessfully to prove that *Musammat* Lachhmi had married Daya Ram by *Karewa*. This matter had been concluded and it was, therefore, impossible for him to re-open it. All that he could do was to attack the two alienations on the ground that they were without legal necessity and, therefore, did not affect his reversionary rights. Whether or not he could have succeeded in establishing his claim was, of course, problematical and would have depended on the circumstances in which the said alienations were made. In any event, it meant litigation which would have cost money. By giving up the suit and acknowledging these transactions he obtained possession of the remainder of Nand Ram's property at once whereas he would have had to wait for this property till the death of *Musammat* Lachhmi. As a matter of fact, he has predeceased *Musammat* Lachhmi so that he could never have come into possession of any portion of Nand Ram's estate. That there was consideration for the compromise is, therefore, evident. Dr. Muhammad Iqbal contended that the admission as to the *Karewa* marriage showed that *Musammat* Lachhmi and her alienees were taking undue advantage of Ram Rattan's ignorance. It is, however, quite clear that Ram Rattan was well aware of the fact that *Musammat* Lachhmi had re-married although he had been unable to prove the fact. The position was peculiar and when doubtful questions of law or of fact have arisen between two parties and each of them has agreed to waive what he honestly believes to be his lawful claim in whole or in part the transaction amounts to a compromise, the waiver or abandonment on either side furnishing the consideration, provided, of course, that both parties had equal knowledge of the facts and equal opportunities of ascertaining their rights. Here it seems to us that both parties were fully aware of the true circumstances and each party waived a right and that, therefore, there was consideration emanating from both sides. In these circumstances, we are unable to see that the compromise was not a valid one. We also think that this compromise was binding on the present plaintiffs appellants, for, in our opinion, Ram Rattan entered into this compromise in good faith believing it to be the best in the circumstances and for the protection of the estate. Nor can we say that in the then existing circumstances it was unreasonable. In our view we are fortified by *Buta* v. *Khuda Bakhsh* (1).

We accordingly dismiss this appeal with costs.

R. N. *Appeal dismissed.*

(1) 97 P. R. 1903; 134 P. L. R. 1903; 102 P. W. R. 1906.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 694 OF 1920.

January 12, 1922.

Present:—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Coyajee.

ANNA NARAYAN PAVGI—PLAINTIFF—APPELLANT

versus

MADHYAMA STHITITILA PARASPARA &c. MANDALI AND OTHERS—DEFENDANTS—RESPONDENTS.

Court-fee—Suit for money against several defendants—Decree against one—Appeal—Decree sought against remaining defendants—Appeal, valuation of—Court-fee payable.

Where in a money suit against a large number of defendants, the plaintiff obtains a decree against only one of them, and he appeals seeking to get a decree against the remaining defendants, he is not entitled to value his appeal as if he was suing for a mere declaration, namely, that the decree obtained by him was binding against the other defendants also. The appeal must be valued on the original claim and Court-fee paid on that amount on the memorandum of appeal. [p. 365, col 2.]

Zinnatunnissa Khatun v. *Girindra Nath Mukerjee*, 30 C. 788, distinguished.

Ramasami v. *Subbusami*, 13 M. 503; 4 Ind Dec. (N. S) 1086, approved.

Second appeal from the decision of the District Judge, Poona, in Appeal No. 60 of 1919, confirming the decree passed by the First Class Subordinate Judge at Poona, in Civil Suit No. 336 of 1916.

Messrs. G. N. *Thakor* and *D. C. Virkar*, for the Appellant.

Mr. G. B. *Ghitale*, for Respondent No. 2.

Mr. N. V. *Gokhale*, for Respondent No. 3.

Mr. D. A. *Tulapurkar*, for Respondent No. 4.

Mr. K. V. *Joshi*, for Respondent No. 7.

Mr. P. B. *Shingne*, for Respondent No. 9.

Mr. S. Y. *Abhyankar*, for Respondent No. 10.

KUNJ LAL v. GULAB RAM.

JUDGMENT.—The plaintiff filed this suit against ten defendants to recover a sum of Rs. 4,617-4-0. A decree was passed against the first defendant only by the Trial Court, and an appeal against that decree was dismissed by the District Judge. The plaintiff has now filed a second appeal against that decree, and claims to value his appeal as if he was suing merely for a declaration, namely, that the decree passed by the Trial Court was binding against the other defendants also. This contention seems to have found favour with the Taxing Officer, who relied upon the decision in *Zinnatunnissa Khatun* v. *Girindra Nath Mukerjee* (1) which has nothing whatever to do with the point raised by the appellant in this case. There the suit was filed originally for a declaration that a certain decree was ineffectual and inoperative against the plaintiffs.

In this case there is a money suit against a large number of defendants, and the plaintiff having only got a decree against one of them, seeks to get a decree against the remaining defendants The only order, therefore, that this Court could pass, if the appellant is successful, would be that the remaining defendants should pay the amount claimed to the plaintiff.

The same question came up for decision before the High Court of Madras in *Ramasami* v. *Subbusami* (2). There the suit was filed upon a hypothecation-bond executed by the first defendant. The son adopted by the deceased husband of the first defendant was made a party, and he claimed that the debt was not binding on him. The first Court passed a decree against both the defendants. In appeal, the second defendant was exonerated. The plaintiff preferred a second appeal against the second defendant as sole respondent and affixed to the memorandum of appeal a ten rupees stamp as if a declaratory decree was sought. The judgment was as follows:—

"The appeal is substantially to establish the plaintiffs' right to render the hypothecated property belonging to the second defendant liable to be sold in satisfaction of the debt claimed in the suit. The Court-fees payable must, therefore, be calculated on this amount."

It is, therefore, clear that the decision of the Taxing Officer was wrong, and the appellant cannot, by saying that he is asking for a declaration that the decree passed against the first defendant is binding against the other defendants, get rid of the fact that he is asking this Court to pass a money decree against the other defendants. The appeal, therefore, has been wrongly valued, and it may be noted that when the first appeal was filed to the District Court, it was not valued on this basis, but was valued on the original claim. The appellant, therefore, must re-pay the Court-fee which was refunded. A week's time is allowed for making this payment.

W. C. A.

Order accordingly.

(1) 30 C. 788.
(2) 16 M. 508; 4 Ind. Dec. (N.S.) 1063.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2943 OF 1916.

November 17, 1921.

Present:—Mr. Justice LeRossignol and Mr. Justice Campbell.

KUNJ LAL—DEFENDANT—APPELLANT

versus

GULAB RAM AND OTHERS—PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Arts. 61, 81, *applicability of—General and particular articles—Suit to recover money paid as surety—Limitation.*

An article in the Schedule to the Limitation Act containing a particular provision must be applied in preference to an article containing a general provision, wherever possible. [p. 366, col. 2.]

One *P.*, a *gomashta* of the plaintiff firm stood surety for a judgment-debtor. Certain property of the firm was eventually held liable for the satisfaction of the decree. In order to save the property from sale, the plaintiff firm satisfied the decree and sued the defendant, the principal debtor, for recovery of the sum which they had paid:

Held, that the suit was governed by Article 81 and not by Article 61 of Schedule I to the Limitation Act. [p. 366, col. 2.]

Second appeal from the decree of the District Judge, Ferozepore, dated the 14th

August 1916, varying that of the Subordinate Judge, Second Class, Ferozepore, dated the 7th February 1916.

Lala *Moti Sagar*, R. S., and Mr. *Raj Krishna* and Lala *Jagan Nath*, for the Appellant.

Mr. *Manohar Lal*, for the Respondents.

JUDGMENT.—On the 26th August 1902 one Kunj Lal was arrested at Jaitu Mandi in the Nabha State in connection with a civil claim against him in that State by a firm named Ratti Ram-Mani Ram. He was released the same day on another person, Pokhar Mal, standing surety for him for the amount of the claim. Pokhar Mal was *gumoshta* of the firm Tej Ram-Ram Karn. After these proceedings a suit was lodged against Kunj Lal in a Nabha Court and decreed against him *ex parte* on 15th December 1902. A note appended to the decree referred to objections by Naurang Rai of the firm Tej Ram-Ram Karn, one of the present plaintiffs, and recorded that that firm's property would not be liable for the amount of the decree if it were found (*a*) that Pokhar Mal was not the *gumashta* of the firm, and (*b*) that the house property pledged by Pokhar Mal in security belonged to the firm, but that if Pokhar Mal was the firm's agent and could by trade custom bind his principals they would be liable.

Subsequently, as found by the District Judge, against whose order this second appeal is preferred, the firm Tej Ram-Ram Karn was held by the Nabha Courts to be liable and in order to save their property from forced sale the proprietors compromised with the decree holder and satisfied the decree against Kunj Lal by payment on 23rd March 1908.

On the 10th March 1914 the plaintiffs, proprietors of the firm Tej Ram-Ram Karn, sued Kunj Lal in the Court of the Subordinate Judge for what they paid *plus* interest, obtained a decree in the first Court for the principal, and were successful on appeal to the District Judge for interest in addition. The defendant Kunj Lal also appealed and his appeal was dismissed.

Kunj Lal has preferred a second appeal on various grounds including that of limitation on which we hold that he must succeed.

The learned District Judge was of opinion that Article 61 of the Limitation Act governed the suit, the period for which in the Punjab is six years. It was contended before him and it is contended before us that the Article applicable is 81. The District Judge applied Article 61 on the ground that the plaintiffs were not the original sureties, and that they were merely held liable for the actions of Pokhar Mal who had given his personal security. We are unable to assent to this reasoning. The plaintiffs came into Court asserting that they had been obliged to pay money as sureties to the defendants, decree-holders. Their whole cause of action was that they had been treated as sureties for Kunj Lal and had paid as such.

Article 61 is the general Article and Article 81 one of a subsequent series of particular Articles specifying various situations in which money is paid by a plaintiff for a defendant. It is a principle well-established that the particular Article must be applied in preference to the general Article wherever possible. Here we are quite clear that the suit of the plaintiffs was one by sureties against the principal debtor for which the period of limitation was three years from the date of payment to the creditor. The suit having been filed a few days short of six years after the date of payment is out of time.

We accept the appeal, set aside the decree of the lower Appellate Court and order that the suit of the plaintiffs be dismissed with costs throughout.

Z. K.

Appeal accepted.

BOMBAY HIGH COURT.

CIVIL EXTRAORDINARY APPLICATION No. 183 OF 1921.

January 11, 1922.

Present:—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Coyajee.

VALI MAHOMED HAMAD—PLAINTIFF—APPLICANT

versus

G. I. P. RAILWAY—DEFENDANTS—OPPONENTS.

Railway Company—Common carrier—Goods, con-

signment of, for carriage—Contract, nature of—Goods lost in transit—Railway Company, liability of.

Where goods are consigned to a Railway Company to be carried from one station to another, the contract is that the goods should be carried by the nearest route. If the Railway Company, to suit their convenience, carry the goods by another and longer route, which offers far more opportunity for loss to occur, they are bound to notify the consignor, so as to give him an opportunity of deciding whether he should sign the Risk Note in Form B or not, and their failure to do so will render them liable for any loss which may occur. [p. 367, col. 2.]

Civil Extraordinary Application against the decision of the First Class Subordinate Judge at Jalgaon, in Small Cause Suit No. 1137 of 19.0.

Mr. *I. J. Sopher* for Mr. *M. B. Ashtaputre*, for the Applicant.

Sir *Thomas Strangman*, Advocate-General, instructed by Messrs. *Little & Co.*, for the Opponents.

JUDGMENT.—This was a suit filed by the consignee of certain goods which were delivered to the South Indian Railway Company, to be carried from Sevoy Petoy, a station on the South Indian Railway, to Jalgaon, a station on the defendant Railway Company. Admittedly, when the goods arrived at Jalgaon, the oil of fourteen tins had been removed and lost to the consignee. The consignor had signed a Risk Note in the Form B, and so the G. I. P. Railway Company would not be liable for any such loss, unless it could be shown to have occurred owing to the wilful neglect of their servants, provided the goods were carried in accordance with the contract of carriage. It was proved that the waggon containing the plaintiff's goods instead of travelling along the shortest route *via* Dhond and Manmad was carried to Kalyan, and thence to Jalgaon. There was evidence that the Station Master of Kalyan had to put fresh seals on the waggon containing the plaintiff's goods and that would point to the loss having occurred between Kalyan and Dhond. The learned Judge found that there was no evidence to show that the Company agreed to carry the consignment *via* Dhond and Manmad, and that the only agreement was to carry the goods *via* Raichur. He also was of opinion that the carriage *via* Kalyan was more attractive to the plaintiff because there was only one junction on the route *via* Kalyan while by the other route there were two, *viz*, Dhond and Manmad. He forgot the fact that the goods-train had to be marshalled at Lanowli and re-marshalled at Karjat before it arrived at Kalyan, and that the same process would have to be repeated at Kasara and Igatpuri on the way from Kalyan to Jalgaon, and, therefore, instead of that route being more attractive to the plaintiff, there would be many more opportunities for the loss to occur than on the route *via* Dhond and Manmad. It seems obvious that the contract was to carry the goods by the nearest route, and that if the Railway Company, to suit their convenience wished to carry the goods by a longer route which offered far more opportunity for the loss to occur, they were bound to give notice to the consignor so as to give him an opportunity of deciding whether he should sign the Risk Note in Form B or not. The evidence also shows that the route *via* Dhond and Manmad would be the usual route for goods coming from Southern India *via* Raichur and that, as a matter of fact, the charges were recovered from the plaintiff as if the goods had travelled *via* Dhond and Manmad. It seems to us, therefore, that the Company by carrying the goods *via* Kalyan went outside the terms of the contract and could no longer rely on the protection afforded by the Risk Note so as to be absolved from liability for the loss which occurred. Therefore, the decree dismissing the suit must be set aside and there must be a decree for the plaintiff with costs throughout.

W. C. A.

Rule made absolute.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 170 OF 1918.

November 28, 1921.

Present:—Mr. Justice Abdul Raoof and Mr. Justice Martineau.

BADLU AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SHEO CHAND AND OTHERS—DEFENDANTS RESPONDENTS.

Contract Act (IX of 1872), s. 65—Contract declared

BADLU v. SHEO CHAND.

to be void—Payment made under contract, recovery of.

A portion of an occupancy tenancy was mortgaged to one *H.* for Rs. 410, and the remainder was mortgaged to the landlords for Rs. 820. Plaintiff purchased the mortgagee rights of *H.* and subsequently purchased the occupancy rights of the tenant. He then applied to the Revenue Authorities for redemption of the mortgage in favour of the landlords and obtained an order directing redemption. In pursuance of this order he deposited Rs. 820 which were paid to the landlords. Subsequently the landlords sued for cancellation of the sale in favour of the plaintiff and obtained a decree whereunder they recovered possession of the tenancy. Plaintiff thereupon sued the landlords for recovery of the amounts which he had paid to *H.* and to the landlords:

Held, (1) that the plaintiff could not recover the money which he had paid to *H.*; [p. 368, col. 2.]

(2) that under the provisions of section 65 of the Contract Act the plaintiff was entitled to recover from the landlords the money which he had paid to them under the sale which had been declared to be void. [p. 368, col. 2.]

Second appeal from a decree of the District Judge, Karnal, dated the 5th October 1917, reversing that of the Senior Subordinate Judge, Karnal, dated the 9th June 1916.

Mr. *Devi Dayal*, for the Appellants.

Mr. *N. C. Mehra*, for the Respondents.

JUDGMENT.—Badlu, an occupancy tenant, sold his occupancy rights for Rs. 2,400 to Karta, predecessor in title of plaintiffs. Karta had previously purchased the mortgage rights in a part of the tenancy from Hirde Ram, defendant No. 6 for Rs. 410. The occupancy rights in the rest of the land were under mortgage to some of the landlords, namely to defendants Nos. 1 to 5, whose charges amounted to Rs. 820 and the plaintiffs, after the death of Karta, applied to the Assistant Collector to have the land redeemed from them. Ramji Lal, defendant No. 3, appeared and objected that the sale by Badlu to Karta was invalid and declined to receive the mortgage-money. The plaintiffs, however, deposited the money, and warrants for delivery of possession of the land were issued. The plaintiffs were put in possession and defendants Nos. 1 to 5 then received the mortgage-money which had been deposited.

After this the landlords, including defendants Nos. 1 to 5 and 10, sued to contest the sale by Badlu and obtained a decree for its cancellation and for the eviction of the plaintiffs, and obtained possession of the land in execution.

The plaintiffs, having been dispossessed, brought the present suit for the return of their money. The First Court held that they were entitled to recover from defendants Nos. 1 to 5 and 10 the Rs. 410 which they had paid to Hirde Ram for the mortgage rights which they had purchased, and the Rs. 820 which they had paid for redeeming the land from defendants Nos. 1 to 5, and it accordingly passed a decree for Rs. 1,230. On appeal the District Judge dismissed the suit, holding that the principle of *caveat emptor* applied, as the purchaser from Badlu should have known that the sale by Badlu was voidable at the instance of the landlord, and that the plaintiffs were, therefore, not entitled to a refund of the money which they had paid. The plaintiffs have preferred a second appeal to this Court.

We do not see how they are entitled to recover the sum of Rs. 410 which their predecessor Karta paid to Hirde Ram in consideration for the purchase of the mortgagee rights before he purchased the occupancy rights from Badlu. But with regard to the sum of Rs. 820 we are of opinion that the appeal must succeed. Defendants Nos. 1 to 5, having dispossessed the plaintiffs of the land, cannot be allowed to keep both the land and the money which was paid to them for its redemption, and the plaintiffs are entitled to a refund of the Rs. 820 under section 65 of the Contract Act. The learned District Judge says that that section does not apply because the contract of sale was not void and was not discovered to be void, but he has failed to notice that section 65 applies where a contract, though not void when it was made, afterwards becomes void, as is the case here. The sale by Badlu, though originally only voidable, became void when the landlords got their decree for its cancellation, and under section 65 of the Contract Act they are bound to refund the money which the plaintiffs paid them.

We, therefore, accept the appeal, reverse the decree of the lower Appellate Court, and give the plaintiffs a decree for Rs. 820, of which Rs. 205 will be payable by defendant No. 1, Rs. 205 by defendants Nos. 2

and 3, Rs. 205 by defendant No. 4 and Rs. 205 by defendant No. 5. Defendants Nos. 1 to 5 will pay plaintiffs' costs on Rs. 820 in all the Courts.

Z. K. *Appeal accepted.*

MADRAS HIGH COURT.

APPEALS AGAINST APPELLATE ORDERS NOS. 2 AND 3 OF 1920

CIVIL REVISION PETITIONS NOS. 11 AND 12 OF 1920.

November 22, 1921.

Present:—Sir William Ayling, Kt., Officiating Chief Justice, and Mr. Justice Venkatasubba Rao.

RAJA RAO AND ANOTHER—PETITIONERS—APPELLANTS

versus

ANANTHANARAYANAN CHETTY AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 144, 151, O. XXI, rr. 58, 61—Sale in execution of decree—Money deposited by auction-purchaser rateably distributed among creditors—Judgment-debtor's objection to sale disallowed but finally decreed—Auction-purchaser deprived of sale-property—Application for restitution under s. 144, Civil Procedure Code, if lies—Inherent powers of Court under s. 151, Civil Procedure Code, when to be invoked.

Restitution can only be granted under section 144, Civil Procedure Code, on the application of a party to the "decree varied or reversed." The applicant must be a *party* entitled to some benefit by way of restitution. It is not sufficient that he is merely a *person* entitled to the benefit. [p. 370, col. 2; p. 372, col. 2.]

Section 151 of the Civil Procedure Code should not be invoked to cover an order which only sets right one injustice by the infliction of another, or, as it is said, robs Peter in order to pay Paul. The extraordinary powers conferred by this section should not be exercised where the equities are evenly balanced. [p. 371, col. 2.]

A claim petition by a judgment-debtor, under O. XXI, r. 58, Civil Procedure Code, on the ground that the property attached in execution of decree against him was trust property, was disallowed under r. 61. The judgment-debtor, however, filed a regular suit and obtained a decree declaring that the property was trust property and that, therefore, it was not liable to be proceeded against. In the meantime, the property was sold at Court auction and the price paid by the auction-purchaser was distributed rateably among several decree-holders, whose decrees were recorded as satisfied.

Upon obtaining the decree declaring that the property was trust property and, therefore, not liable to attachment and sale the judgment-debtor obtained re-delivery of the property under section 144, Civil Procedure Code, and when the auction-purchaser was deprived of the property he claimed back his money from the various decree-holders who had received it rateably. In the meantime, their decrees had become time-barred:

Held, that the auction-purchaser could not invoke to his aid the provisions of

(1) section 144, Civil Procedure Code, inasmuch as

(*a*) the decree in execution of which the property was sold had not been reversed;

(*b*) the auction purchaser was not a party to the order by which the objection-petition under O XXI, r. 58, was disallowed under r. 61; nor could he be treated as the legal representative of the judgment-debtor;

Veyindramuthu Pillai v. *Maya Nadan*, 54 Ind. Cas. 209; 43 M. 107; (1919) M. W. N. 881; 25 M. L. T. 391; 38 M. L. J. 32 (F. B.), referred to.

(*c*) the order which was subsequently varied by the declaratory decree was the one made upon the claim petition and not an order that was passed on the execution petition for attachment and sale of the property;

(*d*) that the order disallowing the judgment-debtor's objection under O. XXI, r. 61, was not a decree;

Ramanadan Chettiar v. *Levvai Marakayar*, 23 M. 195; 10 M. L. J. 64; 8 Ind Dec (N. S.) 535 (F. B.) and *Budruddeen Sahib* v. *Abdul Rahim Sahib*, 31 M. 125; 18 M. L. J. 21; 3 M. L. T. 325, referred to.

(2) section 151, Civil Procedure Code, because,

(*a*) the refund was asked for from persons who had nothing to do with the auction-sale, but merely profited by it, in the way of rateable distribution under the orders of a Court;

Nepal Chandra Bhattacharjee v. *Ramendra Nath Chakravarty*, 24 Ind. Cas 384, distinguished.

(*b*) the decrees had become time-barred, and if restitution was ordered the decree-holders would be deprived of the fruits of their decrees and this hardship would result to them though no blame attached to them.

Appeals against the orders of the District Court, Madura, in Appeal Suits Nos. 474 and 475 of 1918 and 101 and 102 of 1919, preferred against the orders of the Court of the Principal District Munsif, Madura, in Civil Miscellaneous Petition Nos. 294 and 289 of 1918 (Small Cause Suit No. 274 of 1911 on the file of the Court of the Subordinate Judge, Madura).

Petitions, under section 115 of Act V of 1908, praying the High Court to revise the orders of the District Court, Madura, in Appeal Suits Nos. 474 and 475 of 1918 and 101 and 102 of 1919, preferred against the orders of the Court of the Principal District Munsif, Madura, in Civil Miscellaneous Petitions Nos. 294 and 289 of 1918 (Small Cause Suit No. 274 of 1911 on the file of the Court of the Subordinate Judge, Madura.)

FACTS appear from the judgment.

Mr. *K. V. Krishnaswami Aiyar*, for the Ap-

pellants.—Section 144 applies to the application by the auction-purchasers for restitution as it was the order for attachment and sale that was virtually superseded by the decree in Original Suit No. 58 of 1914. The order that was reversed is a decree. The appellants must be deemed to be parties to the proceedings as the representatives of the judgment-debtor. See *Veyindramuthu Pillai* v. *Maya Nadan* (1) In any case, they were parties to the reversing decree. That is sufficient to entitle them to the benefit of section 144, Civil Procedure Code.

As an alternative, the application could be sustained under the more elastic provisions of section 151, Civil Procedure Code. That section could be invoked to set right an obvious injustice. *Nepal Chandra Bhattacharjee* v. *Ramendra Nath Chakravarty* (2) and *Kedar Nath* v. *Jai Berhma* (3).

Mr. *K. S. Jayarama Aiyar* (with him Mr. *K. Rajah Aiyar*), for the Respondents.—The application is unsustainable under both sections 144 and 151, Civil Procedure Code. The former does not apply as the decree in the small cause suit was neither varied nor reversed by the decree in the suit instituted under O. XXI, r. 61, Civil Procedure Code. The appellants were, besides, not parties to the earlier proceedings. As representatives of judgment-debtors, if they could be treated as such, they have no right to restitution of moneys paid to the latter's creditors.

Section 151, Civil Procedure Code, could not be invoked as the appellants can claim no equity against the respondents. The persons who should re-imburse the auction-purchasers are the judgment debtors. The decrees have now become time barred and it is obviously inequitable to deprive them of the fruits of their decrees. *Gadi Neelaveni* v. *Marapparedddigari Narayana Reddi* (4), *Mohideen Ibrahim* v. *Mahamed Meera Levvai* (5), *Gopisetti Narayanaswamy Naidu Garu* v. *Kunchpiraju China Venkata Raju* (6).

(1) 54 Ind. Cas. 209; 43 M. 107; (1919) M. W. N. 881; 26 M. L. T. 391; 38 M. L. J. 32 (F. B.).

(2) 24 Ind. Cas. 384.

(3) 37 Ind. Cas. 863; (1917) Pat. 152; 5 P. L. W. 238

(4) 53 Ind. Cas. 847; 43 M. 94; 37 M. L. J. 599; 26 M. L. T. 377; 10 L. W. 603; (1920) M. W. N. 19 (F. B.).

(5) 17 Ind. Cas. 437; 23 M. L. J. 487; 12 M. L. T. 431; (1912) M. W. N. 1130.

(6) 34 Ind. Cas. 774; 4 L. W. 400.

The right to restitution possessed by the auction-purchaser under the old Code (section 315) has been specially removed by the new Code, (O. XXI, r. 93).

JUDGMENT.

AYLING, OFFG. C. J.—Appellants in this case are purchasers in Court auction, who have been deprived of their properties owing to their cancellation of the sales and who now seek restitution of the sums paid by them which have been rateably distributed among certain persons (respondents) holding decrees against the judgment-debtors. The District Munsif directed these persons to refund to appellants the amounts received by them; but his order was set aside on appeal to the District Judge, who held that appellants were not entitled to restitution either under section 144 of the Civil Procedure Code or with reference to the Court's inherent powers under section 151 of the Civil Procedure Code.

The facts of the case, so far as they are necessary for disposal of these appeals, are these:—The properties were attached and brought to sale in execution of the decree in Small Cause Suit No. 274 of 1911 on the file of the Court of the Subordinate Judge of Madura against one Mariappan Chetty. His sons who on his death were made parties in execution, presented a claim petition (Execution Petition No. 539 of 1922) under O. XXI, r. 58 to the effect that the properties were trust properties in their hands and not liable under the decree. This was dismissed, and the sale proceeded. The sons, however, filed a suit (Original Suit No 53 of 1914 on the file of the Court of the Subordinate Judge of Ramnad) and ultimately obtained a decree declaring that the properties were trust properties and not liable to be proceeded against or sold in execution of the decree in Small Cause Suit No. 274 of 1911. They then obtained re delivery of the properties with mesne profits under section 144 of the Code of Civil Procedure. The first question is whether appellants, the auction-purchasers, are also entitled to avail themselves of its provisions.

In my opinion, the District Judge has rightly held that they are not, looking to the terms of the section. Restitution can only be granted under section 144 on the application of a party to the "decree varied or reversed." What was this decree? The

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District Munsif who decided in appellant's favour did so on the footing that it was the order for attachment and sale, and that this order was superseded by the decree in Original Suit No. 53 of 1914. The appeal was also argued before us on this basis. But the appellants were no parties to the order for sale; nor were they parties to the order dismissing Execution Petition No. 539 of 1912, which might be suggested on the alternative as the "decree varied or reversed." The learned Vakil has argued that they may be treated as the representatives of the judgment-debtors on the strength of the Full Bench judgment in *Veyindramuthu Pillai* v. *Maya Nadan* (1). It may be remarked that these judgments did not lay down that the auction-purchaser should in all circumstances and for all purposes be entitled to pose as the representative of the judgment debtor. But apart from this, such a character would be of no avail to appellants here. As representatives of judgment-debtors who were the successors-in interest of Mariappan Chetty they would have no claim either in law or equity to recover the amounts paid over by the Court to the respondents in satisfaction of the decrees which the latter had obtained against Mariappan Chetty and which were binding on his sons.

As an alternative, it is argued that the order of the District Munsif may be supported as one passed in the exercise of the inherent powers of the Court under section 151 of the Code of Civil Procedure. Reliance is placed on a decision of a Bench of the Calcutta High Court reported as *Nepal Chandra Bhattacharjee* v. *Ramendra Nath Chakravarty* (2) in which refund of the price paid was directed to be made by a decree-holder to an auction purchaser whose sale was set aside after confirmation, and who had in consequence lost the properties purchased. The decree holder in that case was the person responsible for wrongfully bringing the properties to sale. In the present case refund is asked for from persons who had nothing to do with causing the auction-sale, but merely profited by it, in the way of rateable distribution under the orders of the Court. This distinction seems to me to be of considerable importance in connection with the exercise of extraordinary powers which are of a purely equitable and discretionary nature. In the present case it is pointed out by Mr. Jayarama Aiyar for respondents that the persons who in equity should re-imburse the auction-purchasers are the judgment debtors. Respondents' decrees have been recorded as satisfied by the payment of the sums sought to be recovered and the decrees themselves are now long time-barred. This is not denied. The District Munsif's order, therefore, only compensates the appellants for the loss of their money at the expense of equally innocent parties and it certainly seems to me that the extraordinary powers conferred by section 151 for the ends of justice and to prevent abuse of the process of the Court should not be invoked where the equities are so evenly balanced.

The learned Vakil for respondents has quoted several cases *Gadi Neelaveni* v. *Marapareddigari Narayana Reddi* (4), *Mohideen Ibrahim* v. *Mahamed Veera Levvai* (5) and *Gopisetti Narayanaswamy Naidu Garu* v. *Kunaparaja China Venkata Raju* (6) as authorities against the application of section 151 of the Code of Civil Procedure to the present case. I do not propose to discuss them because I feel strongly that the section should not be invoked to cover an order which only sets right one injustice by the infliction of another or, as it is said, robs Peter in order to pay Paul.

I would dismiss the appeals with costs and also the revision petitions without costs.

VENKATASUBBA RAO, J.—Two questions have been argued before us. The appellant contended, first, that his application came within the terms of section 144, Civil Procedure Code. He argued, secondly, that if section 144 did not apply, we should, in the exercise of our inherent powers, grant him relief under section 151 of the Code.

A decree was passed in Small Cause Suit No. 274 of 1911, Madura Sub-Court, against one Mariappan Chetty, and he having died his sons were made parties in execution proceedings. The decree-holder then attached certain items of properties, and Mariappa's sons preferred an objection under Order XXI, rule 58, on the ground that the properties attached were trust properties. The objection was disallowed, and the properties were sold and the appellant purchased them in Court-auction. The appellant paid the purchase-money into Court and the money so paid was rateably distributed among several decree-holders including the decree holder who had

brought the property to sale. In the meantime Mariappan's sons filed a regular suit to set aside the order made under Order XXI, rule 61, disallowing the objection above referred to. The suit was presumably filed under Order XXI, rule 63, and by a decree made in that suit the contentions of Mariappan's sons that the properties were trust properties in their hands was upheld. Thereupon they made an application to the Court for the recovery of possession of the properties sold from the appellant and obtained an order for possession and recovered the properties from the appellant.

The appellant now says that as he has been deprived of the properties, he is entitled to get back the amount he paid into Court from the various decree-holders.

I shall first deal with the question: Does the application lie under section 144? Section 144 cannot apply unless there is a decree that has been subsequently reversed or varied. It is clear that the decree in Small Cause Suit No. 274 of 1911 has neither been varied nor reversed. It has, therefore, been argued on behalf of the appellant that the order of the Court disallowing the objection of judgment-debtors was subsequently reversed by the decree in the regular suit, and that the order that was so reversed is a decree. I am unable to accept this contention. The judgment debtor's objection to the attachment on the ground that they held the properties as trustees was made under Order XXI, rule 58 and an order made upon this objection under Order XXI, rule 61 is not a decree under section 2 of Civil Procedure Code and is not, therefore, appealable. See *Ramanathan Chettiar* v. *Levvai Marakayar* (7) also *Budrudeen Sahib* v. *Abdul Rahim Sahib* (8). It will be further noticed that the order that was subsequently varied was the one made upon the claim petition and not an order that was passed on the execution petition for attachment and sale of the properties. The District Munsif who ordered restitution in favour of the appellant assumed that the order that was subsequently varied amounted to a decree and held that section 144 was applicable. I am of opinion that his view is erroneous and that section 144 does not apply.

There is a further reason for holding that section 144 is not applicable. Assuming that the order which was reversed was a decree, the appellant was not a party to the order which disallowed the objection of the judgment-debtors. The applicant under section 144 must be a "party entitled to any benefit by way of restitution." It is not sufficient that he is merely a person entitled to the benefit. That this is the right construction will appear from the circumstances that a later portion of the section refers to "the parties" being placed "in the position which they would have occupied but for such decree or such part thereof as has been varied or reversed." It is, therefore, necessary to examine whether the appellant was a party to the order reversed. It has been argued on his behalf that though the auction purchaser was not as such a party to the order he must be deemed to be a party as the legal representative of the judgment-debtors. I am unable to accept this contention and I hold for the reasons stated by his Lordship the Officiating Chief Justice, with which I respectfully agree, that the appellant is not the legal representative of the judgment-debtors.

The appellant has further contended that it is sufficient that the applicant was a party to the reversing decree though he was not party to the decree reversed; in other words, that the fact that he was a party to the regular suit filed under Order XXI, rule 63 confers upon him the right to apply under section 144, although he was not a party to the proceeding under Order XXI, rule 58. This contention, in my opinion, is absolutely untenable. The words of the section are incapable of being construed in this manner.

The only question that remains to be decided is whether in the circumstances the appellant can invoke the provisions of section 151 in his favour. The respondent has contended before us that there was no warranty of title at a Court sale and the appellant having purchased the right, title and interest of the judgment-debtors cannot get back the amount he paid into Court on his being deprived of the possession of the property which he purchased. He has further contended that under section 315 of the Code of Civil Procedure, 1882, the auction-purchaser

(7) 23 M. 195; 10 M. L. J. 64; 8 Ind. Dec. (N. S.) 585 (F. B.).

(8) 31 M. 125; 48 M. L. J. 21; 3 M. L. T. 325.

had a right to receive back his purchase-money when it was found that the judgment-debtor had no saleable interest in the property which was purported to be sold; but that under the corresponding rule of the Code of 1908 (Order XXI, rule 93) the auction-purchaser does not possess such a right and the respondent, therefore, argues that the right of the auction-purchaser to recover the purchase-money having been specially conferred upon him by the Civil Procedure Code of 1882, and having been taken away by the Code of 1908, it must be assumed that in law the auction-purchaser has no such right and that, therefore, the power of the Court under section 151 should not be exercised for the purpose of conferring upon the appellant the rights which he does not possess under the law. I think it is unnecessary to decide this question as I am prepared to hold that the appellant cannot even otherwise invoke, in the circumstances of the case, the provisions of section 151 for his benefit. It has been pointed out to us that the decrees against the judgment-debtors have become time barred. If restitution is, therefore, ordered the decree-holders will be deprived of the fruits of their decrees and this hardship will result to them although it is admitted that no blame attaches to them. In this view the cases cited by the appellant, *Kedar Nath* v. *Jai Berhma* (3) and *Nepal Chandra Bhattacharjee* v. *Ramendra Nath Chakravarty* (2), do not apply.

I would, therefore, dismiss the appeals with costs, and also the revision petitions without costs.

M. C. P. *Appeal dismissed;*
S. D. *Petition dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 18 OF 1921.

October 4, 1921.

Present :—Mr. Hallifax, Officiating J. C.

RAJARAM—PLAINTIFF—APPELLANT

versus

Chowdhri MANOHARLAL—DEFENDANT—RESPONDENT.

License, revocability of—Easements Act (V of 1882), s. 60—C. P. Land Revenue Act (II of 1917), s. 203.

A license in respect of an *abadi* plot is revocable at will by the grantor unless the licensee is protected by section 60 of the Easements Act or section 203 of the Land Revenue Act (II of 1917) or the *wajib-ul-arz* of the village.

Appeal from the decree of the District Judge, Hoshangabad, dated the 27th November 1920, in Civil Appeal No. 105 of 1920.

FACTS appear from the following judgment of the District Judge, Hoshangabad, in Civil Appeal No. 105 of 1920, dated the 27th November 1920.

"This is an appeal against the decree passed in Suit No. 295 of 1919 dated 30th June 1920 in the Court of the Munsif, Sohagpur. The suit was for possession of a site and the removal of a superstructure erected on it by the defendant. The site was an *abadi* site in Mouza Jhalon. Plaintiff alleged that the site was given to him by Chowdhri Khubchand, deceased, on payment of *nazrana*; that it was given to him and Murlidhar jointly but on a mutual partition of property this part fell to him so he alone brought this suit. In May 1919 the defendant built a house on this site, where the plaintiff has been in the habit of cultivating monsoon crops, and thus dispossessed him. Defendant denied that the plaintiff was ever given a license to occupy this site and, even if he was, that the document (Exhibit P-1) purports to create a lease in perpetuity of a gift, and is, therefore, void for want of registration; the defendant built his house as he was in lawful possession of the land, and, finally, the plaintiff was not a tenant of the defendant's *mahal* and was liable to be ejected at will as the site was vacant. Defendant also denied that the lane in suit was the same as mentioned in Exhibit P-1. The lower Court passed a decree in favour of the plaintiff. * * * *"

Mr. *C. B. Parakh*, for the Appellant.

Mr. *J. Sen*, for the Respondent.

JUDGMENT.—The Pleader for the plaintiff, who is the appellant here, admitted, or rather pleaded, on the 24th of February 1920 that he was a licensee of the defendant in respect of the *abadi* plot in suit, and the facts of the case and still more the letter from the defendant *malguzar* on which the plaintiff's title rests, filed as Exhibit P 1, make it manifest that he never held the land in any other capacity. The

license is revocable at will by the grantor unless the licensee is protected by section 60 of the Easements Act or section 203 of the Land Revenue Act (II of 1917) or the *wajib-ul arz* of the village. As the land has been under cultivation for some fifteen years neither of these Acts nor the *wajib-ul arz* can give him any protection. The appeal is accordingly dismissed and the appellant must pay all the costs.

G. R. D. *Appeal dismissed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 3229 OF 1917.

December 14, 1921.

Present :—Mr. Justice Chevis and Mr. Justice Campbell.

RAHMAT KHAN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

NAZIR AHMAD, MINOR SON AND LEGAL REPRESENTATIVE OF BARKAT ALI, AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Adoption—Brother's grandson—Naru Rajputs of Hoshiarpur Tahsil—Riwaj-i-am, *entry in*—Baradarzada qaribi, *whether includes brother's grandson.*

Among Naru Rajputs of the Hoshiarpur Tahsil the adoption of a brother's grandson is valid by custom. The term *baradarzada qaribi* is wide enough to include a brother's grandson.

Second appeal from a decree of the Additional District Judge, Hoshiarpur, at Jullundur, dated the 15th October 1917, reversing that of the Subordinate Judge, Second Class, Hoshiarpur, dated the 30th March 1917.

Bakhshi *Tek Chand*, for the Appellants.

Lala *Faqir Chand*, for the Respondents.

JUDGMENT.—This suit relates to the estate of the late Sandal Khan who adopted Barkat Ali, grandson of Jangi Khan, brother of Sandal Khan, by a deed of adoption registered on the 13th March 1907. Sandal Khan had another brother, Karam Bakhsh, whose descendants are the plaintiffs. The plaintiffs claim half the estate, denying the factum of adoption and alleging that if there was any adoption it is invalid by custom. Sandal Khan also executed a deed of gift of certain land in favour of Barkat Ali. This deed was registered on the 8th of February 1913. Sandal Khan died in January 1916 and this suit was brought about three months after his death.

The Courts below have agreed, so far as the deed of gift is concerned holding that the land gifted by it was the self-acquired property of Sandal Khan and that he could do what he liked with it. They are also agreed as to the factum of the adoption but as regards the validity of the adoption they have differed, the First Court holding the adoption to be invalid and the District Judge holding it to be valid. So, the First Court gave the plaintiffs a partial decree but the learned District Judge in appeal dismissed the whole suit.

The plaintiffs, armed with a certificate, have lodged a second appeal in this Court; and the important question is whether the the adoption is valid.

The parties are Naru Rajputs of the Hoshiarpur Tahsil. In the Hoshiarpur District custom varies from one Tahsil to another. So we must confine ourselves to the custom of the Hoshiarpur Tahsil. In the *riwaj i am* prepared for that Tahsil at the Settlement of 1884-85 in answer to the question what sort of relation can be adopted by a Rajput, we read, *god lene wale ka rishtedar ho, qaribi baradarzada howe ya dohtr a yi bhanja sub ka istikqaq musawi hai.* In the corresponding *riwaj-i-am* prepared at the recent Settlement of 1911-12 we find exactly the same answer given except that the word *qaribi* follows the word *baradarzada* instead of preceding it. It is clear, therefore, that the word *qaribi* is linked with the word *baradarzada*. The learned District Judge has drawn a distinction between *baradarzada* and *bhatija* which we fail to follow. The simple question, however, is whether the term *qaribi baradarzada* is wide enough to cover the case of the grandson of a brother. On behalf of the plintiffs-appellants Bakhshi Tek Chand argues that the phrase may mean the son of a first cousin but that it cannot possibly mean the grandson of a nephew. The phrase *qaribi baradarzada* obviously must be something somewhat wider than *baradarzada*. In cases of succession in the Panjab we generally find that the nearness of relationship is ascertained by counting back from the *propositus* to the common ancestor. Thus the grandson of a brother would count as a collateral in the second degree while the son of a first cousin would only be

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regarded as a collateral in the third degree. It seems to us unreasonable to suppose that the term *qaribi baradarzadi* could cover the case of a collateral in the third degree and yet be too narrow to cover the case of a collateral in the second degree. Our opinion, therefore, is that the entry in the *riwaj-i-am* does cover the case of adoption of the grandson of a brother. This provision is in accordance with the ordinary custom of the Punjab, for amongst tribes which follow any custom of adoption a near collateral is generally eligible, whatever may be said as to daughter's sons and sister's sons. Here we find the *riwaj-i-am* declaring in favour of the adoption of both daughters' sons and sisters' sons and it would be unreasonable to suppose that this tribe, while allowing the adoption of a daughter's son or a sister's son, refused to allow the adoption of so near an agnate as a brother's grandson. The only thing that can be said on behalf of the appellants is that, although there are a few instances of the adoption of a brother's son, no particular instance has been cited of the adoption of a brother's grandson. Such cases must, however, be comparatively rare and, merely because no instance has been cited in support of the *riwaj-i-am*, we are not prepared to hold that the adoption is invalid by custom.

We uphold the decree of the learned District Judge dismissing the suit and we dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 7 OF 1921.

March 1, 1922.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Cuming.

PRATAP CHANDRA JANA —PLAINTIFF—APPELLANT

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—DEFENDANT—RESPONDENT.

Bengal Tenancy Act (VIII of 1885), ss. 103 B, 104 H, 104 G, Part II, Chapter X—Rent, settlement of—Record of Rights, entry in, conclusive—Public Demands Recovery Act (III of 1913), ss. 4, 37—Supplementary certificate, whether legal—Civil Procedure Code (Act V of 1908), O II, r 2—Recognition of r. 2 in Revenue Courts—"Public Demand", meaning of—Jurisdiction of Civil Courts, when ousted.

When a settlement of rent has been made under Part II of Chapter X of the Bengal Tenancy Act no evidence is admissible to prove that rent is payable at a rate different from that entered in the rent-roll. [p. 378, col. 1.]

Entries in a Record of Rights are conclusive, unless altered by means of a suit instituted under section 104-H, sub-section (2) within six months from the date of the certificate of final publication of the Record of Rights, or if an appeal has been presented to a Revenue Authority under section 104 G., then within six months from the date of the disposal of such appeal. [p. 378, col. 1.]

Ambica Charan v. *Joy Chandra Ghosh*, 4 Ind. Cas. 470; 13 C. W. N. 210, *Prasanna Kumar* v. *Rachimuddin Howladar*, 15 Ind. Cas. 327; 17 C. W. N. 153, *Baikuntha Nath Ghose* v. *Sodananda Mohapatra* [*Prasanna Kumar*], 46 Ind. Cas. 287; 23 C. W. N. 516, *Prafulla Narain* v. *Palku Mahammad*, 53 Ind. Cas. 122; 23 C. W. N. 860, approved.

It is not open to the Revenue Authorities to issue a supplemental certificate for the period covered by a certificate previously issued under section 4 of the Public Demands Recovery Act [p. 378, col. 2.]

The principle recognised by Legislature in O. II, r. 2 of the Civil Procedure Code has been held applicable to proceedings in Revenue Courts for recovery of arrears of rent as also in cases of not merely deliberate relinquishment but also of accidental or involuntary omission. [p. 379, col. 1.]

Madho Prakash Singh v. *Murli Manohar*, 5 A. 406; A. W. N. (1883) 92; 3 Ind. Dec. (N. S.) 406, *Adhirani Narain Kumari* v. *Raghu Mahapatro*, 12 C. 50; 6 Ind. Dec. (N. S.) 81, *Moonshee Buzloor Ruheem* v. *Shumsoonnissa Begum*, 11 M. I. A. 551 at p. 604; 8 W. R. P. C. 2; 2 Suth. P. C. J. 59; 2 Sar. P. C. J. 259; 20 E. R. 208, referred to.

The "public demand" mentioned in section 4 and defined in section 3, clause (6), read with clause (7), of Schedule I includes a demand payable to the Collector by a person holding any interest in land when such demand is a condition of the use and enjoyment of the land. [p. 378, col. 2; p. 378, col. 1.]

In cases where the action of the Revenue Authorities is wholly unauthorised, section 37 of the Public Demands Recovery Act, 1913, does not oust the jurisdiction of the Civil Court to make a declaration, to issue an injunction or otherwise to grant adequate relief. [p. 379, col. 1.]

Reajuddin v. *Shahamutulla*, 60 Ind. Cas. 759, *Dhiraj Chandra Bose* v. *Hari Dasi Debi*, 29 Ind. Cas. 290; 42 I. A. 58; 42 C. 765; 19 C. W. N. 507; 28 M. L. J. 480; 2 L. W. 422 (P. C.), referred to.

Letters Patent Appeal against the decree of Justice Sir Syed Shamsul Huda, Kt., dated the 22nd of December 1920, in Second Appeal No. 1727 of 1920.

FACTS appear from the judgment.

Mr. *D. C. Maiti* (with him Babu *Apurba Charan Mukherji*), for the Appellant.—The plaintiff is the appellant. The appeal arises out of a suit for declaration that certain certificates issued by the Secretary of State and the money realised thereunder were illegal. There were settle-

ment proceedings in 1910 and the plaintiff was recorded as a tenant paying Rs 25 and odd as rent. After that the Secretary of State realised the amount for the year 13 8 and thereafter for 1319-20 by issuing certificates. Then again they issued certificates for Rs. 85 and realised the balance for the previous years. The first Court decreed my suit. The lower Appellate Court, however, reversed that decree. On second appeal to this Court, Huda, J, confirmed the decision of the lower Appellate Court. The Secretary of State was not entitled to realise the amount by issuing certificate under the law. Their contention is that the rent was wrongly recorded as Rs. 25 by mistake. I submit Huda, J., was wrong in holding that section 104J of the Bengal Tenancy Act does not apply to the case because there was no entry in the Record of Rights as finally published. The only correction that has been made was made in the copy kept in the *khas mahal* office. My submission is that in Chapter X of the Bengal Tenancy Act, sections 101-109 have been divided in three parts. The first part contains general provisions, the second part consists of sections 104-104J and the third part consists of sections 105-109. The present case comes under section 104J of the Bengal Tenancy Act. Refers to sections 103A, 103B, 104F, of the Bengal Tenancy Act. The assessment roll ought to have been incorporated in the Record of Rights before it was finally published. Refers to section 104J of the Bengal Tenancy Act, *Raj Mohan Guha* v. *Alam Gazi* (1). That case is quite distinguishable from the present case. This amendment was made by the *khas mahal* Settlement Officer. I submit he has no power to make the amendment under the Act and, as a matter of fact, no amendment has been made of the Record of Rights as finally published. Then comes the question as to whether the Secretary of State can claim the enhanced rent from me under section 104J. I am an occupancy *ryot* and paid Rs. 25 as rent. That has been enhanced to Rs. 85. I submit the ordinary rules for enhancement of rent in case of occupancy *ryots* would apply to the present case. Previously, certificate was issued for 4 years at Rs. 25 annas 7 per year. Subsequently, they claimed Rs. 85. I submit successive issues of the certificate is allowed under the Public Demands Recovery Act.

[MOOKERJEE, J.—What is the provision under which the certificate is issued ?]

Section 4 of the Public Demands Recovery Act empowers the issue of a certificate. The general provisions of the Civil Procedure Code would also apply. Refers to sections 4, 5, O. II, r. 2 of the Code of Civil Procedure. *Adhirani Narain Kumari* v. *Raghu Mahapatro* (2), *Madho Prakash Singh* v. *Murli Manohar* (3).

Babu *Dwarkanath Chakravarty*, Senior Government Pleader, (with him Babu *Surendra Nath Guha*, Junior Government Pleader), for the Respondent.—The Record of Rights was finally published on 31st May 1910. There the rent is entered as Rs. 25 annas 7. That is incorrect because it appears from a decision dated 27th March 1909 that the rent payable was Rs. 85. That decision was between these parties by the Assistant Settlement Officer in a dispute case. This was not incorporated in the finally published Record of Rights for some reason or other. The procedure that could be followed was an application for correction of the entry to the Board of Revenue under section 104 J, Bengal Tenancy Act. The Collector discovered the mistake and an additional certificate was issued for the collection of the balance. There is no doubt that under the Public Demands Recovery Act the jurisdiction of the Civil Court is confined to section 35.

[MOOKERJEE, J.—Is it for the Civil Court to investigate whether the entry is correct or not ?]

I have been forced to take up that position. They came to the Civil Court. The Collector did not notice that mistake in the Record of Rights as finally published. The facts of the particular case should be taken into consideration. I was bound to proceed on the footing of that decision of the Assistant Settlement Officer.

(1) 17 Ind. Cas. 279; 17 C. W. N. 625; 16 C. L. J. 889.

(2) 12 C. 50; 6 Ind. Dec. (N. S.) 81.

(3) 5 A. 403 (F. B.); A. W. N. (1883) 92; 3 Ind. Dec. (N. S.) 406.

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[MOOKERJEE, J.—You cannot rebut section 104].

When rent has been settled and recorded the presumption may not be rebuttable. Refers to *Parfulla Narain* v. *Palku Mahammad* (4) and *Baikuntha Nath Ghose* v. *Sodananda Mohapatra* [*Prasana Kumar*] (5). In this case the rent settled is Rs. 85.

[MOOKERJEE, J.—But you can't assume that?]

That is not a matter of assumption but of proof. Refers to section 103B of the Bengal Tenancy Act.

[MOOKERJEE, J.—That does not apply.]

No. There is a distinction between sections 103B and 104J. You will draw a distinction between rent that is settled and rent that is recorded.

[MOOKERJEE, J.—Does not section 4 contemplate that the certificate should be for the entire amount?]

The certificate could be challenged only under section 35. The Act does not preclude the Collector from issuing another certificate if there is any amount due and is legally recoverable.

Mr. *S. C. Maiti* replied in brief.

JUDGMENT.—This is an appeal under clause 15 of the Letters Patent from the judgment of Mr. Justice Huda in a suit for a declaration that a certificate issued under the Public Demands Recovery Act, 1913, was *ultra vires*, for refund of the amount recovered thereunder, and for a permanent injunction to restrain the Secretary of State for India from the issue of similar certificates in future. The Court of first instance decreed the suit. On appeal the Subordinate Judge dismissed the suit. On second appeal to this Court, Mr. Justice Huda confirmed this decision. We are now invited to hold that the suit had been rightly decreed by the Trial Court, as the proceedings of the Revenue Authorities were without jurisdiction.

The facts material for the determination of the question in controversy may be briefly outlined. The plaintiff holds a tenancy under the Secretary of State for India within a temporarily settled area. The land was surveyed and the rent was settled under Part II of Chapter X of the Bengal Tenancy Act, and the Record of Rights, which was finally published on the 31st May 1910, contained an entry to the effect that the rent payable by the defendant was Rs. 25 7 annas a year. Rent appears to have been realised at this rate for the year following the publication of the record. On the 31st May 1915 a certificate was made under section 4 of the Public Demands Recovery Act, 1913, for a sum of Rs. 54 15·3. The certificate set out the details which showed that, calculated at the rate of Rs. 25 7·0 per annum, the amount in arrears for the Bengali years 1320, 1321 and 1322 amounted to Rs. 54·15·3. Subsequently, on the 4th December 1915, another certificate was made for Rs. 220·6·3. This certificate also set out details which showed that, calculated at the rate of Rs. 85 a year, a sum of Rs. 220 6·3 was due in respect of the years 1319, 1320, 1321 and 1322, after deduction of the amount covered by the previous certificate and amicably paid. The Revenue Authorities proceeded to sell the tenure in execution of the second certificate, with the result that the plaintiff was compelled to deposit the amount claimed and thereby to avert the sale. On the 23rd February 1918, the plaintiff commenced this litigation on the allegation that the issue of the supplementary certificate and the institution of proceedings for enforcement thereof were without jurisdiction. On behalf of the Secretary of State, the suit was defended on the ground that the entry in the Record of Rights was erroneous, that rent had been settled at Rs. 85 a year in a dispute case on the 27th March 1909, and that this was overlooked when the record was finally prepared and published. Two questions thereupon emerged for consideration, namely, first, whether it was competent to the Secretary of State to raise the question of the accuracy of the entry in the Record of Rights, and, secondly, if the question of correctness of the entry was open for consideration, whether it was competent to the Revenue Authorities to make a supplemental certificate for the period covered by the first certificate. The Courts below have expressed divergent opinions upon these points.

As regards the first question, the plaintiff maintains that section 104J of the Bengal Tenancy Act raises an irrebuttable

(4) 53 Ind. Cas. 122; 23 C. W. N. 860.
(5) 46 Ind. Cas. 287; 28 C. W. N. 516.

presumption in favour of the entry in the Record of Rights. This section provides that, subject to the provision of section 104 H, all rents settled under sections 104-A to 104-F and entered in a Record of Rights finally published under section 103-A or settled under section 104 G, shall be deemed to have been correctly settled and to be fair and equitable rents within the meaning of the Bengal Tenancy Act. The effect of this provision is that when a settlement of rent has been made under Part II of Chapter X, no evidence is admissible to prove that rent is payable at a rate different from that entered in the rent-roll. Section 103-B which finds a place in Part I does not operate to modify the effect of section 104 J which finds a place in Part II. The substance of the matter is that the entry in the Record of Rights is conclusive, unless altered by means of a suit instituted under section 104-H, sub-section 2 within six months from the date of the certificate of final publication of the Record of Rights or, if an appeal has been presented to a Revenue Authority under section 104 G, then within six months from the date of the disposal of such appeal. The expression "deemed to have been correctly settled" would be meaningless, if the entry raised only a rebuttable presumption. The view we take is in accord with that adopted in *Ambica Charan* v. *Joy Chandra Ghosh* (6), *Prasanna Kumar* v. *Rachimuddin Howladar* (7), *Baikuntha Nath Ghose* v. *Sodananda Mohapatra* [*Prasanna Kumar*] (5), *Profulla Narain* v. *Palku Mohammad* (4). In the case before us the time for the institution of a suit under section 104 H, sub-section (2) expired on the 30th November 1910. On the other hand, the time for an appeal to the Superior Revenue Authority expired on the 31st July 1910, and the period prescribed for possible revision by the Board of Revenue terminated on the 31st May 1912. The Revenue Authorities have not availed themselves of the normal procedure; they cannot now be permitted to re-open the matter and re-agitate the question in a different forum by way of defence to an action which the tenant has been obliged to institute by reason of the seizure of his properties by summary process. The Record of Rights, finally published on the 31st May 1910, has never been amended, and the time prescribed for amendment has elapsed. It appears that in 1915, after the issue of the first certificate, some Revenue Officer discovered the inconsistency between the decision of the Settlement Officer in the dispute case dated the 27th March 1909, and the entry in the Record of Rights finally published on the 31st May 1910. He then proceeded to correct the copy of the Record of Rights which was in his custody, and this was made the basis for the issue of the supplemental certificate. The procedure was manifestly unauthorised. The original record has never been and can no longer be amended in accordance with law. There was thus no foundation for the issue of the supplemental certificate and the entry in the Record of Rights must be deemed conclusive between the Secretary of State and the tenant.

As regards the second question, the plaintiff maintains that, even if it be assumed that the Revenue Authorities are at liberty to establish now the inaccuracy of the entry in the Record of Rights, it is not open to them to issue a supplemental certificate for the period covered by the certificate previously issued. We are of opinion that this contention is of considerable force. Section 4 of the Public Demands Recovery Act, 1913, provides that when the Certificate Officer is satisfied that any public demand payable to the Collector is due, he may sign a certificate, in the prescribed form, and stating that the demand is due, and shall cause the certificate to be filed in his office. It is plain that the certificate so filed is intended to cover the entire demand due at the time. The "public demand", mentioned in section 4 and defined in section 3, clause (6), read with clause (7), of Schedule I includes a demand payable to the Collector by a person holding any interest in land, when such demand is a condition of the use and enjoyment of the land. We are of opinion that section 4 should not be so interpreted as to authorise the issue of more than one certificate in the prescribed form (Appendix, form 1) with regard to a single demand broken up into fragments. Such an interpretation would violate the

(6) 4 Ind. Cas. 470; 13 C. W. N. 210.
(7) 15 Ind. Cas. 327; 17 C. W. N. 153.

cardinal rule for the avoidance of multiplicity of proceedings. That rule is recognised by the Legislature in O. II, r. 2 of the Civil Procedure Code, 1905, which requires that every suit shall include the whole of the claim which a plaintiff is entitled to make in respect of the cause of action, with the necessary corollary that where the plaintiff omits to sue in respect of or intentionally relinquishes any portion of his claim, he cannot afterwards sue in respect of the portion so omitted or relinquished. This principle has been held applicable to proceedings in Revenue Courts for recovery of arrears of rent; see *Madho Prakash Singh* v. *Murli Manohar* (3) and *Adhirani Narain Kumari* v. *Raghu Mahapatro* (2). As pointed out by the Judicial Committee in *Moonshee Buzloor Raheem* v. *Shumsoonnissa Begum* (8), the doctrine applies to cases not merely of deliberate relinquishment but also of accidental or involuntary omission. From this standpoint, the issue of the supplemental certificate was entirely unauthorised.

As a last resort, it has been urged that section 37, read with section 35 of, the Public Demands Recovery Act which specifies the grounds for cancellation or modification of a certificate by the Civil Court bars the present suit. There is plainly no foundation for this contention. The action of the Revenue Authorities was wholly unauthorised, constituting a colourable exercise and consequently a flagrant abuse of the provisions of the Statute. In such circumstances, section 37 does not oust the jurisdiction of the Civil Court to make a declaration, to issue an injunction or otherwise to grant adequate relief; *Rezjuddin* v. *Shahamutulla* (9), *Dhiraj Chandra Bose* v. *Hari Dasi Debi* (10).

The result is that this appeal is allowed the judgment of Mr. Justice Huda in affirmance of that of the Subordinate Judge is set aside and the decree of the Primary Court is restored with costs throughout.

N. K. *Appeal allowed.*

(8) 11 M. I. A. 551 at p. 604; 8 W. R. P. C. 2; 2 Suth. P. C. J. 59; 2 Sar. P. C. J. 259; 20 E. R. 208.

(9) 60 Ind. Cas 759.

(10) 29 Ind. Cas. 290; 42 I. A. 58; 42 C. 765; 19 C. W. N. 507 28 M. L. J. 480; 2 L. W. 422 (P. C.).

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1232 OF 1921.

November 21, 1921.

Present:—Mr Justice Broadway.

FEROZ—PLAINTIFF—APPELLANT

versus

GHULAM SARWAR AND ANOTHER—DEFENDANTS—RESPONDENTS.

Custom—Alienation—Near reversioner's inaction—Acquiescence—Right of reversioner's son to contest alienation—Limitation—Indian Soldier's (Litigation) Act (IX of 1918), s. 11—Limitation Act (IX of 1908), s. 6.

Where at the date of an alienation of ancestral property the son of a nephew of the alienor was in existence, under Customary Law, he has a right to contest the alienation independent of his father. Inaction on the part of the father to contest the alienation does not amount to acquiescence. [p. 380, col. 1.]

Sundar v. *Salig Ram*, 9 Ind. Cas. 300; 26 P. R. 1911; 33 P. W. R. 1911; 34 P. L. R 1911, *Arur Singh* v. *Solakhan Singh*, 37 Ind. Cas 412; 174 P. W. R. 1916, followed.

In order to obtain the benefit of the provisions of section 11 of Act IX of 1918, the person claiming the benefit must show that he was absent serving under war conditions before the limitation to institute a suit expired [p. 381, col. 1.]

Second appeal from the decree of the District Judge, Jhelum, dated the 21st February 1921, affirming that of the Munsif, First Class, Jhelum, dated the 7th June 1920.

Sayad *Muhammad Amin*, for the Appellant.

Mr. *H. D. Bhalla*, for the Respondents.

JUDGMENT.—The facts of this case are briefly these:—On the 16th December 1899 one Khan Alam executed a deed of sale relating to certain property in favour of one Ditta, a nephew of his, for Rs. 650. This sale was duly registered and mutation took place on the 22nd May 1900. The mutation entry shows that the Revenue Authorities regarded this alienation to be a gift and not a sale. At the time when this alienation was effected another nephew of Khan Alam, *viz.*, Data was alive. Data also had living two sons, Sher Zaman and Feroz, the latter then being an infant in arms. Data with his father Bahadur had been living for many years prior to this alienation in another village. Neither he nor his son Sher Zaman took any steps to preserve their reversionary rights, although Data was clearly the proper person to object to the alienation, being the nearest reversionary heir. Data is said to have died about 1910. Khan Alam himself died somewhere about 1918. On the 9th February 1920

Feroz, who was then in Persia on military duty, instituted a suit through his brother Sher Zaman, as his Attorney, for possession of the land alienated by the deed of sale, dated the 16th December 1899, on the grounds that the alienation had been effected without consideration and without necessity. The defendant Ghulam Sarwar, son of Ditta, the original alienee, contested the suit *inter alia* pleading that the plaintiff Feroz had no *locus standi* to sue and that the suit was barred by limitation. In addition to the land alienated, the suit was for possession of a house. The Trial Court held that the plaintiff had no *locus standi* to sue and also that the suit was barred by limitation. It was held that the right to sue accrued, to the plaintiff's father Data on the 22nd May 1900 when mutation was effected and that from that date time commenced to run against Data and continued to run against the plaintiff who could derive no benefit from the fact that he was a minor. The suit thus having been dismissed the plaintiff preferred an appeal to the District Judge who confirmed the decree of the Trial Court dismissing the suit. The plaintiff has, therefore, come up to this Court in second appeal through Mr. Muhammad Amin, and I have heard Mr. Hareharan Das Bhalla on behalf of the respondent.

It has been contended that the decision of the Courts below is erroneous on both the points. Article 67 of Rattigan's Digest of Customary Law has been referred to as showing that the plaintiff could maintain his action. It appears that the plaintiff's father Data was absent from the village in which this land is situated and took no steps to have the alienation in question declared void. No collusion between Data and the alienor and alienee has been suggested or proved nor has his refusal to institute proceedings been established, nor, as far as I have been able to ascertain from the record, has any act or conduct of Data been shown which precluded him from suing. Further, I do not think that the fact that he refrained from taking any action can be regarded as acquiescence in the alienation. In these circumstances, it seems to me that the plaintiff who is the next reversioner has a *locus standi* to sue. He does not derive his right to sue from or through his father but holds it independently of Data, *vide Sundar v. Saliq Ram* (1) and *Arur Singh v. Solakhan Singh* (2).

On the question of limitation the position appears to be this:—The plaintiff was born on the 23rd November 1898. He was, therefore, in existence when the alienation was effected and might have brought a suit. He attained the age of 18 years on the 23rd November 1916, and by the operation of section 6 of the Limitation Act could bring the suit up to the 23rd November 1919. As has been pointed out above, the suit was not filed till the 9th February 1920. It is, therefore, barred unless the plaintiff can show that he is entitled to any further saving of time. In order to do this he has alleged that he enlisted before October 1919 and proceeded on active service before the period of limitation had expired. He, therefore, claimed that section 11 of Act IX of 1918 came to his assistance and that the period during which he had been serving under war conditions should be excluded. On the other hand, it has been urged and has been held by the Courts below, that once time began to run no subsequent disability prevented its continuance. With this general proposition I am in agreement, but it seems to me that Act IX of 1918 was a special enactment intended to meet cases of this nature and that if it can be shown that the plaintiff was absent serving under war conditions, the suit should be regarded as within time. On this point there is evidence on the record to show that the plaintiff enlisted in September 1912 in the 72nd Hired Camel Corps. A letter from the Officer Commanding that Unit is on the record and shows that the plaintiff was enrolled in that Corps. The Enrolment Form was sent to the Court but has been returned. That Enrolment Form would show the date of the plaintiff's enrolment. The letter further shows that the plaintiff was recruited by Naik Ram Dass and that Naik Ram Dass left Chakwal for Persia during the first week of September 1919. The fact of enrolment, however, by itself cannot assist the plaintiff, as, in order to benefit by the provisions of section 11 of Act IX of 1918, he must show that he

(1) 9 Ind. Cas. 800; 26 P. R. 1911; 33 P. W. R. 1911; 34 P. L. R. 1911.

(2) 37 Ind. Cas. 412; 174 P. W. R. 1916.

had been serving under war conditions before the limitation expired. Mr. Muhammad Amin contended that this had been shown, but there is no clear evidence of this on the record. Mr. Muhammad Amin, however, produced a document, a duplicate copy of which had been forwarded to the Court, according to which it is certified that Feroz had been serving in the 72nd Hired Camel Corps in East Persia since the 12th October 1919. As a matter of fact, the plaintiff is still absent on active service as is evidenced by the fact that the plaint was filed on his behalf by his brother acting as his Attorney. In these circumstances, it appears to me that it should be held that the plaintiff is entitled to the benefit of section 11 of Act IX of 1918 and that the suit must be held to be within time. In any event, the claim for the house was not barred. The house was not alienated and the right to succeed to it did not accrue till the death of Khan Alam which, it is said, took place within two years of the suit.

I must, therefore, accept this appeal and setting aside the orders of the Courts below, return the case to the Trial Court for disposal in accordance with law. Costs will follow the event and the stamp on appeal will be refunded.

R. M. & W. C. A. *Appeal accepted.*

CALCUTTA HIGH COURT.

LETTERS PATENT APPEALS NOS. 54 TO 57 OF 1920.

January 9, 1922.

Present:—Sir Asutosh Mookerjee, Kt., Mr. Justice Newbould and Mr. Justice Pearson.

MOHINI KANTA SAHA CHOUDHURY AND OTHERS—PLAINTIFFS—APPELLANTS

versus

PREO NATH NEOGY AND OTHERS—DEFENDANTS—RESPONDENTS

Bengal Tenancy Act (VIII of 1885), s. 50 (2)—Enhancement of rent—Presumption under s. 50 (2)—Uniform rate of rent—Tenant claiming benefit of presumption—Proof, nature of.

To entitle a tenant to the benefit of the presumption under sub-section (2) of section 50 of the Bengal Tenancy Act, the tenant is not required to establish *actual payment* of rent during the twenty years at a uniform rate; he has to establish that he and his predecessors-in-interest have *held* at a rent or rate of rent which has not been changed during the twenty years immediately before the suit or proceeding: for a person may hold as a tenant, even though he does not actually pay the rent agreed upon to his landlord. [p. 382, col. 2.]

It has not been, and, cannot be, maintained that the omission to pay on behalf of the tenant or refusal to receive rent on the part of the landlord causes a cessation of the tenancy. [p. 382, col. 2.]

A tenant paid rent at a certain rate which was uniform from 1845 to 1897, since when there was no actual payment of rent: the landlord attempted to enhance the rent but the tenant did not accede to the demand and no proceeding was instituted in Court for alteration of the rent. In 1915 the tenant was recorded in the Record of Rights as an occupancy *raiyat*, whereupon the landlord instituted the present proceeding for enhancement of rent on the ground that the prevailing rent was higher than that paid by the tenant:

Held, that as the rent which was in operation in 1897 was in operation from 1897 to 1915, in other words, as the rent at which the tenant had held during the twenty years immediately before the institution of the proceeding had been at a uniform rate, he was entitled to the presumption mentioned in sub-section (2) of section 50 of the Bengal Tenancy Act. [p 383, col. 1.]

Ahmed Ali v. *Golam Guffoor*, 11 W. R. 432; 3 B. L. R. App 40; *Sham Churn Koondoo* v. *Dwarkanath Kubeeraj*, 19 W. R. 100; *Kshirod Gobinda Chowdhury* v *Rajendra Narayan Shaha*, 38 Ind Cas 94; 27 C. L. J. 281; *Grant* v. *Har Sahay Singh*, 20 Ind. Cas. 53; 18 C. L. J. 76; 19 C. W. N. 1 7; *Rajnarain Roy Chowdhury* v. *Mrs. Olivia Atkins*, 1 W. R. 45; *Mahmooda Bebee* v. *Hareedhun Khuleefa*, 5 W. R. Act X Rul., 12; *Prem Sahoo* v. *Shaikh Nyamut Ali*, 6 W. R. Act X Rul., 89; *Sham Lal Ghose* v. *Boistab Churn Muzoomdar*, 7 W. R. 407; *Ramjadoo Gangoly* v. *Luckhee Narain Mundul*, 8 W. R. 488, referred to.

Letters Patent Appeals against the judgment of Mr. Justice Teunon, differing in opinion from Mr. Justice Shamsul Huda, in Appeals from Appellate Decrees Nos. 500, 578 to 580 of 1918, against the decree of the Special Judge, Dacca, dated the 17th November 1917, reversing those of the Settlement Officer, Dacca, dated the 22nd December 1916.

Dr. *Dwarka Nath Mitter* and Babu *Kalinkar Chuckerbutty*, for the Appellants.

Babus *Amarendra Nath Bose*, *Bhitish Chunder Chuckerbutty* and *Ramendra Mohan Majumdar* (for Babu *Biraj Mohan Majumdar*), for the Respondents.

JUDGMENT.

L. P. A. No. 54 OF 1920.

MOOKERJEE, J.—This is an appeal under clause 15 of the Letters Patent from a judgment of this Court in an appeal preferred under section 109A of the Bengal Tenancy Act, in the course of a proceeding under section 103.

MOHINI KANTA SAHA v. PREO NATH NEOGY.

It appears that in 1915, a Record of Rights was prepared which contained an entry to the effect that the defendants respondents were occupancy *raiyats*. The landlords appellants thereupon instituted the present proceeding for enhancement of rent on the ground that the prevailing rate was higher than that paid by the tenants. The tenants resisted the claim on the ground that they held at a rent or rate of rent which was fixed in perpetuity and that their rent was consequently not liable to enhancement. The Settlement Officer gave effect to the contention of the landlord and allowed the claim for enhancement. Upon appeal, the Special Judge upheld the defence and dismissed the claim for enhancement. On appeal to this Court, Mr. Justice Teunon held that the judgment of the Special Judge was not liable to be challenged in second appeal as erroneous in law. Mr. Justice Huda, on the other hand, came to the conclusion that the view of the Special Judge was based upon an erroneous construction of section 50 of the Bengal Tenancy Act. The result was that the decision of the Special Judge stood affirmed. On the present appeal, it has been contended on behalf of the landlords that the decision of Mr. Justice Teunon in affirmance of the decision of the Special Judge is based upon an erroneous interpretation of sub-section (2) of section 50.

Sub-section (1) of section 50 provides that where a *raiyat* and his predecessors-in-interest have held at a rent or rate of rent which has not been changed from the time of the Permanent Settlement, the rent or rate of rent shall not be liable to be enhanced except on the ground of an alteration in the area of the tenancy or holding. In the present case, there is no direct evidence that the *raiyats* held at a rent or rate of rent which had not been changed from the time of the Permanent Settlement. They are consequently compelled to have recourse to the presumption specified in sub-section (2) of section 50, which provides as follows: 'If it is proved in any suit or other proceeding under this Act that a *raiyat* and his predecessors-in-interest have held at a rent or rate of rent which has not been changed during the twenty years immediately before the institution of the suit or proceeding, it shall be presumed, until the contrary is shown, that they have held at that rent or rate of rent from the time of the Permanent Settlement." Consequently, the *raiyats* have to establish in this case that they and their predecessors-in-interest have held at a rent or rate of rent which has not been changed during the twenty years immediately before the institution of the suit or proceeding. The landlords have argued that the *raiyats* have failed to establish the affirmative of this proposition, because from that it is conceded that no rent has in fact been paid by them to their landlords since 1893, in other words, during the seventeen years immediatley preceding the institution of the suit. The substance of the contention of the landlords is that the tenant is entitled to the benefit of the presumption under sub-section (2) of section 50, only if he proves actual payment at an unvaried rate, if not in each of the twenty years preceding the suit, at least in so many of them as to lead to the inference that there has been no change in the rent paid throughout the period of twenty years. We are of opinion that this contention cannot be accepted in view of the plain language of sub-section (2) of section 50. The tenant is not required to establish *actual payment* of rent during the twenty years at a uniform rate; he has to establish that he and his predecessors-in-interest have *held* at a rent or rate of rent which has not been changed during the twenty years immediately before the suit or proceeding. This involves a real distinction; for a person may hold as a tenant, even though he does not actually pay the rent agreed upon to his landlord. As was pointed out by Mr. Justice Dwarkanath Mitter in *Ahmed Ali* v. *Golam Guffoor*(1), there may be cases in which a *raiyat* might not have paid his rents for many years prior to the institution of the suit for enhancement; but if there has been no change in the rent payable by him he is not to be deprived of the presumption which the law has expressly laid down for his benefit; the payment at a uniform rate is one mode of showing that the tenure was held at a uniform rate, but what is only a particular mode of proceeding to the solution of a question ought not to be confounded with the question itself. It has not been, and, in our opinion, cannot be, maintained that the omission to pay on behalf of the tenant or refusal to receive rent on the part of the landlord causes a cessation of the tenancy. The present proceeding is, indeed, based on the assumption

(1) 11 W. R. 432; 3 B. L. R. App. 40.

that the defendants hold as tenants and that their rent is liable to be enhanced. The question, consequently, arises, what is the rent or rate of rent at which they have held during the twenty years immediately before the institution of the suit or proceeding. There is evidence to show that rent was paid at a certain rate in 1897. There is further evidence to show that the rent had been paid at the same rate for very many years earlier, and, it has been stated to us that, in one case the oldest receipt produced dates back to 1845. There is thus evidence which justifies the finding of the Special Judge that rent was paid at a certain rate which was uniform from 1845 to 1897. There has been no actual payment of rent since then. Does this justify the inference that there has been a change in the rent or rate of rent which was in operation in 1897? The answer manifestly must be in the negative. The rent could have been altered either by mutual agreement or by a decree of Court. There was an attempt on the part of the landlords to enhance the rent, but the tenants did not accede to the demand. Consequently, there is no room for the hyphothesis that the rent might have been altered by agreement of parties. Admittedly, there has been no proceeding in Court for alteration of the rent before the date of the institution of the present suit. We must, consequently, hold that the rent which was in operation in 1897 was in operation from 1897 up to 1915: in other words, that the rent at which the *raiyats* have held during the twenty years immediately before the institution of the suit or proceeding has been at a uniform rate. This attracts the operation of the presumption mentioned in sub-section (2) of section 50. The view we take is supported by the decisions in *Ahmed Ali* v. *Golam Guffoor* (1), *Sham Churn Koondoo* v. *Dwarkanath Kubeeraj* (2), *Kshirod Gobinda Choudhury* v. *Rajendra Narayan Shaha* (3) and *Grant* v. *Bar Sohay Singh* (4) although there may be innaccurate expression in *Narain Roy Chowdhry* v. *Mrs Olivia Atkins* (5), *Mahnooda Bebee* v. *Hareebhun Khuleefa* (6), *Prem Sahoo* v. *Shaikh Nyamut Ali* (7), *Sham Lal Ghose* v. *Boistab Churn Mustoomdar* (8) and *Ramjadoo Gangoly* v. *Luckhee Narain Mundul* (9) which may at first sight lend apparent support to a contrary position. Our conclusion is, that the view taken by Mr. Justice Tennon is correct, and that the appeal must consequently be dismissed with costs.

The judgment will govern the other appeals Letters Patent Appeals Nos. 55, 56 and 57 of 1920.

NAWBOULD, J.—I agree.

PEARSON, J.—I agree.

S. D. & W. C. A.

Appeals dismissed.

(2) 19 W. R. 100.
(3) 33 Ind. Cas. 94; 27 C. L. J. 281.
(4) 20 Ind. Cas. 53; 18 C. L. J. 76; 19 C. W. N. 117.
(5) 1 W. R. 45.
(6) 5 W. R., Act X Rul., 12.
(7) 6 W. R., Act X Rul., 89.

(8) 7 W. R. 407.
(9) 8 W. R. 438.

LAHORE HIGH COURT.

LETTERS PATENT APPEAL No. 205 OF 1921.

January 24, 1922.

Present:—Sir Shadi Lal, Kt., Chief Justice and Mr. Justice Abdul Qadir.

AMARNATH—RESPONDENT—APPELLANT

versus

Musammat TEHAL KAUR—PETITIONER—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XLI, r. 1—Receiver—Jurisdiction to appoint—Declaratory suit—Ppower of Court to remove a party from possession.

Where a Single Judge of the High Court finds that a case is a fit one for the appointment of a Receiver, a Division Bench of the High Court will not interfere with the Single Judge's discretion, unless it is satisfied that the discretion has been improperly exercised and contravenes any principles of law. [p. 385, cols. 1 & 2.]

A Court has a right to proceed under O. XL, r 1, Civil Procedure Code, where it appears to be just and convenient to do so [p. 385, col. 1.]

Dan Parsad v. *Gopi Kishen*, 22 Ind. Cas. 59; 36 A. 19; 11 A. L. J. 973 and *Bidya Prosad Narain Singh* v. *Asrafi Singh*, 20 Ind. Cas. 263; 40 C. 862; 17 C. W. N. 1070, referred to.

A Court is not debarred from appointing a Receiver of property, forming the subject-matter of a declaratory suit, in which possession of the property is not to be awarded to one party or the other, as the object of the appointment of the

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Receiver is, to protect the property and to maintain the status *quo ante* pending the disposal of dispute between the parties; nor is a Court debarred under O. XL, r. 1 (2) of the Civil Procedure Code, from removing one of the parties from the possession of the property. [p. 385, col. 2; p. 386 col. 1.]

Satya Narain Singh v. *Srimati Rani Keshabati Kumari*, 25 Ind. Cas. 406; 18 C. W. N. 537 and *Ajappa Natesa Pandara Sannadhi* v. *Ramalingam Pillai*, 20 Ind. Cas. 767; 24 M. L. J. 658, referred to.

Appeal, under section 10 of the Letters Patent, against an order, of Mr. Justice Abdul Raoof, dated the 6th June 1921, passed in Civil Miscellaneous Application No. 184 of 1921, appointing a Receiver of the property in dispute in Civil Appeal No. 1847 of 1917 pending in the High Court.

Dr. *Gokal Chand Narang*, Lala *Moti Sagar*, R. S., Lala *Duni Chand Gupta* and Babu *M. N. Mukerji*, for the Appellant.

Bakhshi *Tek Chand*, Lala *Badri Das*, R. B., Lala *Jai Lal*, R. B., Mr. *H. D. Bhalla* and Lala *Amar Nath Chona*, for the Respondent.

JUDGMENT.—This is an appeal from an order passed by Mr. Justice Abdul Raoof on the 6th June 1921, holding that a Receiver be appointed to take possession of the property which is the subject-matter of controversy between the parties and adjourning the case to another date for the purpose of selecting a suitable person for the office of Receiver. The appeal was preferred on the 11th July 1921, after the expiry of the period of 30 days prescribed for the purpose and Mr. Tek Chand, on behalf of the respondents consequently raises a preliminary objection that the appeal is barred by time. A perusal of the record, however, shows that on the 29th June 1921 the appellant applied for a copy of the order but could not get it because the judgment was still with the learned Judge and had not yet been pronounced. There can, therefore, be no doubt that the appellant could not prefer an appeal before the delivery of the judgment and we must accordingly overrule the preliminary objection.

On the merits, we have listened to lengthy arguments advanced by the learned Counsel on both sides but the question for determination is a simple one, namely, whether, to use the language of O. XL, r. 1, it appears to the Court to be just and convenient that a Receiver should be appointed to take charge of the property which is the bone of contention between the parties. Now the facts, so far as they are relevant to the question in issue, are briefly as follows:—

The property, which appears to be very valuable, belonged to one Pandit Bansi Lal who died childless on the 30th July 1897 leaving him surviving two widows *Musammat* Bishen Kaur and *Musammat* Budhwanti. It appears that there was a dispute between the widows which was finally settled by means of a compromise dated the 22nd February 1903. The sum and substance of this compromise is, that the property of the late Pandit Bansi Lal was declared to be trust property in accordance with the Will alleged to have been made by the deceased. The appellant Amar Nath and Jawala Datt Parshad were the next reversioners of Pandit Bansi Lal and the latter instituted in 1906 a suit contesting the validity of the aforementioned trust but subsequently abandoned his claim, and consented to the compromise entered into by the widows.

In 1909 the present appellant, Amar Nath, brought an action for a declaration that the property was not trust and that the compromise should not adversely affect his rights of succession after the death of the two widows. In that suit Jawala Datt Pershad, Prem Nath, a relation of Pandit Bansi Lal, and *Musammat* Tehal Kaur, Pandit Bansi Lal's step-mother, were made *pro forma* defendants along with the principal defendants, *Musammat* Bishen Kaur and *Musammat* Budhwanti. *Musammat* Bishen Kaur died during the pendency of the suit which was continued against the remaining defendants and resulted in 1917 in a decree in favour of Amar Nath. Against this decree *Musammat* Budhwanti preferred an appeal which is pending in this Court. In August 1918 *Musammat* Budhwanti died and *Musammat* Tehal Kaur applied to be impleaded as her representative and a formal order granting her application subject to all just exceptions was duly made by a Judge of this Court. On the 9th April 1921, she made an application for the appointment of a Receiver and this application was allowed by Mr. Justice Abdul Raoof who has written a long judgment setting out the disputes among the various persons who claim to be interested in the property and enumerating the alienations alleged to have been made by some of

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them affecting a substantial portion of the estate.

The first point raised before us is to the effect that *Musammat* Tehal Kaur cannot be regarded as the legal representative of the deceased *Musammat* Budhwanti and consequently has no right either to prosecute the appeal or to make an application for the appointment of a Receiver. Now, it is true that as the step-mother of Pandit Bansi Lal this lady is not entitled under the Hindu Law to inherit his estate and that she can get only maintenance out of the property left by him. Mr. Tek Chand, however, invokes a custom which, he alleges, confers upon a step-mother the right of succession to the property of her step-son in the absence of lineal descendants and parents but we do not consider it necessary to prolong the proceedings by ordering an enquiry into the existence of the alleged custom. It is common ground that the widows of Pandit Bansi Lal were devoting a very large portion of the income of the estate to the maintenance of a temple, a Pathshalla and a Dharamsala, and there can be little doubt that the reversioners, who dispute the validity of the religious and charitable trust, cannot be expected to maintain these institutions. Of all the relations of Pandit Bansi Lal, *Musammat* Tehal Kaur is the only person who is interested in carrying out the trust, and we consider that she is entitled to take steps to preserve the property for the trust pending the disposal of the appeal. Indeed it is laid down in *Dan Parsad* v. *Gopi Kishen* (1) that a Court has a right to proceed under Order XL, rule 1 where it appears to be just and convenient to do so and that the Court can make an order *suo motu*. Observations to the same effect are to be found in *Bidya Prosad Narain Singh* v. *Asrafi Singh* (2). Accordingly we must hold that the order appealed from cannot be impeached on the ground that *Musammat* Tehal Kaur has not established her right of inheritance in the property.

On the question whether this is a fit case for the appointment of a Receiver we have got a clear finding arrived at by a Judge of this Court against the appellant and we must decline to interfere with his discretion in a matter of this character, unless we are satisfied that the discretion has been improperly exercised and contravenes any principle of law. We are not called upon nor do we think we should be justified to express any opinion in the matter in controversy in the appeal preferred against the decree of the Subordinate Judge and we have no desire to make any observations which would pre-judge that appeal or prejudice the claim of any of the reversioners to the property. Confining ourselves strictly to the merits of the application for the appointment of a Receiver we consider that, in view of Jawala Datt Parshad's admission by words and conduct in the suit instituted by him in 1905, one half of the estate, which he might have successfully claimed as one of the two nearest reversioners of the last male owner, should, for the purposes of this application, be regarded as trust property and that the fate of the remaining half must depend upon the result of the appeal pending in this Court. There is, therefore, at least one half of the property which should be administered for the maintenance of religious and charitable endowments and it is the duty of the Court to take suitable steps to preserve these endowments.

It is contended on behalf of the appellant that as the suit brought by him was one for a mere declaration this Court should not appoint a Receiver of the property the possession of which cannot be awarded to one party or the other by the Court disposing of the main appeal. Our attention has not been invited to any authority which would limit the jurisdiction of the Court in the manner indicated above and considering that the object of the appointment of the Receiver is to protect the property and to maintain the status *quo ante* pending the disposal of the question whether the remaining half of the estate is or is not trust property, we are of opinion that this is a fit case in which the property should remain in *custodia legis*. Mr. Gokal Chand Narang argues that under Order XL, rule 1 (2) the Court has no authority to remove from the possession or the custody of property any person who on any party to the suit has not a present right so to remove and that the Court should not, therefore, remove his client from the possession of the property where *Musammat* Tehal Kaur herself has not a present right so to remove him. It has, however, been held by the Calcutta High Court

(1) 22 Ind. Cas. 59; 36 A. 19; 11 A. L. J. 973.
(2) 20 Ind. Cas. 269; 40 C. 862; 17 C. W. N. 1070.

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in *Satya Narain Singh* v. *Srimati Bani Keshabati Kumari* (3), that the aforesaid sub-rule refers to the case of the removal of a person other than a party to the suit and the same view has been taken in *Alapi Nateza Pandara Sannadhi* v. *Ramalingam Pillai* (4), we concur in this exposition of the law and hold that sub rule (2) does not debar the Court from removing one of the parties from the possession of the property.

Upon a view of all the circumstances we are not prepared to hold that any adequate ground for our interference has been established. Before concluding we must state that the final order appointing Rai Sahib Seth Ram Parshad to be the Receiver of the property is not impeached before us though a separate appeal reiterating the grounds of objection to the property of the order directing the appointment of a Receiver was preferred by the appellant. We are, therefore, not called upon to consider the question of the personnel or of the remuneration to be awarded to the Receiver for his services.

We accordingly dismiss the appeal with costs.

S. D.

Appeal dismissed.

(3) 25 Ind. Cas. 406; 18 C. W. N. 537.
(4) 20 Ind. Cas 767; 24 M. L. J. 658.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1456 OF 1920.

February 15, 1922.

Present:—Mr. Justice Newbould.

HEM CHANDRA ROY CHOWDHURY—DEFENDANT—APPELLANT

versus

Srimati BIRAJA SUNDARI CHOWDHURANI, WIDOW OF GIRISH CHANDRA ROY CHOWDHURY, AND OTHERS—PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), s. 3, Sch. I, Art. 14—Plea of limitation raised in first appeal when to be given effect to.

The plea of limitation can be taken at any stage of a case and under section 3 of the Limitation Act a Court of Appeal is bound to give effect to this plea when raised. But in order that this plea may be given effect to when raised in appeal it is necessary that the facts showing that the suit is barred should be apparent on the record [p. 387, col 2.]

Appeal against a decree of the Additional Subordinate Judge, Dacca, dated the 23rd February 1920, affirming that of the Munsif Third Court at Narainganj, dated the 17th May 1919.

FACTS appear from the judgment.

Babu *Tarak Nath Chakraburty* (with him Babu *Ramani Mohan Chatterjee*), for the Appellant.—The defendant is the appellant. The appeal arises out of a suit that the land in suit did not appertain to Zamindari No. 162 but to Mahal No. 1170 of the Dacca Collectorate. The First Court decreed the suit according to the admission in our defence that 14 annas share of the land belonged to the Mahal No. 1170. We then appealed and raised the plea of limitation. The appeal was, however, dismissed. My point is that the plea of limitation can be raised at any stage of the suit. The Court is bound to go into the question. Refers to section 3 of Indian Limitation Act. The bar of limitation appears on the face of the record. Order VIII, rule 2 of the Code of Civil Procedure has, therefore, no application. There is no allegation of fraud even in the plaint. There is not the slightest indication as to the cause of delay in filing the suit. The order may have been illegal or improper but that does not show that it was passed without jurisdiction. Refers to *Yar Mohammad Saha* v. *Hayat Mohammad Saha* (1). The mere fact that no notice of the application under section 88 of the Estates Partition Act was served on the plaintiffs would not take away the jurisdiction of the Collector. At best, the Collector might be said to have acted illegally or with material irregularity in the exercise of his jurisdiction. If the order is a nullity

(1) 42 Ind. Cas. 768; 22 C. W. N. 342 at p. 345; 18 Cr. L. J. 1024.

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then the plaintiff has no cause of action at all.

Babu *Priya Nath Dutt* (with him Babu *Biraj Mohan Mazumdar*, for the Deputy Registrar), for the Respondent.—My point is that the order of the Collector is a nullity having been passed in our absence. Refers to *Raj Chandra Roy* v. *Fajiruddin Hossain* (2). Article 14 of the Limitation Act has no application. Assuming that it does apply, the Subordinate Judge is right in his conclusion. We distinctly said that the defendant falsely and without our knowledge applied for partition under the Estates Partition Act. The objection as to limitation was not taken in the First Court. Refers to Order XII, rule 6; Order VIII, rule 2, of the Code of Civil Procedure. They ought to have taken the point specifically so that we could have amended our plaint. I submit the suit is not barred. Refers to *Kedar Nath Mondal* v. *Mohesh Chandra Khan* (3). In that case Mukerjee, J., held that the point of limitation should be taken in first stage. Refers to *Lalon Singh* v. *Purna Chander Banerjee* (4), *Ananda Kishore Chowdhury* v. *Daije Thakurain* (5) and *Narendra Lal Khan* v. *Jogi Hari* (6).

Babu *Tarak Chandra Chakraburty* replied in brief.

JUDGMENT.—The plaintiffs brought the suit out of which this appeal arises for a declaration that the land described in the schedule to the plaint did not appertain to Zemindari No. 162 but appertained to Mahal No. 1170 of the Dacca Collectorate. The first defendant who has appealed before me filed a written statement admitting that the 14 annas share of the disputed land appertain to Mahal No. 1170. He further stated that he had no objection to the said 14 annas being partitioned as appertaining to Mahal No. 1170. In the First Court the only issue that was tried on these pleadings was whether the plaintiffs had any cause of action. That issue was determined in the plaintiffs' favour and the suit was decreed with costs. In the decree it was directed that "it be declared that the alleged 14 annas share of the disputed land appertain to Mahal No. 1170 *taluk* Mahadeb Roy and not to Zemindari No. 162 and that the said 14 annas share of the disputed land should in partitioning the said Mahal No. 1170 be taken as appertaining to the same." Against this decree the first defendant appealed and in the lower Appellate Court he, for the first time, raised a plea that the plaintiffs suit was barred by limitation under Article 14 of the Schedule 1 of the Indian Limitation Act. The lower Appellate Court held that as the suit had been instituted one year after the order of the Deputy Collector under section 88 of the Estates Partition Act it was time barred, but as the plaintiffs denied the *factum* of notice as required by section 88 of the Estates Partition Act and there was no assertion against that denial, the defendant could not be allowed to take up that point at that stage.

It is contended on behalf of the appellants that the plea of limitation can be taken at any stage of the case, and that under section 3 of the Limitation Act the Court of Appeal was bound to give effect to this plea when raised. But in order that this plea may be given effect to when raised in appeal it is necessary that the facts showing that the suit is barred should be apparent on the record. In the present case, owing to the nature of the defence set up by the defendant, I find it difficult to hold that the plea of limitation should succeed. It has been found as a fact, and this finding must be accepted in second appeal that no notice of the application under section 88 of the Estates Partition Act was served on the plaintiffs. This would make the order passed in these proceedings a bad order since the section expressly requires that due notice should be given to the parties before any enquiry is made into facts of possession. But my principal difficulty in this case is that it is impossible to ascertain what was the actual order passed or by whom it was passed. Section 88 provides for an enquiry by a Deputy Collector who would report his conclusion to the Collector and on this report the Collector would dispose of the matter by passing an order. On behalf of the appellant reliance is placed on the plaint. But the plaint is by no means clear. In paragraph 4 of the plaint reference is made to a report made under section 88 which would appear to be the report under that

(2) 32 C. 716.
(3) 46 Ind. Cas. 787; 28 C. L. J. 216.
(4) 24 C. 140; 12 Ind. Dec. (N. S.) 765.
(5) 1 Ind. Cas 549; 36 C. 726; 10 C. L. J. 189.
(6) 32 C. 1107; 2 C. L. J. 107.

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section by a Deputy Collector. But in the same paragraph it is stated that the Deputy Collector committed an error by deciding that the land in suit appertained to estate as 162. But under section 88, as already poined out, the decision on the dispute is to be made not by the Deputy Collector but by the Collector. In paragraph 9 reference is made to the date of the judgment of the proceedings. Whether the judgment is the final order by the Collector or the report by the Deputy Collector referred to in paragraph 4 is by no means clear, owing to there being no dispute as to the plaintiff's main contention no copy of the proceedings under section 88 of the Estates Partition Act was filed in the Court and there is nothing to show what actually happened in these proceedings. Without knowing what the order passed was it is impossible to say whether or not this suit was maintainable without setting aside the order passed in the partition proceedings or whether the judgment of the 10th November 1917 was the final order in the case from which the period of limitation should commence. Taking this view I hold that the lower Appellate Court was substantially right in holding the plea of limitation could not succeed in appeal.

I accordingly dismiss the appeal with costs.

S D. *Appeal dismissed.*

LAHORE HIGH COURT.

LETTERS PATENT APPEAL No. 130 OF 1921.

January 14, 1922.

Present:—Sir Shadi Lal, Kt., Chief Justice and Mr. Justice Harrison.

RULDU SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

SAWAL SINGH—PLAINTIFF—RESPONDENT.

Letters Patent (Lahore), cl. 10—"Judgment"—Order when 'judgment'—Suit dismissed by Trial Court as barred by limitation—Suit held within limitation by lower Appellate Court and remanded for trial on merits—Appeal against order of remand dismissed by Single Judge of High Court—Letters Patent Appeal—Limitation, whether matter of procedure or of substantive law—Civil Procedure Code (Act V of 1908), s. 104—Effect of section on appeal under Letters Patent—Punjab Limitation (Ancestral Land Alienation) Act (I of 1900), Sch. I, Arts. 1, 2—Limitation Act (IX of 1908), Sch. I, Art. 144—Suit for possession by heir or reversioner—Object of Punjab Act—Suit barred before accrual of right to sue—Limitation—Particular provision, plaint to determine.

In determining whether an order constitutes a 'judgment' or not within the meaning of clause 10 of the Letters Patent, the Court must take into consideration the nature of the order and its effect upon the civil proceeding in which it is made. If it puts an end to the proceeding, or, if its effect, if it is not complied with, is to put an end to the proceeding, then it is a 'judgment.' [p. 391, col. 2; p. 392, col. 1.]

(Case-Law reviewed.)

A suit was dismissed by the Trial Court as barred by limitation. The District Judge held that it was not so barred and remanded it for decision on the merits. An appeal against the order of remand was dismissed by a single Judge of the High Court:

Held, that the order of the single Judge constituted a 'judgment' within the meaning of clause 10 of the Letters Patent. [p. 392, col. 1.]

Obiter dicta—(1) It is not necessary that a decision in order to constitute a 'judgment' must involve an actual decision on the right in controversy between the parties. While a mere formal order or an order merely regulating the procedure cannot be viewed as a 'judgment', it cannot be held that the words 'right' and 'liability' used in the definition of "judgment" given by Sir Richard Couch in *Justices of the Peace for Calcutta* v. *Oriental Gas Company, Limited* (1) have reference only to the substantive law and not to a matter of procedure. [p. 391, col. 1.]

(2) The determination of the question whether a person is entitled to institute a suit for possession within twelve years from a certain date is a determination of a right, more especially when it involves the determination of the acquisition of a prescriptive right by the person in possession. [p. 390, col. 1.]

Ramendra Nath Ray v. *Brojendra Nath Dass*, 41 Ind. Cas. 944; 45 C. 111 at p. 127; 21 C. W. N. 794; 27 C. L. J. 158, referred to

(3) The object of the Legislature in enacting sub-section (2) of section 104, Civil Procedure Code, was to make it clear that there was no second appeal under the Code from the orders specified in sub-section (1) of the section. Sub-section (2) was never intended to override the express provisions of the Letters Patent and to take away by implication the right of appeal conferred by those special provisions. [p. 390, col. 2.]

Muhammad Naim-ul-lah Khan v. *Ihsan-ul-lah Khan*, 14 A. 226; A. W. N. (1892) 14; 7 Ind. Dec. (N. S.) 515. *Piare Lal* v. *Madan Lal*, 39 Ind. Cas. 460; 39 A. 191; 15 A. L. J. 46, *Hurrish Chunder Chowdury* v. *Kali Sunderi Debi*, 9 C. 482; 10 I. A. 4; 12 C. L. R. 51.; 7 Ind. Jur. 16; 4 Sar. P. C. J. 406; 4 Ind. Dec. (N. S.) 970 P. C., *Banno Bibi* v. *Mehdi Husain*, 11 A. 375; A. W. N. (1889) 70; 6 Ind. Dec. (N. S.) 667, *Toolsee*

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(1) 8 B. L. R. 433; 17 W. R. 361.

RULDU SINGH v. SAWAL SINGH.

Money Dassee v. *Sudevi Dassee*, 26 C. 361; 3 C. W. N. 347; 13 Ind. Dec (N. S.) 834; *Sabhapathi Chetti* v. *Narayanasami Chetti*, 25 M. 555; 11 M. L. J. 346 and *Secretary of State for India in Council* v. *Jehangir Maneckji Cursetji*, 4 Bom. L. R. 342, referred to.

An action to recover possession of ancestral land alienated by a male proprietor subject to the Customary Law of the Punjab is governed by the provisions of the Punjab Limitation (Ancestral Land Alienation) Act, I of 1900, if the death of the alienor, which gives rise to the cause of action for a suit for possession, takes place after the enforcement of the Act. [p. 392, col. 2.]

Mahna Singh v. *Ladha Singh*, 49 Ind Cas. 708; 18 P. R. 1919, followed.

The whole scheme of the Act makes it clear that the object of the Legislature was to remove an uncertainty about titles to land by compelling the relatives of the male proprietors to impeach their alienations within a limited period, namely, twelve years from one of the dates specified therein. It was intended that the title of the alienee should be immune from attack, if the alienation in his favour was not contested within twelve years from the date mentioned in the third column of the schedule. Article 2, which deals with a suit for possession, should be read with Article 1 which prescribes the period of limitation for a suit for a declaratory decree, and the word 'heir' used in the former Article connotes the same person or persons as the expression "son or reversioner" in the latter Article. [p 392, col. 2; p. 393, col. 1.]

The word "heir" denotes a person who succeeds by descent to an estate of inheritance, and it is beyond doubt that as long as a proprietor is living he has no heir. The person impeaching his alienation and seeking a declaratory decree cannot, therefore, be designated by the term "heir" and is consequently described as "son or reversioner." It is only after the death of the proprietor that the "son or reversioner" becomes his heir. [p. 393, col. 1.]

In order to determine whether an action is governed by a particular provision of the Law of Limitation the Court has only to peruse the plaint and to decide whether upon the averments contained therein the claim comes within that provision. [p. 393, col 1.]

It is by no means a rare thing that a suit for possession is barred by limitation though the right to sue for possession has not yet accrued. [p. 398, col. 2.]

Letters Patent Appeal from an order of Mr. Justice Scott-Smith (passed in Civil Appeal No. 2523 of 1920), dated the 10th March 1921, and reported as 64 Ind. Cas. 67 affirming that of the District Judge, Ludhiana, dated the 20th August 1920.

Thakur *Gullu Ram*, for the Appellant.

Pandit *Sheo Narain*, R. B, and Lala *Balwant Rai*, for the Respondent.

JUDGMENT.—The facts which are relevant to the question of limitation arising in appeal are as follows:—

On the 17th March 1894 one Baghela, a Jat of the Ludhiana District, made a gift of the land in dispute to his step son Ruldu Singh and on the 11th January 1896 a mutation in respect of it was effected in favour of the donee. The donor died on the 14th July 1901 and the present action for possession of the property was brought on the 21st January 1919 by his collateral Sawal Singh. The Trial Court dismissed the suit holding that it was barred by limitation, but its decree was discharged by the District Judge who came to the conclusion that the suit was within the period of limitation prescribed by Article 144 of the Second Schedule to the Indian Limitation Act, and remanded the case under Order XLI, rule 23, Civil Procedure Code, for decision on the remaining issues. Against the order of remand an appeal was preferred to the High Court which was heard by Mr. Justice Scott-Smith who has affirmed the decision of the District Judge and dismissed the appeal.

From the decision of the learned Judge the defendant has brought the present appeal under clause 10 of the Letters Patent. Mr. Sheo Narain for the respondent raises a preliminary objection that the order complained of does not constitute a "judgment" within the meaning of the aforesaid clause, and that consequently no appeal lies from it.

The expression "judgment" is not defined in the Letters Patent, and though some attempts have been made by the High Courts at defining the term, it cannot be said that any precise and, at the same time, exhaustive definition has been formulated. The earliest definition, which is often cited and is now regarded as the *locus classicus*, is contained in the well known judgment of *Justices of the Peace for Calcutta* v. *Oriental Gas Company Limited* (1). In that case Sir Richard Couch C. J., said, "we think 'judgment' in clause 15 means a decision which affects the merits of the question between the parties by determining some right or liability. It may be either final or preliminary or interlocutory, the difference between them being that a final jugdment determines the whole cause or suit, and a preliminary or interlocutory judgment determines only a part of it leaving other matters to be determined." The learned Advocate for the respondent places his reliance upon this definition and contends that the words 'right' and 'liability' as used

(1) 8 B. L. R. 433; 17 W. R. 364.

in the definition, have reference to the substantive law and not to a matter of procedure; and that the question of limitation which was the only issue determined by the Single Bench in this case, is not a question of 'right' or 'liability', but is a matter which affects only the remedy of the plaintiff. In this connection our attention is invited to the observations of Mookerjee, J., in *Ramendra Nath Roy* v. *Brojendra Nath Dass* (2), but we do not think that they support the contention of the respondent. The question for consideration in that case was whether the adjudication that there was a misjoinder of causes of action in the suit and that the plaintiff could not proceed against all the defendants in one suit was a 'judgment' within the definition given by Sir Richard Couch. Now, Mr. Justice Mookerjee points out that, while a mere formal order or an order merely regulating the procedure in a suit could not be treated as a judgment, the adjudication on the question of multifariousness was not an order of that description and that it determined some right between the parties, namely, the right whether the suit as framed was not authorized by the law and the rules relating to procedure, and could not, therefore, be entertained. It is not necessary that a decision, in order to constitute a judgment, must involve an actual decision on the right in controversy between the parties. While fully endorsing the view that a mere formal order or an order merely regulating the procedure cannot be viewed as a judgment, we cannot hold that the words, 'right' and 'liability' were used in the narrow sense contended for by the learned Advocate. It seems to us that the determination of the question whether the plaintiff is entitled to bring his suit after the lapse of twelve years from the date of the mutation is a determination of a right, and the adjudication thereupon certainly affects the merits of the question between the parties, more especially when it involves, as it does in the present case, the determination of the point whether the defendant has acquired a prescriptive right of ownership to the land in dispute, *vide* section 28 of the Indian Limitation Act. It is, however, clear that this definition, which has no doubt been adopted by the High Courts of Calcutta and Bombay as a useful guide in determining the question whether a decision is or is not a judgment, has never been regarded as absolutely exhaustive *vide*, *Budhu Lal* v. *Chattu Gope* (3) and *Ramendra Nath Roy* v. *Brojendra Nath Dass* (2). The Allahabad High Court has not felt the necessity of defining the term 'judgment,' because it has held that the right of appeal given by the Letters Patent is, in respect of an order made under the Civil Procedure Code, controlled by the provision of section 104, Civil Procedure Code. Now section 588 of the old Code, which has now been replaced by section 104 and Order XLIII, rule 1 of the new Code, enacted that an appeal lay from the order specified in that section and from no other orders, and it was consequently decided by a Full Bench of that Court in *Muhammad Naim-ul-lah Khan* v. *Ihsan-ul lah Khan* (4) that clause 10 of the Letters Patent was controlled in its operation by section 588, and that no appeal lay under the Letters Patent from an order passed under the Code if it was not one of the orders enumerated in that section. Section 104 of the new Code, however, expressly saves the right of appeal otherwise provided by "any law for the time being in force," but a Division Bench of the Allahabad High Court in *Piare Lal* v. *Madan Lal* (5), has again adopted the rule enunciated in *Muhammad Naim ul-lah Khan* v. *Ihsan ul-lah Khan* (4) on the ground that sub section (2) of section 104 makes the appellate orders final and takes away *pro tanto* the right of appeal conferred by the Letters Patent. It seems to us that the object of the Legislature in enacting sub-section (2) was to make it clear that there was no second appeal under the Code from the orders specified in sub-section (1) of section 104, and that sub-section (2) was not intended to override the express provisions of the Letters Patent. In the case of *Hurrish Chunder Chowdhury* v. *Kali Sunderi Debi* (6) their Lordships of the

(2) 41 Ind. Cas. 944; 45 C. 111 at p. 127; 21 C. W. N. 794; 27 C. L. J. 158.

(3) 39 Ind. Cas 465; 44 C. 804 & 816; 21 C. W. N. 269; 25 C. L. J. 193; 18 Cr. L. J. 497.

(4) 14 A. 226; A. W. N. (1892) 14; 7 Ind. Dec. (N. S.) 515.

(5) 39 Ind. Cas 460; 39 A. 191; 15 A. L. J. 48.

(6) 9 C. 482; 10 I. A. 4; 12 C. L. R. 511; 7 Ind. Jur. 161; 4 Sar. P. C. J. 406; 4 Ind. Dec. (N. S.) 970 (P. C.).

Privy Council made the following important observations. "It only remains to observe that their Lordships do not think that section 588 of Act X of 1877, which has the effect of restricting certain appeals, applies to such a case as this, where the appeal is from one of the Judges of the Court to the Full Court." We do not agree with the learned Judges of the Allahabad High Court when they say, *vide Banno Bibi* v. *Mehdi Husain* (7), that these observations were confined to the facts of that particular case. We consider that the general provision contained in section 104 does not take away by implication the right of appeal conferred in express terms by the special provisions relating to appeal to be found in the Letters Patent and this is the view taken by the High Courts of Calcutta, Madras and Bombay in *Toolsee Money Dassee* v. *Sudevi Dassee* (8), *Sobhapathi Chetti* v. *Narayanasami Chetti* (9) and *Secretary of State for India* v. *Jehangir Maneckji Cursetji* (10).

Coming now to the definition of the expression "judgment" given by the Madras High Court we find that the earliest Madras case which deals with this matter is that of *DeSouza* v. *Coles* (11). In that case Mr. Justice Bittleston said, "the words, judgment' ...cannot be limited to the final judgment in the suit, but must be held to have the more general meaning of any decision or determination affecting the rights or the interest of any suitor or applicant.... When the language giving the appeal is so general in its terms as that contained in the 15th clause of the Charter, it is, we think, impossible to prescribe any limits to the right of appeal founded upon the nature of the order or decree appealed from." It is difficult to endorse the view contained in the second sentence of the passage quoted above. There can be no doubt that this definition is much too wide, and it has now been superseded by another definition which appears to be the best definition attempted so far. In *Tulsiram Row* v. *Alagappa Chettiar* (12) it was rightly pointed out that in order to decide whether an adjudication should be treated as a 'judgment' regard should be had, not to the form of the adjudication, but to its effect upon the suit or other civil proceeding in which it was made. In that case Sir Arnold White laid down the following test:—"If its effect, whatever its form may be, and whatever may be the nature of the application on which it is made, is to put an end to the suit or proceeding so far as the Court before which the suit or proceeding is pending is concerned, or if its effect, if it is not complied with, is to put an end to the suit or proceeding, I think the adjudication is a judgment within the meaning of the clause." It will be observed that this definition furnishes a better and a surer test for deciding the question whether an adjudication is or is not a judgment than that given by Sir Richard Couch in the case of *Justices of the Peace for Calcutta* v. *Oriental Gas Company Limited* (1) If an adjudication puts an end to the suit or appeal, or if its effect, if it is not complied with, is to put an end to the suit or the appeal, then it is clearly a judgment. The difficulty, however, arises when an adjudication has no such effect upon a suit or appeal, but disposes of only an application made in a suit or appeal. Now there can be no doubt that it is not every application which results in an adjudication which can be held to be a judgment. In the Madras case, cited above, Sir Arnold White draws a distinction between an application which is nothing more than a step towards obtaining a final adjudication in a suit and an application which is an independent proceeding ancillary to the suit and instituted not as a step towards judgment but with a view to render the judgment effective, if obtained. He considers that while an adjudication on the former would not be a judgment an order terminating the latter would come within the purview of that expression.

Now, there are a large number of applications in respect of which it is easy to determine whether they belong to one category or the other. For example, applications for transfer, summoning witnesses, issue of commission for the examination of witnesses, adjournments, directing a party to produce and give inspection of documents, framing an issue, are clearly those on which an adjudication cannot be regarded as a judgment. On the

(7) 11 A. 375: A. W. N. (1889) 70; 6 Ind. Dec. (N. S.) 667.
(8) 26 C. 361; 3 C. W. N. 347; 13 Ind. Dec. (N. S.) 834.
(9) 25 M. 555; 11 M. L. J. 346.
(10) 4 Bom. L. R. 342.
(11) 3 M. H. C. R, 384.
(12) 8 Ind. Cas. 340; 35 M. 1; (1910) M. W. N. 697; 8 M. L. T. 458; 21 M. L. J. 1.

other hand, applications for the appointment of a Receiver, issue of an *interim* injunction, etc., belong to the second class, in which the order disposing of the application would be a judgment appealable under the Letters Patent. Indeed, to this class may be assigned all the applications, the orders on which are appealable under section 104 or Order XLIII, rule 1, of the Code of Civil Procedure. There are, however, several applications in respect of which the distinction drawn in the Madras case cannot be of much practical assistance in deciding whether the order thereupon should be a judgment within the meaning of the Letters Patent. Applications for a *mandamus*, leave to defend in a summary suit, on a negotiable instrument, etc., may be cited as examples of this type of applications. There is no sure guide for deciding whether an order terminating an application of this character is or is not a judgment, and it is for this reason that the High Courts have, in respect of orders passed therein, taken divergent views; for instance, an order directing a *mandamus* to issue to a public body to compel it to refer a question of compensation to arbitration has been held by the Calcutta High Court in *Justices of the Peace for Calcutta* v. *Oriental Gas Company, Limited* (1) not to be a judgment, but this view has been dissented from by the Madras High Court in *Tuljaram Row* v. *Alagappa Chettiar* (12).

It is clear that, in the absence of an authoritative definition binding upon all the High Courts, there is bound to be some divergence of judicial opinion on the subject. It is, therefore, impossible to lay down any definite rule which would meet the requirements of all the cases, and the only thing which can be said is that, in determining whether an order constitutes a judgment or not, the Court must take into consideration the nature of the order and its effect upon the civil proceeding in which it was made.

The case with which we are concerned does not, however, present any real difficulty. It is beyond dispute that the decision of the learned Judge confirming the order of the District Judge put an end to the appeal which came up before him, and it must, therefore, be held to be a 'judgment' within the meaning of clause 10 of the Letters Patent. We are accordingly of opinion that the preliminary objection is not well founded and must be overruled.

On the merits we are unable to endorse the conclusion of the Single Bench and consider that the suit is governed by the provisions of the Punjab Limitation Act, I of 1900. It is common ground that the alienor died in 1901, after the date of the enforcement of the Act, and it has been repeatedly held, *vide, inter alia, Mahna Singh* v. *Ladha Singh* (13) that an action to recover possession of ancestral land alienated by a male proprietor subject to the Customary Law of the Punjab is governed by the provisions of the aforesaid Act, if the death of the alienor, which gives rise to the cause of action for a suit for possession, takes place after the enforcement of the Act. It is, however, urged that Article 2 of the Schedule to the Act, which is the only provision governing a suit for possession, refers to a suit by the "heir" of the alienor, and that the plaintiff Sanwal Singh was not the heir of Baghela within the meaning of the above Article. Now, it appears that one Basawa Singh was the nearest reversioner of Baghela, but that he assented to the alienation and attested the deed of gift executed by Baghela. Basawa Singh, however, survived Baghela and is said to have died only four or five years before the institution of the suit, and it is, therefore, contended that on the date of Baghela's death Basawa Singh was his heir, and that Sanwal Singh was "only a remote reversioner who became entitled to possession after the death of Baghela's heir."

We have considered this argument, but we do not think that it takes the case out of the purview of the aforesaid Article. The whole scheme of the Act makes it clear that the object of the Legislature was to remove an uncertainty about titles to land by compelling the relatives of the male proprietors to impeach their alienations within a limited period, namely, twelve years from one of the dates specified therein. It was intended that the title of the alienee should be immune from attack, if the alienation in his favour was not contested within twelve years from the date mentioned in the third column of the Schedule. Article 2, which deals with a suit

(13) 49 Ind. Cas. 703; 18 P. R. 1919.

for possession, should be read with Article 1, which prescribes the period of limitation for a suit for a declaratory decree, and it seems to us that the word "heir" used in the former Article connotes the same person or persons as the expression "son or reversioner," in the latter Article. The word "heir" denotes a person who succeeds by descent to an estate of inheritance, and it is beyond doubt that as long as a proprietor is living he has no heir. The person impeaching his alienation and seeking a declaratory decree cannot, therefore, be designated by the term "heir," and is consequently described as "son or reversioner." It is only after the death of the proprietor that the "son or reversioner" becomes his heir.

The plaintiff Sanwal Singh, when seeking to recover possession of the property of Baghela, claims to be his heir, and it seems to us that the suit as brought by him is a suit by Baghela's heir. Whether he could or could not have claimed the property immediately after the death of Baghela is beside the point; the question is, whether the suit as brought by him is a suit by the heir of the proprietor. In order to determine whether an action is governed by a particular provision of the Law of Limitation the Court has only to peruse the plaint and to decide whether upon the averments contained therein the claim comes within that provision. Now if the claim in the present case is one by the heir of the alienor to recover possession of the property alienated by him, (and we consider that there can be no reasonable doubt on that point) the Court is not called upon to go into the history of the question whether the plaintiff was or was not entitled to inherit the estate immediately after the alienor's death.

It is urged that the plaintiff could not sue for possession during the lifetime of Basawa Singh, that his right to possession accrued for the first time on the latter's death, and that the date of that death should be regarded as the *terminus a quo* for the period of limitation prescribed for the suit. Now, assuming that the plaintiff's right to possession did not accrue until the death of Basawa Singh, we consider that the Legislature has drawn a clear distinction between the date on which the right to sue accrues and the date from which the period of limitation begins to run. Indeed, it is laid down in express terms that if no declaratory decree has been obtained, in respect of an alienation, the period of twelve years for a suit for possession is to be counted from the date of the mutation in respect of the alienation, or, in the absence of mutation, from the date of the alienee obtaining possession, etc., as the case may be; and it is by no means a rare thing that a suit for possession is barred by limitation though the right to sue for possession has not yet accrued. The argument that the contention urged by the defendant would lead to an anomalous position does not appeal to us, because it is beyond doubt that the provisions of the Act are not free from such anomalies. The reason, however, is not far to seek. The object of the Legislature was to ensure, without leaving any loophole, that the title of the alienee should not remain in doubt for more than twelve years and that object has been achieved regardless of any anomalies or absurdities which may arise in special cases.

We, must, however, point out that it would also be absurd that each successive reversioner should have twelve years for a suit for possession from the date of death of the preceding reversioner. According to this contention an alienation could be attacked after the expiry of even a hundred years, a result which is much more absurd than that pointed out by the learned Counsel for the plaintiff. It may be that the framers of the Act did not anticipate all the results which flow from its provisions, but we have to interpret the Statute as we find it.

We accordingly hold that the action brought by the plaintiff comes within the ambit of the Act and as it was brought after the expiry of twelve years from the date mentioned in the Schedule to the Act it is barred by time. We, therefore, accept the appeal and, reversing the judgment of the Single Bench, dismiss the suit with costs throughout.

S. D.

Appeal accepted.

NITYA GOPAL v. RAMSASI ROY.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2770 OF 1919.

February 6, 1922.

Present :—Justice Sir N. R. Chatterjea, Kt., and Mr. Justice Pearson.

NITYA GOPAL TEWARY AND OTHERS—APPELLANTS

versus

RAMSASI ROY AND OTHERS—DEFENDANTS—RESPONDENTS.

Pleadings—Suit for possession of mortgaged property—Mortgage-bond challenged as fraudulent—Fraud not proved—Amendment—Suit, whether can be converted into suit for redemption—Discretion of Court.

In the absence of special circumstances, a suit to recover possession of a plot of land on a declaration that a mortgage-bond was fraudulent, collusive and without consideration, when the case of fraud has failed, cannot be converted into a suit for redemption of the mortgage: but it may be so converted, in the discretion of the Court, if the mortgage is valid and binding and the circumstances of the case permit it. [p. 395, col. 1.]

A plaintiff must ordinarily succeed on the case he has made in the plaint and, unless there are special circumstances, an action instituted for purposes absolutely inconsistent with redemption cannot properly be converted into an action to redeem, as it would in reality amount to the conversion of a suit of one character into a suit of another and inconsistent character. [p. 395, col. 1.]

Ghurphekni v. *Purmeshar Dayal*, 5 C. L. J. 653 at p. 659, *Kokilasari Dasi* v. *Rudranand Goswami*, 5 C. L. J. 527, *Bal Kishan Lal* v. *Topeswar Singh*, 14 Ind. Cas. 845; 15 C. L. J. 446; 17 C. W. N. 319 and *Ram Dao Mondal* v. *Indromoni Dasi*, 3 C. W. N. 325, referred to.

Appeal against the decree of the Subordinate Judge, First Court, Hooghly, dated the 8th of September 1919, affirming that of the Munsif, First Court at Arambag, dated the 22nd of April 1918.

FACTS appear from the judgment.

Babus *Hemendra Nath Sen* and *Gopendra N. Das*, for the Appellants.—The lower Appellate Court should have given us an opportunity to redeem the mortgage. That course was followed in the case of *Bal Kishan Lal* v. *Topeswar Singh* (1). There although the plaintiff failed in his main contention he was allowed to redeem.

Babu *Manmatha Nath Roy*, for the Respondents.—Where, as in this case, possession has been sought on the ground that the mortgage itself was fraudulent and the allegation of fraud has failed, the suit cannot be allowed to be converted into one for redemption: *Kokilasari Dasi* v. *Rudranand Goswami* (2), *Ghurphekni* v. *Purmeshar Dayal* (3). Mookerjee, J., who was a party to the decision in *Bal Kishan Lal's case* (1) was also a party to these decisions. Refers also to *Ram Dao Mondal* v. *Indromoni Dasi* (4) and to *Gordon* v. *Horsfall* (5).

[N. R. CHATTERJEA, J.—This case was before the Judicature Acts.]

Bal Kishan Lal's case (1) is not in point. In case the validity of the mortgage was not challenged, what was attacked was the decree and the execution proceedings.

The necessary parties are wanting—the Thakur and Tiwari have not been made parties.

Babu *Hemendra Nath Sen*, in reply.—The Code gives your Lordships power to grant leave to amend the plaint at any stage.

[N. R. CHATTERJEA, J.—But not so as to alter the whole character of the plaint].

Your Lordships will allow the amendment to save the expense and delay of another litigation.

[N. R. CHATTERJEA, J.—As the Thakur is not a party, even if we make an order in your favour the order will be infructuous.]

JUDGMENT.—The question raised in the appeal is whether the plaintiff should be allowed to redeem in the present suit, which is one for recovery of possession, on a declaration that the mortgage-bond was fraudulent, collusive and without consideration and that the decree obtained, therefore, was also fraudulent and collusive.

It is found by the Courts below that the mortgage was not fraudulent and the suit was accordingly dismissed.

It is contended before us, as it was before the lower Appellate Court, that the plaintiff should be allowed to redeem in the present suit and in support of that contention the case of *Bal Kishen Lal* v. *Topeswar Singh* (1) is relied on.

In that case it appears that there were allegations of fraud which had failed, but notwithstanding that the plaintiff was allowed to redeem in that suit. It is to be observed, however, that what was attacked as

(1) 14 Ind. Cas. 845; 15 C. L. J. 446; 17 C. W. N. 319.

(2) 5 C. L. J. 527.

(3) 5 C. L. J. 653 at p. 659.

(4) 3 C. W. N. 325.

(5) (1846) 5 Moo. P. C. 393; 11 Jur. 569; 13 E. R. 543; 70 R. R. 48.

fraudulent was not the mortgage but the decree which was obtained upon the mortgage against the father of the plaintiff who was the Kurtha of a Mitakshara family. That decision of Mookerjee, J., cannot be said to be directly in point.

On the other hand, Mr. Justice Mookerjee discussed this question in two earlier cases. In *Kokilasari Dasi* v. *Rudranand Goswami* (2) where it was held that "a plaintiff must ordinarily succeed on the case he has made in the plaint and that, unless there are special circumstances, an action instituted for purposes absolutely inconsistent with redemption, cannot properly be converted into an action to redeem."

In another case *Ghurphekni* v. *Purmeshor Dayal* (3), it was held that "where a plaintiff has rested his case upon fraud, when the case of fraud has failed, he cannot be permitted to support it upon an entirely different and inconsistent ground. Although, therefore, a suit, brought as one for possession, may, in the discretion of the Court, where the circumstances of the case permit it, be converted into one for redemption on the assumption that the mortgage was valid and binding, a plaintiff must ordinarily succeed on the case he has made in the plaint, and that, unless there are special circumstances, an action instituted for purposes absolutely inconsistent with redemption cannot properly be converted into an action to redeem, as it would in reality amount to the conversion of a suit of one character into a suit of another and inconsistent character."

These cases do not appear to have been cited before the learned Judges in the case of *Bal Kishon Lal* v. *Tepeswar Singh* (1). Although the decision on the question whether a suit for possession can be converted into a suit for redemption are not uniform, no case has been cited in support of the contention that, where the mortgage has been challenged as fraudulent, and the fraud attempted to be proved and the plaintiff failed to prove it, he should be allowed to redeem.

On the other hand, in the case of *Ram Dao Mondal* v. *Indromoni Dasi* (4) Macpherson, J., observed: "I know of no case in which a suit based on fraud and fought out on the ground of fraud and dismissed in the First Court on the ground of there having been no fraud has, in the Appellate Court, been converted into one for redemption."

We are unable to hold that there are any special circumstances in the case. It is unnecessary to discuss the matter further because that is not the only difficulty in the way of the plaintiff. The property has been found to have been dedicated to a Thakur and the Thakur is not a party to the suit. Any decree for redemption passed against the defendants in the absence of the Thakur would, therefore, be infructuous.

In these circumstances, we think that the present suit must fail. This, however, will not prevent the plaintiff from bringing any suit that he may be advised for redemption.

The appeal must accordingly be dismissed with costs.

N. K.

Appeal dismissed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1258 OF 1921.

January 16, 1922.

Present:—Mr. Justice Martineau.

IMAM DIN—PLAINTIFF—APPELLANT

versus

JALAL—VENDOR AND NATHA SINGH—VENDEE—DEFENDANTS—RESPONDENTS.

Pre emption—Mortgagee pre-emptor—Acceptance of mortgage-money from vendee—Delay in institution of pre-emption suit—Waiver.

The mere acceptance of the mortgage-money by a mortgagee from the vendee of the equity of redemption or his omission at the time to express a desire to purchase the property does not amount to a waiver of his right to claim pre-emption. [p. 396, col 1.]

Fazaldad Khan v. *Sawan Singh*, 37 P. R. 1908; 39 P. L. R. 1908; 30 P. W. R. 1908, followed.

Bawa Lehna Singh v. *Jagan Nath*, 138 P. R. 1888, *Mehta Chandras* v. *Malik Itbar Khan*, 154 P. L. R. 1906, distinguished.

A pre-emptor is allowed by the law twelve months to make up his mind whether he will sue or not, and any delay in suing is immaterial provided that the suit is within the period of limitation. [p. 396, col. 2.]

IMAM DIN v. JALAL.

Fazaldad Khan v. *Sawan Singh*, 37 P. R. 1908, 39 P. L. R. 1908; 30 P. W. R. 1908, followed.

Baijnath Ram Goenka v. *Ramdhari Chowdhury*, 35 C. 402; 10 Bom. L. R. 253; 12 C. W. N. 419; 7 C. L. J. 318; 18 M. L. J. 116; 35 I. A. 60; 3 M. L. T. 49 (P. C.), distinguished.

Second appeal from a decree of the Additional Judge, Sheikhupura at Lohare, dated the 3rd March 1921, affirming that of the Senior Subordinate Judge, Sheikhupura, dated the 21st December 1920.

Lala *Amir Chand Mehta*, for the Appellant.

JUDGMENT.—The plaintiff sues to pre-empt land which was sold by the first defendant, Jalal, to the second defendant Natha, Singh. Rupees 800 out of the purchase-money were left with the vendee for payment to the plaintiff, to whom the land had been mortgaged. The Courts below have concurred in dismissing the suit on the ground that the plaintiff waived his right of pre emption by accepting the mortgage-money from the vendee without demur and without setting up his claim. The plaintiff has filed a second appeal in this Court.

The Courts have not noticed the fact that the receipt given by the plaintiff for the mortgage-money recites, not that he received the money from Natha Singh, but that he received it from Jalal through Natha Singh, with whom it was deposited. Further, in *Fazaldad Khan* v. *Sawan Singh* (1) it was held that the mere acceptance of his money by a mortgagee from the vendee, or his omission at the time to express a desire to purchase the property is not a waiver of his right to claim pre-emption.

Bawa Lehna Singh v. *Jagan Nath* (2) which has been relied on by the Courts below, is clearly distinguishable as in that case the mortgagee had elected to recognise the validity of the sale by demanding his money from the vendee and this distinction was pointed out in *Fazaldad Khan* v. *Sawan Singh* (1).

Mehta Chandras Malik v. *Itbar Khan* (3), referred to by the lower Appellate Court is also distinguishable as in that case the vendee had sent a formal notice to the mortgagee that he, the vendee, had bought the property and that the mortgagee should take his money.

(1) 37 P. R. 1908; 39 P. L. R. 1908; 30 P.W. R. 1908.
(2) 138 P. R. 1888.
(3) 154 P. L. R. 1906.

The learned District Judge has also laid stress on the fact that the plaintiff stood by while the vendee proceeded to break up part of the land in dispute, which at the time of the sale was left waste, and that he did not bring his suit till 7½ months after the redemption of the mortgage. But the ruling of 1903 mentioned above is also an authority for holding that mere delay in suing is not a waiver of the plaintiff's right of pre-emption. A pre-emptor is allowed by the law twelve months to make up his mind whether he will sue or not, and any delay in suing is immaterial provided that the suit is within the period of limitation.

The lower Appellate Court has quoted *Baijnath Ram Goenka* v. *Ramdhari Chowdhury* (4), in which it was held that the right of pre emption must be exercised with the utmost promptitude and that any unreasonable or unnecessary delay, is to be construed as an election not to pre empt. But that case related to a right of pre-emption under the Muhammadan Law, and is, therefore, quite inapplicable to the present case.

I hold, therefore, that plaintiff's conduct in accepting the mortgage-money without asserting his right of pre-emption, and in waiting for 7½ months before bringing the suit, is not a waiver of his right of pre emption. I accordingly accept the appeal, set aside the decree of the lower Appellate Court, and remand the case under Order XLI, rule 23, Civil Procedure Code to that Court for the disposal of the appeal before it according to law. The Court-fee on the memorandum of appeal in this Court will be refunded and other costs will be costs in the case.

S. D.

Appeal accepted;
Case remanded.

(4) 35 C. 402; 10 Bom. L. R. 253; 12 C. W. N. 419; 7 C. L. J. 318; 18 M. L. J. 116; 35 I. A. 60; 3 M. L. T. 349 (P. C.).

KARUPPA GOUNDAN *v.* MUDALI GOUNDAN.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 586 OF 1920.

November 23, 1921.

Present:—Mr. Justice Kumaraswami Sastri and Mr. Justice Devadoss.

KARUPPA GOUNDAN—DEFENDANT—APPELLANT

versus

MUDALI GOUNDAN and OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Surrender of estate by widow—Reservation of absolute estate in portion for maintenance—Validity of surrender.

A surrender by a widow of her husband's estate is not invalid merely because she bargains for an absolute estate in a portion of the estate for her maintenance, so long as the lands allotted to her for maintenance are not in excess of her requirements for maintenance and the transaction is otherwise fair.

A reservation for maintenance to be valid need not be only of a life-estate.

Bhagwat Koer v. *Dhanukdhari Prashad Singh*, 53 Ind. Cas. 347; 47 C. 466; 37 M. L. J. 513; 17 A. L. J. 1036; (1919) M. W. N. 860; 1 P. L. T. 1; 2 U. P. L. R. (P. C.) 27; 46 I. A. 259; 22 Bom. L. R. 477; 24 C. W. N. 274; 12 L. W. 105 (P. C.), referred to.

Second appeal against a decree of the Court of the Subordinate Judge, Coimbatore, in Appeal Suit No. 52 of 1919, preferred against a decree of the Court of the District Munsif, Tiruppur, in Original Suit No. 66 of 1918.

Mr. *A. Krishnaswami Aiyar*, for the Appellant.

Mr. *A. Visvanatha Aiyar*, for the Respondent.

JUDGMENT.—We are of opinion that Exhibits I and II and the evidence in the case show that there was a surrender by the second defendant to the third defendant of all the properties she was in possession of as widow and that she got a sum of Rs. 500 and land yielding about Rs. 25 a year absolutely for her maintenance. There is nothing in the evidence to show that the transaction evidenced by Exhibits I and II was a device by the widow to get an absolute estate in a portion of her husband's property. It is in evidence that she would require at least Rs. 4 a month for her maintenance and that the land she got would yield about Rs. 25 a year. The interest on the sum of Rs. 500 and the yield of the land would hardly be sufficient for her maintenance. Having regard to the extent of the lands surrendered by her and the yield, it is difficult to see why she should have entered into the transaction evidenced by Exhibits I and II if her object was not *bona fide*.

The next question is whether the fact that she got an absolute estate in the land which she got for her maintenance and in Rs. 500 given to her would render the surrender invalid. In the case of widows entitled to maintenance it is open to them to get properties absolutely in lieu of their claim and there is no reason why a surrender by a widow should be invalid where she bargains for an absolute estate in a portion of the estate for her maintenance so long as the lands allotted to her for maintenance are not in excess of her requirements for maintenance and the transaction is otherwise fair. No authority is cited for the view that the reservation for maintenance which would, under the decision of the Privy Council in *Bhagwat Koer* v. *Dhanukdhari Prashad Singh* (1), be valid should be only of a life estate.

We are of opinion that there was a valid surrender by the 2nd defendant in favour of the 3rd defendant, who is the father of the plaintiffs, and that the suit by the plaintiffs is not maintainable.

We reverse the decrees of the lower Courts and dismiss the plaintiff's suit with costs throughout.

V. C. P.

S. D.

Appeal allowed.

(1) 53 Ind Cas. 347; 47 C. 466; 37 M. L. J. 513; 17 A. L. J. 1036; (1919) M. W. N. 860; 1 P. L. T. 1; 2 U. P. L. R. (P. C.) 27; 46 I. A. 259; 22 Bom. L. R. 477; 24 C. W. N. 274; 12 L. W. 105 (P. C.).

TEJENDRA CHANDRA DHAR v. DURGADAS DUTT.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 1894 OF 1919 AND 216 AND 521 OF 1920.

January 6, 1922.

Present :—Justice Sir N. R. Chatterjea, Kt., and Mr. Justice Panton.

TEJENDRA CHANDRA DHAR, EXECUTOR TO THE ESTATE OF LATE RAM DHAN DHAR —PLAINTIFF—APPELLANT

versus

IN No. 1894 OF 1919.

DURGADAS DUTT AND OTHERS—DEFENDANTS—RESPONDENTS.

IN No. 216 OF 1920.

DURGADAS DUTT AND OTHERS—DEFENDANTS—RESPONDENTS.

IN No. 521 OF 1920.

DURGADAS DUTT AND OTHERS—DEFENDANTS—RESPONDENTS.

Revenue sale—Wilful default—Fraud—Purchaser joining in fraud after *default and* before *sale, position of.*

A fraudulent motive of the proprietor, who purposely defaults in paying revenue, cannot affect the rights of a *bona fide* purchaser at the sale. But a purchaser, who joins in the fraud *after* the default and *before* the sale, which is the machinery by which the fraud is to be carried out, and with knowledge thereof, cannot be permitted to enjoy the benefits which result to a *bona fide* purchaser at a sale for arrears of revenue. The rights of such a purchaser are not higher than those of a purchaser at a private sale. [p. 401, col. 1.]

Nawab Sidhee Nazir Ali Khan v. *Ojoodhyaram Khan*, 5 W. R. P. C. 83; 10 M. I. A. 540; 1 Ind. Jur. 185; 2 Sar. P. C. J. 198; 1 Suth. P. C. J. 635; 19 E. R. 1076, *Sreenath Ghose* v. *Hurnath Dutt*, 18 W. R. 240; 9 B. L. R. 220, *Harendra Lal Roy* v. *Salimullah*, 7 Ind. Cas. 21; 12 C. L. J. 336 and *Uma Charan* v. *Midnapore Zemindary Co.*, 26 Ind. Cas. 182; 20 C. L. J. 11; 19 C. W. N. 270, referred to.

Appeals against the decrees of the Additional District Judge, Chittagong, dated the 23rd of June 1919, modifying that of the Munsif, Fourth Court at Patiya, dated the 20th of April 1918.

FACTS appear from the judgment.

Babu *Ram Chandra Mazumdar* (with him Babu *Dhirendra Lal Kastgir*), for the Appellant.—The plaintiff is the appellant. The appeal arises out of a suit for *khas* possession. The plaintiff's predecessor was auction-purchaser at a sale for arrears of revenue. The sale took place in 1911. The plaintiff's case is that the defendants are the tenure-holders of the *mahal* and hence the tenure is liable to be cancelled and the plaintiff is entitled to *khas* possession. The defence was threefold *viz.*—(1) that the sale has not the effect of a revenue sale inasmuch as there was a previous arrangement between the auction-purchaser and the outgoing proprietor; (2) that the tenure was a protected interest within the meaning of section 37 of the Revenue Sale Law, and (3) that the defendant is a cultivating *raiyat* having the right of occupancy in the land. The First Court held that the defendant was a tenure-holder and as such he had no protected interest in the land, that there was a previous arrangement as alleged and hence it amounted to a sale. The First Court, therefore, passed a decree for rent and mesne profits. On appeal by both the plaintiff and the defendant the lower Appellate Court agreed with the First Court on the first two points. With reference to the last point the First Court's decree for rent was affirmed but mesne profits were decreed in accordance with the old rate of rent. The plaintiff now appeals to this Court. The defendant has filed cross appeal. My point is that there having been no fraud in law, the effect of the sale was that of a revenue sale and secondly that the mesne profits ought not to have been allowed at the old rate of rent. The previous arrangement was reduced into writing but was not called for and secondary evidence was gone into. I submit that cannot be done in accordance with law. Section 66 of the Indian Evidence Act does not apply to cases of this nature. As regards mesne profits the Court below has affirmed the decree for fair rent. I would, therefore, be entitled logically to mesne profits on the basis of fair rent fixed by the Courts. The case in *Harendra Lal Roy* v. *Salimullah* (1)] is distinguishable. In the present case there were other bidders. Refers to *Sreenath Ghose* v. *Hurnath Dutt* (2). The arrangement in the present case was made after the properties were advertised for sale. I submit there could be no fraud in a case like this. I cannot suffer for any act of the outgoing proprietor. All that the arrangement was for, was that a fair value would be obtained at the sale. That could not possibly constitute a fraud in law.

Babu *Dwarkanath Chuckerbutty* (with him Babu *Chandra Sekhar Sen*), for the Respondents.—I hold under a *kaimi darimi pottah* and

(1) 7 Ind. Cas. 21; 12 C. L. J. 336.
(2) 18 W. R. 240; 9 B. L. R. 220.

TEJENDRA CHANDRA DHAR v. DURGADAS DUTT.

the *jamah* is fixed and consolidated. It does not lie in their mouth to question the contract now. They cannot give oral evidence to prove alterations in the contract of tenancy. Refers to *Lakhi Charan Saha* v. *Hamid Ali* (3), *Sarbeswar Patra* v. *Maharaja Sir Bijoy Chand* (4), *Maung Kyin* v. *Ma Shwe La* (5), have been recorded in the settlement proceedings as a *raiyat*. Refers to *Promoda Nath Roy* v. *Asir-ud-din* (6), *Secretary of State for India* v. *Digambar Nanda* (7). The suit for *khas* possession being dismissed on the ground that the sale was private the question does not lie. I would be protected under the terms of my contract. If the purchaser is bound by the contract no question of settling fair rent can possibly arise. I hold under the terms of my lease. Refers to *Uma Charan* v. *Midnapore Zemindari Co.* (8). The findings of fact all conclude the appeal as regards the question of secondary evidence I submit it could be given according to section 66 of the Indian Evidence Act.

Babu *Ram Chandra Mazumdar* replied in brief.

JUDGMENT.

IN No. 1894 OF 1919.

This appeal arises out of a suit for *khas* possession of the lands in dispute by the purchaser of an estate at a sale for arrears of revenue. The defendants pleaded that by reason of an agreement between the defaulter and the purchaser the latter was not entitled to the benefit of a revenue sale, and that the defendants had a protected interest in the land which could not be annulled. The Courts below found that the defendant's interest was that of a tenure-holder, and was not a protected interest, but that the sale in essence was a private sale, and the plaintiff, therefore, could not get *khas* possession of the land. The plaintiff has appealed to this Court.

It is found that the former proprietor Purno was heavily indebted, and that he purposely defaulted in the payment of Government revenue in order that the property might fetch a higher price than at a private sale. He had already twice done this, but his object had been frustrated by the tenure-holder depositing the arrears of revenue. He defaulted a third time, and on this occasion he entered into an agreement with Ramdhan (the plaintiff's predecessor-in-interest), before the sale, under which the latter was to purchase the property at the revenue sale. The price of the disputed *tarof* together with other *mahals* was settled at Rs. 4,300, and it was agreed that if the price at the auction sale was less than that amount, Ramdhan was to pay Purno the balance privately, but that if the bidding exceeded that sum, and plaintiff had to bid any sum in excess of Rs. 4,300, the defaulter (Purno) would refund such excess to Ramdhan. As security for the performance of the contract Ramdhan deposited Rs. 1,000 with a third person (one Shamsunder). As a matter of fact the bidding went up to Rs. 5,100 and Purno refunded the excess to Ramdhan.

The learned District Judge has held that the wilful default of Purno in order that the revenue sale might fetch a higher price than a private sale was fraudulent. That fact by itself cannot affect the rights of the purchaser if he is no party to the design. A proprietor of an estate may be unwilling to retain an estate, and if he defaults in paying revenue in order that he may get a higher price at the sale which entitles the purchaser to set aside all interests other than protected interests, his fraudulent motive cannot affect the rights of a *bona fide* purchaser at the sale. It is not found that there was any agreement between Purno and Ramdhan before there was default in paying the revenue. It is accordingly contended that the purchaser is not affected by any fraudulent design on the part of the defaulter.

But the finding of the learned Additional District Judge is "that Ramdhan Dhar knew what the real nature of the sale was, that it was essentially a private sale and not a revenue sale, and, if he knew that, it must reasonably be held that for the sake of obtaining an advantage (the advantage of the power to annul

(3) 44 Ind. Cas. 543; 27 C. L. J. 284.
(4) 63 Ind. Cas. 986; 26 C. W. N. 15; 34 C. L. J. 233.
(5) 42 Ind. Cas. 642; 22 C. W. N. 257; 15 A. L. J. 825; 33 M. L. J. 648; 3 P. L. W. 185; 6 L. W. 777; 23 M. L. T. 36; 27 C. L. J. 175; 20 Bom. L. R. 278; (1918) M. W. N. 300; 45 C. 320; 9 L. B. R. 114; 11 Bur. L. T. 21; 44 I. A. 236 (P. C.).
(6) 11 Ind. Cas. 262; 15 C. W. N. 896.
(7) 45 Ind. Cas. 43; 27 C. L. J. 334.
(8) 26 Ind. Cas. 182; 20 C. L. J. 11; 19 C. W. N. 970.

incumbrances) he agreed in making the transaction ostensibly a revenue sale and that the advantage he thus obtained was an unfair advantage and was obtained by deciet, and that, therefore, he colluded with Purno and, along with Purno acted fraudulently." Ramdhan Dhar, the predecessor in-interest of the plaintiff, was then a party to this fraud and is bound by its consequences.

In the case of *Nawab Sidhee Nozir Ali Khan* v. *Ajoodhyaram Khan* (9) the Judicial Committee held that it was a great fraud in a mortgagee to attempt to deprive the mortgagor of his right of redemption by means of a fictitious sale of the property for arrears of revenue. The agreement in that case, however, was made with the purchaser before the default took place. But in *Sreenath Ghose* v. *Hurnath Dutt* (2) there was an actual arrear of rent for which a decree had been obtained and execution threatend before any negotiation took place with the purchaser. Markby, J., in that case observed :—"Now, we are by no means sure that it is not the duty of a lessor under such circumstances to do his utmost to postpone the sale, and so to protect the interests of his lessee, that is certainly what an upright and honest man would do under the circumstances ; and it is a rule of English Law which seems to be founded on broad principles of equity which are applicable here also, that an intermediate landlord is bound to protect his own tenant from all paramount claims. See *Graham* v. *Allsopp* (10). At any rate we cannot doubt that it is gross fraud in the intermediate landlord to use his influence to urge on a sale for arrears of rent in order to secure to the purchaser the advantages of such a sale under the Act ; the intermediate landlord at the same time bargaining to receive as a reward for his services a share in the advantages thereby secured. And if this be a fraud, then to this fraud the plaintiff was a party ; and the sale being part of the machinery by which this fraud was effected, we think it ought to be put entirely on one side in considering the question now before us, and that, as between the plaintiff and the Bapuress, the plaintiff ought to be considered, not as having the rights of an auction-purchaser under the Bengal Act, VIII of 1865, but only as having the right of a private purchaser."

This case was followed in the cases of *Harendra Lal Roy* v. *Salimullah* (1) and *Uma Charan* v. *Midnapore Zemindary Co.* (3). In them the agreement with the purchaser appears to have taken place before the default was committed though in the latter the final settlement of the price at which the purchaser was to purchase the property at the sale took place only on the day of sale. The learned Judges in that case observed:—"In the case before us, the default was wilfully made; the sale was deliberately brought about though the judgment-debtor was able to pay the judgment debt; the purchaser and the price to be paid by them were settled in advance ; here we have all the characteristics of a private sale. It was clearly an abuse of statutory provisions for sale of tenures in execution of decrees for rent; to bring about designedly a sale under such circumstances, so that the right of under-tenure holders might be destroyed; an unencumbered title conveyed to the purchaser, and the maximum of benefit conferred upon the defaulter. The transaction in all its characteristics was a private sale, and if we were to regard it as a real rent sale, we would have to hold that an unscrupulous tenure-holder may successfully avail himself of the stringent provisions of the rent law, solely with a view to injure subordinate tenure-holder and to profit by their detriment, while providing, by means of a secret arrangement with the intending purchaser, ample safeguards against any possible loss to himself by the transaction," and held "that the plaintiffs (the purchasers) must be treated as in no better position than a purchaser by a private transfer."

We think in the present case although Ramdhan only joined in the fraud after the default had been made he cannot, by reason of his entering into the agreement before the sale which was the machinery by which

(9) 5 W. R. P. C. 82; 10 M. I. A. 540; 1 Ind. Jur. 185; 2 Sar. P. C. J. 193; 1 Suth P. C. J. 635; 19 E. R. 1076.

(10) (1848) 3 Ex. 186; 77 R. R. 592; 18 L. J. Ex. 85; 154 E. R. 809.

the fraud was to be carried out, and with knowledge thereof, be permitted to enjoy to the detriment of others the benefits which result to a purchaser at a sale for arrears of revenue; and that Ramdhan did not by this transaction acquire rights higher than those of a purchaser at a private sale.

It is contended on behalf of the appellant that the defendant not having called upon the plaintiff to produce the agreement, oral evidence was inadmissible to prove the terms of the agreement. But no objection was taken when oral evidence was adduced on the point. Had any objection been taken at the time the defendant might have called upon the plaintiff to produce the written agreement. We do not think, therefore, that the objection should be entertained.

Since Ramdhan did not acquire rights higher than those of a purchaser at a private sale, it is unnecessary to consider whether the interest was a protected one. The plaintiff is not entitled to *khas* possession. He is entitled only to the rent which was being paid previously to the sale.

The suit is not one for rent but the Courts below have given a decree for rent without objection on the part of the defendant on this point. We accordingly hold that the plaintiff should get rent at the rate provided in the *kabuliyat*.

The appeal is accordingly dismissed. We direct that each party do bear his own costs in all Courts.

In the view we have taken in the appeal, it is unnecessary to consider the question of status of the defendants which was dealt with by the Court below and which forms the subject-matter of the cross-objections before us. The cross-objections are accordingly disallowed. With regard to cross objections we make no order as to costs.

This judgment will govern the other appeals (Second Appeals Nos. 216 and 521 of 1920.)

S. D. *Appeals dismissed.*

PATNA HIGH COURT.

APPEALS FROM ORIGINAL DECREES Nos. 101 AND 102 OF 1919 AND Nos. 28, 29, 30 AND 32 OF 1920.

April 12, 1922.

Present:—Mr. Justice Das and Justice Sir John Bucknill, Kt.

Mahant RAMRUP GIR AND OTHERS—APPELLANTS

versus

LAL CHAND MARWARI AND OTHERS—RESPONDENTS.

Hindu Law—Math—Alienation by Mahant—Suit to set aside—Cause of action—Property, vesting of, in idol and in Mahant, distinction between—Different causes of action—Legal necessity—Direct proof impossible—Recitals in sale-deed, value of—Mahant, whether "trustee"—Limitation Act (IX of 1908), Sch. I, Art. 134, whether applicable to alienations by Mahant—Evidence Act (I of 1872), s. 108—Presumption as to date of death, whether any—Parties to suit—Transferee pendente lite, *whether necessary party.*

Where property is vested in a juridical person and such property is transferred by a person who is only the representative and manager of that juridical person, such transfer is a direct challenge upon the title of the juridical person, and there is adverse possession to the right of that person from the date of the transfer, and a suit to contest such a transfer must be brought within 12 years from that date. But where the property is vested in the Mahant or *shebait*, the act of alienation is not a challenge upon the title of the juridical person, though the property may be endowed property, in the sense that its income has to be appropriated to the purposes of the endowment, and there is no adverse possession so long as the person making the alienation is alive, the possession of the alienee becomes adverse when a new title comes into existence which is capable of maintaining a suit and which has not approved of, or acquiesced in, the alienation. [p. 405, col. 2]

Vidya Varuthi Thirtha v. *Balusami Ayyar*, 65 Ind. Cas. 161; 44 M. 831; (1921) M. W. N. 449; 41 M. L. J. 346; 3 U. P. L. R. (P. C.) 62; 15 L. W. 78; 30 M. L. T. 66; 3 P. L. T. 245; 26 C. W. N. 537; 24 Bom. L. R. 629; 20 A. L. J. 497; 48 I. A. 302 (P. C.) and *Abhiram Goswami* v. *Shyama Charan Nandi*, 4 Ind. Cas. 449; 36 C. 603; 10 C. L. J. 284; 6 A. L. J. 857; 11 Bom. L. R. 1234; 19 M. L. J. 530; 14 C. W. N. 1; 36 I. A. 148 (P. C.), followed.

Damodar Das v. *Lakhan Das*, 7 Ind. Cas. 240; 37 C. 835; 14 C. W. N. 889; 12 C. L. J. 110; (1910) M. W. N. 303; 7 A. L. J. 791; 8 M. L. T. 145; 20 M. L. J. 624; 12 Bom. L. R. 632; 37 I. A. 147 (P. C.), distinguished.

Where in respect of a deed of sale proof of necessity has become almost impossible, the recitals in the deed that there was representation as to the existence of necessity, coupled with such evidence as will establish that the circumstances were such as to justify a reasonable belief that an enquiry would have confirmed the truth of the representation that there was necessity of which the recital is evidence, will be sufficient evidence to support the deed. [p. 407, col. 2.]

RAMRUP GIR v. LAL CHAND MARWARI.

The endowments of a Hindu Math are not "conveyed in trust," nor is the head of the Math a "trustee" with regard to them, save as to any specific property proved to have vested in the head for a specific and definite object, and consequently Article 134 of the Limitation Act does not apply where the head of a Math has alienated the properties not proved to be subject to a specific trust. [p. 402, col 2, p. 403, col. 1.]

Vidya Varuthi Thirtha v. *Balusami Ayyar*, 65 Ind. Cas. 161; 44 M. 831; (1921) M. W. N. 449; 41 M. L. J. 346; 3 U. P. L. R. (P. C.) 62; 15 L W. 78; 30 M. L. T. 66; 3 P. L. T. 245; 26 C. W. N. 537; 24 Bom. L. R. 629; 20 A. L. J. 497; 48 I. A. 302 (P. C.), followed.

Although a person who has not been heard of for seven years is presumed to be dead, there is no presumption as to the time of his death, and if any one seeks to establish the precise period at which such person died, he must do so by actual evidence. [p 406, cols. 1 & 2.]

A person in whose favour a conveyance is made of the suit properties *pendente lite*, is not a necessary party to the suit, and if, on his own application, he is joined as a party, and during the pendency of an appeal in the suit he dies, the fact that his heirs are not substituted in his place, is not a defect in the constitution of the appeal. [p 407, col. 1.]

Appeal from a decision of the Subordinate Judge, Muzaffarpore.

Messrs. *Hasan Imam, O. C. Das, G. C. Pal, S. Dayal* and *B. K. Prasad*, for the Appellants.

Messrs. *Sultan Ahmed, S. C. Mitra, L. N. Singh*, Rai *T. N. Sahay, Sant Prasad, J. G. Prasad Singh* and *Bhagwan Prasad*, for the Respondents.

JUDGMENT.

DAS, J.—These analogous appeals arise out of suits instituted by the appellants for recovery of certain properties held by Mohant Bhuan Gir as Mohant of an Asthal at Pakri Khemkaran, and now in the possession of the defendants as a result of certain transactions of Mohant Bhuan Gir. Plaintiff No. 1 claims to have succeeded Bhuan Gir as Mohant of the Asthal. The remaining plaintiffs have taken certain conveyances from plaintiff No. 1 and have actually paid the expenses of this litigation. The plaintiffs allege that Bhuan Gir was addicted to certain vicious habits and that there was an entire absence of legal necessity in respect of the various transactions into which Bhuan Gir entered as a result of which the properties, to recover which the present suits have been instituted, have passed into the hands of the defendants. It appears that Bhuan Gir left for a pilgrimage sometime prior to 1895, and has not been heard of since. In 1895 the plaintiffs instituted suits for recovery of these properties and they allege that Bhuan Gir had in fact died on the 15th Baisak 1299. The defendants in their written statement raised the plea that Bhuan Gir was in fact alive at the date of the institution of the suits and they maintained that the suits were premature. Both the Court of first instance as well as the High Court on appeal found in favour of the defendants on the point raised by them and dismissed the plaintiffs' suit as premature, the judgment of the High Court being dated the 30th November 1897. As Bhuan Gir has not been heard of since the date of the pronouncement of the judgment by the High Court, the plaintiffs instituted these suits in June 1917.

The defendants raise various questions of law and facts but the learned Subordinate Judge has decided all the points, save one, in favour of the plaintiffs. He has come to the conclusion that Bhuan Gir held the properties as a trustee for the Asthal and that there was no necessity for him to dispose of these properties. But he came to the conclusion that the suits having been instituted more than twelve years from the date of the alienations in question, they are barred under the provisions of Article 134 of the Limitation Act. It has, however, been held by the Judicial Committee in the recent case of *Vidya Varuthi Thirtha* v. *Balusami Ayyar* (1) that the endowments of a Hindu Math are not "conveyed in trust" nor is the head of the Math a "trustee" with regard to them, save as to any specific property proved to have vested in the head for a specific and definite object, and that consequently Article 134 of the Limitation Act does not apply, where the head of a Math has alienated the

(1) 65 Ind Cas. 161; 44 M. 831; (1921) M. W. N. 449; 41 M. L. J. 346; 3 U. P. L. R. (P. C.) 62; 15 L. W. 78; 30 M. L. T. 66; 3 P. L. T. 245; 26 C. W. N. 537; 24 Bom. L. R. 629; 20 A. L. J. 497; 48 I. A. 302 (P. C.).

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properties not proved to be subject to a specific trust. It is not the case of the respondents that the properties in dispute were conveyed in trust to the head of the Asthal at Pakri Khemkaran or that they were vested in him for a specific and definite object. In my opinion, the decision of the learned Subordinate Judge on this point cannot be supported and must be reversed.

The learned Vakil for the respondents accepts the position that, in view of the decision of the Judicial Committee to which I have just referred, the decision of the learned Subordinate Judge cannot be supported; but he maintains that, though Article 134 does not apply, the suits are nevertheless barred under Article 144 of the Limitation Act. Under Article 144 of the Limitation Act the period begins to run from the time when the possession of the defendant becomes adverse to the plaintiff. There are decisions, far too numerous to mention, that, where the property is in a juridical person and such property is transferred by a person who is only the representative and the manager of that juridical person, then there is adverse possession to the right of the juridical person from the date of the alienation. It is sufficient to refer to *Damodar Das* v. *Lakhan Das* (2). The facts of that case were these; the properties in question which were annexed to the Math at Bibi sarai formed part of the *debutter* estate of idol Sri Gopaljiu, the Bibisarai Math being subordinate to the Math at Bhadrak. On the death of a Mahant, a controversy arose between two *chelas* as to the right of succession to the Maths and the property annexed to them. The dispute was settled by an arrangement embodied in an *ekrarnama* dated the 3rd November 1874 executed by the senior *chela* in favour of the junior *chela*, by which the Math at Bhadrak was allotted in perpetuity to the senior *chela* and his successors, while the Math at Bibisarai and the properties annexed to it were allotted to the junior *chela* and his successors for the purposes connected with his Math, subject to an annual payment of Rs. 15 towards the expenses of the Bhadrak Math. Less than twelve years after the death of the senior *chela*, but considerably more than that period after the date of the *ekrarnama*, the appellant, the successor of the senior *chela*, brought a suit against the junior *chela* to recover possession of the properties annexed to Bibisarai Math, on the allegation that they were *debutter* properties dedicated to the worship and service of the plaintiff's idol and that they should not have been alienated in favour of the predecessor-in title of the defendant. Now, it will be noticed that if the period of limitation began to run from the date of the alienation the suit was clearly barred by limitation; but that if it began to run from the date of the death of the person who alienated the property, the suit was well within time. It was held by the Judicial Committee that the period began to run from the date of the *ekrarnama* and that the suit was accordingly barred by limitation. The basis of the decision was stated by Sir Arthur Wilson who delivered the judgment of the Board to be this: that in point of law the property dealt with by the *ekrarnama* was, prior to its date, to be regarded as vested not in the Mohant, but in the legal entity, the idol, the Mahant being only his representative and manager. The learned Vakil for the respondents strongly relied on this case and maintained that the plaintiffs' suits having admittedly been brought more than twelve years after the dates of the alienation in question must be dismissed as barred by limitation.

But there is a second and a different line of cases upon which Mr. Imam strongly relies. The first of these cases is *Abhiram Goswami* v. *Shyama Charan Nandi* (3). The facts of that case were there; in 1787 the then Raja of Pandra made a grant "by way of *lakheraj debutter*" the entire Mouza of Gorfalbari to the

(2) 7 Ind. Cas. 240; 37 C. 885; 14 C. W. N. 889; 12 C. L. J. 110; (1910) M. W. N. 303; 7 A. L. J. 791; 8 M. L. T. 145; 20 M. L. J. 624; 12 Bom. L. R. 632; 37 I. A. 147 (P. C.).

(3) 4 Ind Cas. 449; 36 C. 1003; 10 C. L. J. 284; 6 A. L. J. 857; 11 Bom. L. R. 1234; 19 M. L. J. 530; 14 C. W. N. 1; 36 I. A. 148 (P. C.).

predecessor-in-title of the plaintiff. It will be noticed that the grant was in terms not to an idol but to the predecessor-in-title of the plaintiff who received the gift as one for the service of the particular idols whose *shebait* he was. On the 6th February 1860 and on the 2nd November 1896 respectively the then Mahant of the endowment granted leases of the Mouza in question in favour of the defendants. The action was brought within twelve years of the death of the Mahant who granted the leases in question but considerably more than twelve years after the dates of the leases for possession of the Mouza on the ground that there was no power in his predecessor to alienate the Mouza in favour of the defendants. The Judicial Committee came to the conclusion that the leases were valid only during the lifetime of the Mahant by whom these were granted and that, as Article 134 of the Limitation Act did not apply, the plaintiff's suit could not be regarded as barred by limitation. It will be noticed that on the construction of the original grant in favour of the plaintiff's predecessor-in-title it was argued on behalf of the lessees that the property was in fact not *debutter* property but was the property of the Mahant by whom the leases were granted. The argument was that although the grant was to the Mahant and by way of *Lakheraj debutter* there was no complete or specific dedication of the Mouza to the service of any idol but that the gift was to the Mahant personally and descendible to his heirs in return for blessings bestowed on the donor and his family. The Judicial Committee came to the conclusion that the donee received the gift as a gift for the service of the particular idols whose *shebait* he was and that the income of the Mouza was entirely appropriated to that service. It will be noticed that if the argument of the respondents before us be well-founded, that argument was a clear answer to the suit in *Abhiram Goswami's case* (3).

The only other case to which I need refer is the case of *Vidya Varuthi Thirtha* v. *Balusami Ayyar* (1). The properties which were the subject-matter of the litigation in that case were undoubtedly endowed properties in the sense that their income was appropriated to the purposes of the endowment, but the title to the properties was in the head of the endowment and the income was at his absolute disposal during his lifetime. On the 17th March 1891 the then Mahant, who may be described as Mahant No. 1, gave a lease in favour of plaintiff No. 2. The Mahant died shortly after and was succeeded by Mahant No. 2. In 1902 plaintiff No. 2 gave a sub-lease to defendants Nos. 1 and 2. In 1905 plaintiff No. 2 assigned his interest under the leases of the 17th March 1891 to plaintiff No. 1 in the same year the management of the Math passed into the hands of the Diwan of Mysore. In 1905 Mahant No. 2 died and was succeeded by defendant No. 26 who may be described as Mahant No. 3. In 1912 the sub-lease in favour of defendants Nos. 1 and 2 expired. Before the expiry of the lease they obtained a lease for seventeen years from the Diwan of Mysore. On the 5th March 1913 the suit was instituted for recovery of the land from defendants Nos. 1 and 2 and the question raised was whether Mahant No. 1 was entitled to grant a lease in favour of plaintiff No. 2 and if he was not so entitled, whether the plaintiffs had acquired a title in themselves by adverse possession. Now, it will be noticed that the alienation in question took place on the 17th March 1891 and the dispossession of the plaintiffs took place in 1912. If it be considered that the time began to run from the date of the lease, the plaintiffs undoubtedly acquired a title in the subject-matter of the lease by adverse possession. If, on the other hand, it be held that the time began to run only from the death of the Mahants who granted and recognised the lease then it could not be said that the plaintiffs had acquired a title by adverse possession; for though Mahant No. 1 died shortly after granting the lease there was evidence which was accepted by the Judicial Committee that Mahant No. 2 recognised the transfer and received the rent from the plaintiffs. Mahant No. 2, it will be remembered, died in 1905 and if the period of limitation only began to run from the date of the death of Mahant No. 2 it could not be said that the plaintiffs had acquired a title by adverse possession. The Judicial Committee came to the conclusion that

neither under Article 134 nor under Article 144 had the plaintiffs acquired a title to hold the land as against the endowment. It will be useful to quote the following passage from the judgment of the Judicial Committee :—"Before the Board an alternative argument has been advanced. It is contended that the second plaintiff acquired the title he is seeking to establish by twelve years adverse possession under Article 144. That Article declares that for a suit 'for possession of immoveable property or any interest therein not hereby (*i.e.*, by the Schedule) otherwise specially provided for" the period of limitation is twleve years from the date when the possession of the defendant became adverse to the plaintiff. In view of the argument it is necessary to discover when, according to the plaintiff, his adverse possession began. He was let into possession by Mahant No. 1 under a lease which purported to be a permanent lease, but which under the law could endure only for the grantor's lifetime. According to the well settled law of India (apart from the question of necessity, which does not here arise) a Mahant is incompetent to create any interest in respect of the Math property to endure beyond his life. With regard to Mahant No. 2, he was vested with a power similarly limited. He permitted the plaintiff to continue in possession and received the rent during his life. Such receipt was with the knowledge which must be imputed to him that the tenancy created by his predecessor ended with his predecessor's life and can, therefore, only be properly referable to a new tenancy created by himself. It was within his power to continue such tenancy during his life, and, in these circumstances, the proper inference is that it was so continued, and consequently the possession never became adverse until his death."

Now, how is the decision in *Damodar Das* v. *Lakhan Das* (2), to be reconciled with the decisions in the other two cases? In *Damodar Das's case* (2) the period of limitation, according to the decision of the Judicial Committee, began to run from the date of the alienation and not from the date of the death of the person who made the alienation. In the two other cases the period of limitation was held to run not from the dates of the alienations in question, but from the dates of the death of the persons making the alienations. In my opinion the true rule is this, where the property is vested in the juridical person, as it was in *Damodar Das's case* (2), and the Mahant is only the representative and manager of the idol, the act of alienation is a direct challenge upon the title of the idol, and the idol or the manager of the idol on behalf of the idol must bring the suit within 12 years from the date of the alienation. But where the title is in the Mahant or the *shebait*, as it was in the two other cases to which I have referred, the act of alienation is not a challenge upon the title of the idol, though the property may be endowed property in the sense that its income has to be appropriated to the purposes of the endowment, and there is no adverse possession so long as the person making the alienation is alive, and the possession of the defendant becomes adverse to the plaintiffs only when a new title has come into existence capable of maintaining the suit and which has not approved of or acquiesced in the alienation.

I have now to see whether the title to the properties in dispute was in the juridical person or in the succession of Mahants who presided over the affairs of that juridical person. In my opinion, there is no doubt whatever that the title is not in the juridical person but in the Mahants. Exhibit 12 is an extract from the certified copy of register relating to Parganna Tilokchand and it shows that the villages stood in the name of the Mahant as "Bishunprit" and "Sheotar" villages. Exhibits 13, 13*a* and 13*b* show that the grants in question were made in favour of the Mahants although the documents by which the grants were made are variously named as "Sheotar" and "Sheoprit" documents. Exhibit 11 is the certified copy of a *rubkar* dated the 2nd November 1836 in certain proceedings instituted by the Government to assess revenue on these properties. The document recites that the original grant was made by Raja Pratap Singh in favour of Lachmi Gir, the predecessor-in-title of the plaintiff, and that the property was Shivater property and that in 1836 the question arose whether the grantee was entitled to hold the land revenue free. Certain proceedings were instituted to try

the question whether the grant had been made previous to the 12th of August 1765, the date of the accession of the East India Company to Diwani, the British Government having adopted the principle that grants previous to the accession to Diwani accompanied with possession should be held valid. As the grantee could not establish that the grant had in fact been made to him prior to the accession of the East India Company to Diwani, it was held that revenue should be assessed on these properties and we find from various documents in the record that settlement was concluded with Mahant Manik Gir one of the predecessors-in-title of the plaintiff. There can be no doubt whatever that though the property was endowed property in the sense that its income had to be appropriated to the purposes of the endowment, still the title was in the successive Mahants and that accordingly time began to run from the date of the death of Bhuan Gir who alienated the properties in dispute. There is no evidence when Bhuan Gir died, but as he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, we are entitled to presume that he is dead. I am of opinion that these suits are not barred by limitation.

While I am on the question of limitation, it will be convenient to dispose of another point which was raised by Mr. Sultan Ahmed who appeared on behalf of some of the respondents. He argued that assuming that time began to run from the date of the death of Bhuan Gir, the suits must still be held to be barred by limitation inasmuch as it was the plaintiff's own case in the suits which he instituted in 1895 that Bhuan Gir died on the 15th Baisak 1299. Alternatively, he argues that the plaintiff must show that his suit is within time. In other words, he must give evidence as to the date when Bhuan Gir actually died. In my opinion, the arguments are without any substance. It is quite true that it was the plaintiff's case in the suit which he instituted in 1895 that Bhuan Gir died on the 15th Baisak 1299 but that case was not accepted by the Courts. As regards the argument that Bhuan Gir must have died more than 12 years before the institution of these suits, the short answer is that, though a person who has not been heard of for seven years, is presumed to be dead, there is no presumption as to the time of his death, and that if any one seeks to establish the precise period at which such person died, he must do so by actual evidence. The plaintiffs in substance say this: "We have not heard of Bhuan Gir for seven years and we would naturally have heard of him if he had been alive. Consequently we ask the Court to presume that he is dead". The Court is entitled to presume that he is actually dead at the date of the institution of the suit and if it be the defendants' case that he died more than twelve years prior to the institution of these suits, it is for the defendants to establish the date of Bhuan Gir's death by actual evidence. I must overrule the contentions raised on behalf of the defendants on the question of limitation.

The learned Subordinate Judge decided all the other issues in favour of the appellants, but the respondents have challenged the decision of the learned Subordinate Judge on these issues, and it will now be necessary for me to consider how far the arguments advanced on behalf of the respondents are entitled to succeed. It is argued that the suit is bad for non-joinder of parties. It appears that prior to 1895 there was a transfer by plaintiff No. 1 of certain share in the properties in dispute in favour of one Mahabaruni Prashad and it was argued before us that the failure to join him as a plaintiff in the action debarred the plaintiffs from recovering possession at any rate of such share of the properties which plaintiff No. 1 sold to Mahabaruni Prashad. The argument, in my opinion, is unsubstantial. The conveyance was admittedly prior to 1895 and it was found in the suits which the plaintiffs instituted in 1895 that the plaintiffs had no cause of action. In other words, plaintiff No. 1 had no title in him to convey. Accordingly it was unnecessary for him to join Mahabaruni Prashad as a plaintiff in the action. It was also argued that as one of the appellants, Nurul Husain, died pending the disposal of the appeals in this Court and that as the plaintiffs declined to substitute the heirs of Nurul Husain in the place of Nurul Husain, the plaintiffs are incompetent to get a decree in respect of the share which the plaintiff No. 1 sold to Nurul Husain. In my opinion, the question

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is one between plaintiff No. 1 and Nurul Husain. Now the answers to this argument are two in number. In the first place, the suit was filed on the 30th November 1916 and the conveyance in favour of Nurul Husain is dated the 15th of June 1917. In other words, Nurul Husain took the transfer *pendente lite* and it was wholly unnecessary to join him as a plaintiff in the action. He was in fact added as a plaintiff on the 30th January 1918 on his own application. In my opinion, he was not a necessary party to the suit and it is not a defect in the constitution of the appeal that his heirs were not substituted in his place. The other answer is that the question whether any title passed to Nurul Husain is a question of evidence which can only be decided in a proceeding between the plaintiff and Nurul Husain. We do not know whether Nurul Husain paid the purchase-money to plaintiff No. 1 and it may have been agreed between them that title would not pass until the payment of the full consideration money. I am wholly unable to decide this point in the present proceedings between the plaintiffs and the defendants.

The next argument of Mr. Sultan Ahmed is that as a result of the resumption proceedings to which I have already referred the properties in suit must now be regarded as having been resumed by the Government and settled with the Mahant in his personal capacity. Mr. Sultan Ahmed puts his argument as follows: The properties were either in the idol or in the Mahant If they were in the idol the suit is clearly barred. If they were in the Mahant then we are bound to consider the effect of the resumption proceedings. If the result of the resumption proceedings was to vest the property in the Mahant then Bhuan Gir was fully competent to alienate the property and Mr. Sultan Ahmed relied on *Divi Punniah* v. *Goruntla Kotimma* (4). That was a case where the Government resumed certain lands which were held previously as charitable *inam* and after imposing an assessment granted a *patta* to one of the persons who were the trustees thereof prior to the resumption. It was held that the representatives of the other trustees had no right to claim a share in the land as against the trustee to whom the *patta* was given. Now, in my opinion, the question here is entirely different. It was not the object of the paramount authority in the resumption proceedings to resume the lands and to re-settle the lands with the persons who originally held the lands. As the history of the legislation on the subject shows the resumption was not of the land but of the revenue and that resumption meant nothing more than assessing the land to Government revenue. In my opinion, the person with whom the Government settled the land in 1836 must be regarded as having continued to hold the land on the same terms and subject to the same restrictions that bound him prior to the resumption proceedings.

It was lastly argued that there was legal necessity in respect of the transactions in question. The learned Subordinate Judge has dealt with this question and has decided the issue in favour of the plaintiff. Mr. Sultan Ahmed argued before us that it was sufficient for him to establish that there was representation made to his predecessors in-title that there was necessity for the loans, and that he made due enquiry to satisfy himself that there was in fact such necessity although it may be that there was no necessity to raise the loans, and he relied upon the decision of the Judicial Committee in a recent case* to the effect that the recital is clear evidence of representation and if the circumstances are such as to justify a reasonable belief that an enquiry would have confirmed its truth, then, when proof of actual necessity has become impossible, the recital coupled with such circumstances will be sufficient evidence to support the deed. We have been referred to the documents which establish that the transactions took place so far back as the 19th December 1878 and the 6th March 1880, and we accept Mr. Sultan Ahmed's contention that proof of actual necessity has become almost impossible. But before he can take advantage of the principle laid down by the Judicial Committee he must establish that the circumstances were such as to justify a reasonable belief that an enquiry would have confirmed the truth of the representation of which the recital is evidence. Now we have no proof at all as to what the circumstances in 1878 were. The income of the properties was

(4) 38 Ind. Cas. 237; 40 M. 939; 5 L. W. 157.

*See 36 Ind. Cas. 420—[Ed.]

between Rs. 3,000 and Rs. 4,000 a year. We have no evidence that the circumstances at that time were such as to compel Bhuan Gir to go to the defendants' predecessor-in title for loans. In my opinion, the issue was rightly decided by the learned Subordinate Judge in favour of the appellants.

I would allow these appeals, set aside the judgment and decree passed by the Court below and give the plaintiffs a decree for possession in respect of the properties specified in the plaint with costs in both the Courts and mesne profits.

BUCKNILL, J.—I agree.

W. C. A. & N. H.

Appeals allowed.

PRIVY COUNCIL.

APPEAL FROM THE MADRAS HIGH COURT.

January 31, 1922.

Present:—Lord Buckmaster, Lord Atkinson, Lord Carson, Mr. Ameer Ali and Sir Lawrence Jenkins.

T. B. RAMACHANDRA RAO AND ANOTHER —APPELLANTS

versus

A. N. S. RAMACHANDRA RAO AND OTHERS RESPONDENTS.

Res judicata—*Proceedings under Land Acquisition Act (I of 1894), operate as* res judicata—*Principle of* res judicata *is general—Plea of trifling value for not appealing, not admissible—Land Acquisition Act (I of 1894), s 54—No further appeal to Privy Council from award—"Award," meaning of—Dispute among persons interested in compensation money is not part of award—Decision of such dispute appealable to Privy Council—Hindu Law—Gift—Widow—Alienation.*

A decision of a competent Court in proceedings under the Land Acquisition Act operates as *res judicata* and the same question cannot be re-opened in a subsequent litigation between the same parties. [p 412, col. 2.]

It is not competent for a Court, in the case of the same question arising between the same parties, to review a previous decision, no longer open to appeal, given by another Court having jurisdiction to try the second case. If the decision was wrong, it ought to have been appealed from in due time. Nor in such circumstances can the interested parties be heard to say that the value of the subject-matter on which the former decision was pronounced was comparatively so trifling that it was not worth their while to appeal from it. If such a plea were admissible, there would be no finality in litigation. The importance of a judicial decision is not to be measured by the pecuniary value of the particular item in dispute [p. 412, col. 2]

Badar Bee v. *Habib Merican Noordin*, (1903) A. C. 615 at p. 623; 78 L. J. P. C. 161; 101 L. T. 161, referred to.

The principle which prevents the same case being twice litigated is of general application, and is not limited by the specific words of the Code of the Civil Procedure in this respect. [p. 413, col, 2.]

George Henry Hook v. *Administrator General of Bengal*, 60 Ind. Cas. 631; 48 I. A. 187; 19 A. L. J. 366; 40 M. L. J. 423; 29 M. L. T. 336; (1921) M. W. N. 313; 33 C. L. J. 405; 3 U. P. L. R. (P. C.) 17; 23 Bom. L. R. 648; 25 C. W. N. 915; 14 L. W. 221; 48 C. 499 (P. C.), referred to.

Under the Land Acquisition Act there are two perfectly separate and distinct forms of procedure contemplated. The first is that necessary for fixing the amount of the compensation and this is described as being an award. [p. 412, col. 2.]

When once the award as to the amount has become final, all questions as to fixing of compensation are then at an end; the duty of the Collector in case of dispute as to the relative rights of the persons together entitled to the money is to place the money under the control of the Court, and the parties then can proceed to litigate in the ordinary way to determine what their right and title to the property may be [p. 412, col. 2.]

The award as constituted by Statute is nothing but an award which states the area of the land, the compensation to be allowed and the apportionment among the persons interested in the land of whose claims the Collector has information, meaning thereby people whose interests are not in dispute, but from the moment when the sum has been deposited in Court under section 31 (2), the functions of the award have ceased; and all that is left, is a dispute between interested people as to the extent of their interests. Such dispute forms no part of the award. [p. 413, col. 1.]

Trinagani Dassi v. *Krishna Lal Dey*, 6 Ind. Cas. 157; 17 C. W. N. 935*n*. and *Balaram Bhramaratar Ray* v. *Sham Sunder Narendra*, 23 C. 526; 12 Ind. Dec. (N. S.) 350, referred to.

From an award under the Land Acquisition Act an appeal lies to the High Court and there is no further appeal to the Privy Council. But a dispute as to the relative rights of the persons interested in the compensation money, fixed by the award, forms no part of the award and the right of appeal to the Privy Council from a decision of such a dispute is not taken away. [p. 412, col. 2.]

Rangoon Botatoung Company Limited v. *Collector of Rangoon*, 16 Ind. Cas. 188; 39 I. A. 197; 16 C. W. N. 961; 12 M. L. T. 195; (1912) M. W. N. 781; 16 C. L. J. 245; 23 M. L. J. 276; 14 Bom. L. R. 823; 10 A. L. J. 271; 5 Bur. L. T. 205; 40 C. 2; 6 L. B. R. 150 (P. C.), explained.

The proposition that under the Hindu Law in the case of a gift of immoveable property to a Hindu widow, she has no power to alienate unless such power is expressly conferred, is not accurate, as it is possible by the use of words of sufficient amplitude

to convey in the terms of the gift itself the fullest rights of ownership including the power to alienate. [p. 412, col. 1.]

Surajmani v. *Rabi Nath Ojha*, 35 I. A. 17; 5 A. L. J. 67; 12 C. W. N. 231; 18 M. L. J. 7; 10 Bom. L. R. 59; 7 C. L. J. 131; 3 M. L. T. 144; 30 A. 84 (P. C.), *Sasiman Chowdhurain* v. *Shib Narain Chowdhury*, 86 Ind. Cas. 193; 49 I. A. 25; 26 C. W. N. 425; 15 L. W. 434; 42 M. L. J. 492; 30 M. L. T. 242; 20 A. L. J. 362; 35 C. L. J. 427; 24 Bom. L. R. 576; (1922) M. W. N. 368 (P. C.) and *Bhaidas Shivdas* v. *Bai Gulab*, 65 Ind. Cas 974; 49 I. A. 1; 26 C. W. N. 129; 15 L. W. 412; 20 A. L. J. 289; 42 M. L. J. 385; 35 C. L. J. 314; 24 Bom. L. R. 551; 46 B. 153 (P. C.), explained.

Appeal from a decree of the Madras High Court (Wallis, C. J. and Seshagiri Aiyar, J.), dated 8th October 1918, Appeal Suit No. 1 of 1918 and reported as 52 Ind. Cas. 91, reversing a decree of the Additional Temporary Subordinate Judge, Tanjore.

FACTS.—The appellants are the reversioners of one Bavaji Pandit. The respondents are the sister's sons of one of the widows of the said Bavaji Pandit. The widow got the suit property under the Will of her husband. In 1884 a piece of land forming a portion of the property got by the widow under the said Will was acquired by the Government under the Land Acquisition Act. A question then arose as between the widow and the father of the appellants as to the character and extent of the estate taken by the widow under the Will. The District Court held that the widow took an absolute estate but, on appeal, the High Court held that she took only a limited estate. There was no appeal from that decree. In 1916 the widow alienated the remaining property to the respondents by a Will. After the death of the widow in 1916 the appellants instituted the present suit for possession of the property in the hands of the respondents. The Trial Judge gave the appellants a decree but the High Court, on appeal, went into the question of construction of the Will and dismissed the appellant's claim holding that the widow had an absolute and alienable estate. Hence the present appeal.

Mr. *De Gruyther*, K.C., and Mr. *Narasimham*, for the Appellants.—A Hindu widow may have an absolute estate under her husband's Will [*Surajmani* v. *Rabi Nath Ojha* (1) and *Bhaidas Shivdas* v. *Bai Gulab* (2) decided on the 2nd December 1921]. There is a long catena of cases in all the High Courts that a gift to a widow by the husband does not imply a heritable estate. (Mayne's Hindu Law, paragraph 664). *Kunjbehari Dhur* v. *Premchand Dutt* (3), *Jamna Das* v. *Ramautar Pande* (4), *Carlapatti Chinna* v. *Cota Wammalivarioh* (5).

A widow can only alienate immoveable property for a legal necessity. She cannot alienate immoveable property without the consent of her husband. (Narada, Colebrook's Digest, Book V, page 476).

[LORD BUCKMASTER.—The effect of *Surajmani* v. *Rabi Nath Ojha* (1) is that if you have a gift to a woman in unqualified language she takes absolutely unless there is something to cut it down.]

Independent of the recent decisions of the Board, the Bombay High Court held that even the use of the word "Malik" would not give a woman powers of alienation. *Motilal Mithalal* v. *Advocate General of Bombay* (6).

[LORD BUCKMASTER.—I think that *Surajmani* v. *Rabi Nath Ojha* (1), decides otherwise. Full ownership includes the power to alienate.]

There are texts of Hindu Law that, in the case of a widow, even though she be given an absolute estate, she has no power of alienation unless conferred by express terms. A Hindu widow may have an estate of inheritance but she has no power of alienation.

The question in issue was decided by the High Court on a previous occasion in Land Acquisition proceedings. The High Court construed the Will as conferring only a limited estate. It is not open to the High Court to go into the question again as the prior decision operates as *res judicata*. *George Henry Hook* v. *Administration General of Bengal* (7). The widow could have appealed against that decree to this Board. Special leave was

(1) 35 I. A. 17; 5 A. L. J. 67; 12 C. W. N. 231; 18 M. L. J. 7; 10 Bom. L. R. 59; 7 C. L. J. 131; 3 M. L. T. 141; 30 A. 84 (P. C.).

(2) 65 Ind. Cas. 974; 49 I. A. 1; 26 C. W. N. 129; 15 L. W. 412; 20 A. L. J. 289; 42 M. L. J. 385; 35 C. L. J. 314; 24 Bom. L. R. 551; 46 B. 153 (P. C.).

(3) 5 C. 684; 5 C. L. R. 561; 2 Ind. Dec. (N. S.) 1048.

(4) 27 A. 334 at p. 367; A. W. N. (1904) 278; 1 A. L. J. 709.

(5) 3 Ind. Cas. 475; 33 M. 91.

(6) 13 Ind. Cas. 547; 35 B. 279; 13 Bom. L. R. 471.

(7) 60 Ind. Cas. 632; 48 I. A. 187; 19 A. L. J. 366; 40 M. L. J. 423; 29 M. L. T. 336; (1921) M. W. N. 318; 33 C. L. J. 105; 3 U. P. L. R. (P. C.) 17; 23 Bom. L. R. 648; 25 C. W. N. 915; 14 L. W. 22[illegible]; 44 C. 639 (P. C.).

given in one case. *Sri Braja Kisora Devu Garu* v. *Sri Kundana Devi Patta Mahadevi Garu* (8). The principle of *res judicata* applies to the whole property and not merely to that portion concerned in the land acquisition proceedings. Section 54 of the Land Acquisition Act applies only to appeals from the award. Other questions are tried and decided as in ordinary suits.

Mr. *Dube*, for Respondent No. 1.—Ameer Ali's Book takes the view that it is not *res judicata* The effect of the English decisions is given in *Reid* v. *Victoria Station Co* (9).

[LORD BUCKMASTER referred to *Ram Chunder Singh* v. *Madho Kumari* (10)].

The preamble to the Land Acquisition Act clearly shows that the object of the Act was to determine the amount of compensation. Section 54 gives one appeal to the High Court and no more.

If there is a dispute as to apportionment, it had to be referred to a Civil Court. In this case we have no evidence as to what the dispute was. The only papers filed here are the judgment and the decree and we do not know whether the dispute arose so as to create an estoppel.

[LORD BUCKMASTER.—The judgment expressly refers to sections 31 and 32 of the Act.]

Those sections do not necessarily mean that there shall be a judicial determination as to who is entitled. The judgment says that the District Judge is to pass an order under section 32; we do not know what order he passed. All proceedings under the Land Acquisition Act end in awards. It has been laid down that there is no further appeal to this Board. *Rangoon Botatoung Company Limited* v. *Collector of Rangoon* (11).

[LORD BUCKMASTER.—This is not an award but an adjudication as to title.]

There was an application for special leave in proceedings under the Land Acquisition Act and the Board refused leave.

Special Officer, Salsette Building Sites v. *Dosabhai Bezanji* (12). An adjudication forms part of the award. Since the decision in *Rangoon Botatoung Co. Limited* v. *Collector of Rangoon* (11) there has been no appeal to the Board in land acquisition cases. *Mahadevi* v. *Neelamani* (13) is an express decision that it cannot be *res judicata*. That was no doubt a decision on section 39 of the Act of 1870 but on this point the present Act of 1894 is identical. Ameer Ali's Civil Procedure Code, page 103, lays down that having regard to the peculiar nature of land acquisition proceedings, the Courts have always held that there is no *res judicata*.

Mr. *De Gruyther, K. C.*, and Mr. *Narasimham*, for the Appellants, were not called upon to reply.

JUDGMENT

LORD BUCKMASTER.—On the 6th August 1858 Ramajee Bavajee Pandit, who died on the 10th August 1858, executed a deed of settlement of all his moveable and immoveable properties. It is prefaced by a statement that he had adopted Panchapikes, the second son of Mahasubd Rajaram, and after various gifts and dispositions which are not material, it continued in these terms:—

"Out of the remaining property, after deducting the above, my adopted son, to whom I have given the name of Bavajee Pandit, shall be entitled to and enjoy half of the property. Out of the remaining half of the property these two persons, namely, (my) senior wife Sowbhagiavathy Kamatchi and junior wife Sowbhagiavathy Thulja shall take half and half."

In 1894 one acre and 74 cent. of the land so given, and then in the possession of Thulja Boyee, was acquired by the Government. The usual proceedings for determining the amount of compensation appear to have taken place, and no dispute arose as to the award, but a question did arise as between Ramajee Bavajee Pandit, the adopted son, and the widow as to the character and extent of the estate that she took under the Will. If she took absolutely, the money could be divided forthwith; but if she took a limited interest, her share would have to be invested. It was consequent-

(8) 22 M. 431; 1 Bom. L. R. 287; 26 I. A. 66; 9 M. L. J. 157; 7 Sar. P. C. J. 529; 8 Ind. Dec. (N. S.) 309 (P. C.).

(9) (1863) 2 Smith's Leading Cases (11th Ed.) 785; 1 H. & C. 826; 32 L. J. Ex. 167; 9 Jur. (N. S.) 1061; 11 W. R. 1032; 158 E. R. 1117; 130 R. R. 788.

(10) 12 C. 481; 12 I. A. 188; 9 Ind. Jur. 474; 4 Sar. P. C. J. 666; 6 Ind. Dec. (N. S.) 329 (P. C.).

(11) 16 Ind. Cas. 188; 39 I. A. 197; 16 C. W. N. 961; 12 M. L. T. 195; (1912) M. W. N. 781; 16 C. L. J. 245; 23 M. L. J. 276; 14 Bom. L. R. 853; 10 A. L. J. 271; 5 Bur. L. T. 205; 40 C. 21; 6 L. B. R. 150 (P. C.).

(12) 20 Ind. Cas. 763; 17 C. W. N. 421 (P. C.).

(13) 20 M. 269; 7 Ind. Dec. (N. S.) 191.

ly necessary that this dispute should be determined in order that the compensation monies should be properly dealt with. Section 31, sub-section (2), of the Land Acquisition Act, 1894, expressly contemplates this position, for, after referring in sub section (1), to the payment of the compensation by the Collector to the persons interested, sub-section (2) provides that "if there be no person competent to alienate the land, or if there be any dispute as to the title to receive the compensation or as to the apportionment of it, the Collector shall deposit the amount of the compensation in the Court to which a reference under section 18 would be submitted." Section 18 does not define the Court; this is done by section 3, sub section (*d*), which provides that a Court means a principal Civil Court of original jurisdiction, unless a special Judicial Officer within specified limits has been appointed to perform the functions of the Court under the Act. Section 32 further provides that when money has been deposited in Court under sub-section (2) of section 31, and it appears that the land whereof the same was awarded belonged to any person who had no power to alienate, the Court shall order the money to be invested as therein mentioned. Now, the dispute between Bavajee and the widow was plain upon the face of the document. It depended upon whether the deed had conferred an absolute heritable and alienable estate upon the widow, or whether she took either a limited Hindu widow's estate or a heritable estate which she was incapable of alienating. What the actual proceedings were that ensued between them is not plain, but they must have come before the District Court of Tanjore, for the grounds of appeal from the order of that Court are before their Lordships, and from these it appears that the District Judge had held that the widow had an absolute estate. From this decision Bavajee brought the appeal to the High Court of Judicature at Madras. Judgment was delivered by the High Court on the 13th July, 1897, by Sir Arthur Collins, C. J., and Mr. Justice Shephard. Their judgment is short, and, as it throws considerable light upon the whole proceedings, it is desirable that it should be reproduced in full. It is as follows:—

"The first question is what estate the widow Thulja Boyee took under the gift of 1858. We cannot agree with the District Judge that the law is unsettled on the question of such gifts. There being no indication of intention to give a large estate, we must assume that the husband intended that a widow's estate only should pass. This being so, it is quite clear that sections 31 and 32 of the Act apply. The order must be set aside as the parties are not agreed as to the mode in which the money should be invested.

"We must direct the District Judge to pass order under the provisions of section 32. Each party to bear his own costs of this appeal."

On the 10th June 1911 and again on the 11th January 1916 Thulja Boyee executed Wills and bequeathed all her moveable and immoveable properties to the first respondent; she died on the 2nd April 1916. The adopted son, Bavajee Ramajee Pandit, also died at a date subsequent to the decision of the High Court, but the exact time is not stated, nor is it material, and the present appellant and his brother Jeevanna Rao, now deceased, were his two sons. On the 12th July 1916 they instituted the suit out of which these proceedings have arisen against the claimants under Tulja's Will, alleging that she had only a limited estate under the deed of settlement, and that she had no power to dispose of the properties by Will. The learned Subordinate Judge decided in their favour, but this decision was reversed by the High Court, from whose decree the present appeal has been brought. Both the judgments of the Subordinate Judge and the High Court depended upon the true effect of the deed of settlement, but for reasons, which their Lordships will shortly explain, they do not think that this question was open to either of the Courts.

Their Lordships do not, therefore, propose to embark upon the consideration of what the effect of the deed of gift in favour of Thulja Boyee might be correctly determined to be, but as some misapprehension appears to exist as to the effect of certain decisions of the Board, and notably one in *Surajmani* v. *Rabi Nath Ojha* (1) their Lordships think it desirable to remove this doubt, lest error should creep into the administration of the law in India with regard to the

rights of a Hindu widow. In the case referred to, *Surajmoni* v. *Rabi Nath Ojha* (1), when originally heard before the High Court it had been stated that under the Hindu Law in the case of a gift of immoveable property to a Hindu widow, she had no power to alienate unless such power was expressly conferred. The decision of this Board did no more than establish that that proposition was not accurate, and that it was possible by the use of words of sufficient amplitude to covey in the terms of the gift itself the fullest rights of ownership, including, of course, the power to alienate, which the High Court had thought required to be added by express declaration. In that case it is true that there is some comparison drawn between the gift to a widow and a gift to a person not under disability, but that was not the foundation of the decision, which depended entirely upon the wide meaning attributed to the words in which the gift to the widow was clothed. More recent decisions of this Board [*Sasiman Choudhurain* v. *Shib Narain Chowdhury* (14) and *Bhaidas Shivdas* v. *Bai Gulab* (2)] do nothing but repeat this same proposition in other words. The importance of preventing confusion due to the contrasting of different phrases used in distinct cases to express the same idea has led their Lordships to make this explanation, but the points argued as to the effect of the gift in the present case are not now open to consideration, for in their Lordship's opinion the decision given on the 13th July 1897, by the High Court at Madras is a clear and complete determination as between the parties to that suit and those claiming under them, which the present litigants cannot dispute.

It is urged on behalf of the respondents that the judgment cannot be so regarded because it arose out of proceedings under the Land Acquisition Act, 1894 and for the purpose of their arguments they rely upon the case of *Rangoon Botatoung Company Limited* v. *Collector of Rangoon* (11). There appears to be some misapprehension in the Courts in India as to the effect of this authority which it is desirable should be removed. Under the Land Acquisition Act there are two perfectly separate and distinct forms of procedure contemplated. The first is that necessary for fixing the amount of the compensation and this is described as being an award. By section 54 an appeal from that award or any part of the award is given to the High Court. The case in *Rangoon Botatoung Company Limited* v. *Collector of Rangoon* (11) decided that in those circumstances the appeal so given was the only one open to the parties and that even if appealed against, the award still retained its characteristics and was incapable of further appeal. The argument which succeeded in that case emphasizes the distinction between an award and a decree, and the judgment mentions this in terms by stating that the appellants, although admitted to the High Court, could not have the right to carry an award made under an arbitration as to the value of land taken for public purposes up to this Board as if it were a decree of the High Court made in course of its original jurisdiction. The manifest inconvenience that would attend any such proceeding is also pointed out, but neither this judgment nor any other judgment of this Board affects the question of an appeal on the totally different proceedings that arise when there is a dispute as between the persons claiming compensation involving, as it does in this case, a difficult question of title. When once the award as to the amount has become final, all questions as to fixing of compensation are then at an end; the duty of the Collector in case of dispute as to the relative rights of the persons together entitled to the money is to place the money under the control of the Court, and the parties then can proceed to litigate in the ordinary way to determine what their right and title to the property may be. That is exactly what occurred in the present case. How the proceedings were commenced is a matter that is not material provided that they were instituted in the manner that gave the Court jurisdiction, for they ended in a decree made by the High Court and appealable to this Board. It is true that in the case of *Trinogini Dassi* v. *Krishna Lal Dey* (15) following an earlier case, *Balaram Bhramcratar Ray* v. *Sham Sunder Narendra* (6) it was decided that

(14) 66 Ind. Cas. 193; 49 I. A. 25; 26 C. W. N. 425; 15 L. W. 434; 42 M. L. J. 492; 30 M. L. T. 242; 20 A. L. J. 362; 35 C. L. J. 427; 24 Bom. L. R. 576; (1922) M. W. N. 368 (P. C.).

(15) 6 Ind. Cas. 157; 17 C. W. N. 935*n*.

(16) 23 C. 526; 12 Ind. Dec (N. S.) 350.

an order under section 32 may appropriately be deemed as an integral part of the award made by the Court, but their Lordships regard this as a misapprehension as to the meaning of the award. The award as constituted by Statute is nothing but an award which states the area of the land, the compensation to be allowed and the apportionment among the persons interested in the land of whose claims the Collector has information, meaning thereby people whose interests are not in dispute, but from the moment when the sum has been deposited in Court under section 31 (2) the functions of the award have ceased; and all that is left is a dispute between interested people as to the extent of their interest. Such dispute forms no part of the award, and it would indeed be strange if a controversy between two people as to the nature of their respective interests in a piece of land should enjoy certain rights of appeal which would be wholly taken away when the piece of land was represented by a sum of money paid into Court. There has in the present case been a clear decision upon the very point now in dispute which cannot be re-opened. The High Court appear only to have regarded the matter as concluded to the extent of the compensation money, but that is not the true view of what occurred, for as pointed out in *Badar Bee* v. *Habib Merican Noordin* (17), it is not competent for the Court, in the case of the same question arising between the same parties, to review a previous decision, no longer open to appeal, given by another Court having jurisdiction to try the second case. If the decision was wrong, it ought to have been appealed from in due time. Nor in such circumstances can the interested parties be heard to say that the value of the subject matter on which the former decision was pronounced was comparatively so trifling that it was not worth their while to appeal from it. If such a plea were admissible, there would be no finality in litigation. The importance of a judicial decision is not to be measured by the pecuniary value of the particular item in dispute. It has been suggested that the decision was not in a former suit, but whether this were so or not makes no difference, for it has been recently pointed out by this Board in *George Henry Hook* v. *Administrator General of Bengal* (7), that the principle which prevents the same case being twice litigated is of general application, and is not limited by the specific words of the Code in this respect. Their Lordships will, therefore, humbly advise His Majesty that the decree appealed from be reversed, and the decree of the Subordinate Judge restored with costs here and in the Courts below.

S. D. *Appeal allowed.*

Solicitor for the Appellants.—Mr. *Douglas Grant.*

Solicitors for the Respondents.—Messrs. *Barrow, Rogers and Nevill.*

(16) (1909) A. C. 615 at p. 623; 78 L. J. P. C. 16; 101 L. T. 161.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 385 OF 1921.

January 27, 1922.

Present:—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Coyajee.

DHUNDIRAJ BALKRISHNA PHALINKAR—DEFENDANT—APPELLANT

versus

RAMCHANDRA GANGADHAR KALE AND OTHERS—PLAINTIFFS—RESPONDENT.

Easement—Right of way, once established, whether can be altered.

When once a right of way is defined, it cannot be altered, and the dominant owner is entitled to exert his strict rights unless he can be induced to consent to a deviation. [p 414, col. 2.]

Lovell v. *Smith*, (1857) 3 C. B. (N. S.) 120; 140 E. R. 685; 111 R. R. 572, *Hulbert* v. *Dale*, (1903) 2 Ch. 570; 101 L. T. 504; 76 L. J. Ch. 457, *Young* v. *Kinloch*, (1910) A. C. 169, *Deacon* v. *The South Eastern Railway Company*, (1889) 61 L. T. 377, *Syud Hamid Hossein* v. *Gervain*, 15 W. R. 495 and *Varajlal Parbhudas* v. *Moti Kuber*, (1893) P. J. 478, referred to.

Second appeal from the decision of the Joint Judge, Poona, in Appeal No. 308 of 1920, amending the decree passed by the Additional First Class, Subordinate Judge, at Poona, in Civil Suit No. 344 of 1918.

Mr. *P. B. Shingne*, for the Appellant.

Mr. *G. N. Thakor* for Mr. *K. V. Joshi*, for the Respondent.

JUDGMENT.

MACLEOD, C. J.—The question in this second appeal is whether the order of the lower Appellate Court restraining the defendant from obstructing the plaintiffs' *bhangi* and

bhisti from entering by the door X in the map Exhibit 20 and thence passing over the defendant's back yard and entering the plaintiffs' privy at point A is right.

Defendant's house adjoins the plaintiffs' house to the west. There is a lane to the west of the defendant's house and it is admitted that the plaintiffs have a right of way over the defendant's back yard, so that the sweeper may have access to the plaintiffs' privy. The defendant bought his house in 1915. Until then the sweeper had passed through the door X but in 1916 the defendant made certain alterations. He opened a door at the southern end of his wall and after reserving a passage of about three feet he built a wall to the north, so as to reserve for himself the rest of the back-yard. It cannot be said that it would be in any way more inconvenient for the sweeper to pass along this passage to the plaintiffs' privy instead of going in by the door X as he used to do, but the plaintiffs contend that they are entitled to stand on their strict right, that the right of way from the door X to their privy having once been acquired, the servient owner cannot substitute any other way between the lane and the plaintiffs' privy. The Trial Judge appears to have admitted this proposition of law to be correct, but considered that the plaintiffs were agreeable to the new arrangement when he visited the spot. Because the second plaintiff had adduced no evidence to show that the defendant had made the alterations against his will or without his consent, the learned Judge appears to have held that there was acquiescence on the part of the plaintiffs, and that it was owing to other disputes having arisen between the parties relating to the ownership of the party wall and certain windows in the plaintiffs' house that the plaintiffs began to object to the obstruction at door X. If an issue had been raised on the point of acquiescence this finding might have been entitled to consideration but the Judge seems to have thought that the plaintiffs, even if the issue had been raised, ought to have called evidence to prove that they had not acquiesced, and, as the Appellate Court has pointed out, the defendant never pleaded consent, no issue was raised and the evidence was not directed to it. It would, therefore, be dangerous to assume that consent had been given. I do not think that section 22 of the Indian Easements Act can assist the defendant. Its provisions can only apply when the exact way to be taken over the premises of the servient owner has not been ascertained. Whether the servient owner, when once the right of way has been defined, can substitute a new way is a question which does not seem to have been provided for by the Indian Easements Act and, therefore, we must have resource to the Common Law: *Lovell* v. *Smith* (1), *Hulbert* v. *Dale* (2) and *Young* v. *Kinloch* (3). No doubt the general rule is that a right of way once defined cannot be altered [*Deacon* v. *The South Eastern Railway Company* (4)] and the dominant owner is entitled to exert his strict rights unless he can be induced to consent to a deviation. The defendant was aware of the existing right of way when he bought his premises and unless he can prove acquiescence in the new way the plaintiffs must succeed. The appeal must be dismissed with costs.

COYAJEE, J.—I concur, and would add that Courts in this country have given effect to the general rule that when once the line of way has been definitely set out, neither the dominant nor the servient owner can compel the other to give or to accept a different and a substituted way. In *Syud Hamid Hossein* v. *Gervain* (5) Norman, C. J. observed: "We think it is clear that if any person has a right of way from one place to another over a particular line, if he and his ancestors have been accustomed to use that way from a long time past, he has a right to go over it, and cannot be compelled to use *a different* and *substituted* way." Similarly, in *Varajlal Parbhudas* v. *Moti Kuber* (6), where the facts were not widely different from those in this case, this Court held that: "If the defendant's right of way was directly from the door in plaintiffs' *osri* to the defendant's *osri*, the plaintiff cannot obstruct that right of way and offer him another way through his *chowk*." In my opinion, therefore, the decision of the lower Appellate Court is right.

W. C. A. *Appeal dismissed.*

(1) (1857) 3 C. B. (N. S.) 120; 140 E. R. 685; 111 R. R. 572.
(2) (1909) 2 Ch. 570; 101 L. T. 504; 78 L. J. Ch. 457.
(3) (1910) A. C. 169.
(4) (1889) 61 L. T. 377.
(5) 15 W. R. 496.
(6) (1893) P. J. 473.

DHAN KAUR v. SUNDER.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 3172 OF 1918.
January 6, 1922.

Present:—Mr. Justice Scott-Smith and Mr. Justice Broadway.

Musammat DHAN KAUR AND OTHERS—DEFENDANTS—APPELLANTS

versus

SUNDER AND OTHERS—PLAINTIFFS—RESPONDENTS.

Custom—Succession—Daughters v. *collaterals of sixth degree—Burden of proof—Hindu* Jats *of Ludhiana District*—Riwaj-i-am, *entry in, value of.*

Among Hindu *Jats* of Ludhiana District collaterals of the sixth degree exclude daughters from succession. [p. 417, col. 1.]

Where a collateral is more distantly related than the fifth degree, the initial *onus* is on him to prove that he excludes the daughters and the more remote the collateral is the more heavily does the *onus* lie upon him. [p. 416, cols. 1 & 2.]

Bholi v. *Man Singh*, 86 P. R. 1908; 146 P. W. R. 1908, *Jiwan Singh* v. *Har Kaur*, 22 Ind. Cas. 415; 41 P. R. 1914; 51 P. L. R. 1914; 34 P. W. R. 1914, relied upon.

In the case of collaterals related in the sixth degree the *onus* is not a very heavy one. An entry in the *riwaj-i-am* which says that the collaterals in the sixth degree exclude daughters is not opposed to general custom and is quite sufficient to shift the initial *onus* from the collateral to the other side. [p. 417, col. 1.]

Beg v. *Allah Ditta*, 68 Ind. Cas. 354; 45 P. R. 1917; 12 P. W. R. 1917; 21 M. L. T. 310; 32 M. L. J. 615; 19 Bom. L. R. 388; 15 A. L. J. 525; 21 C. W. N. 842; 44 C. 749; 26 C. L. J. 175; 44 I. A. 89 (P. C.), followed.

Chhuttan v. *Hazari Lal*, 30 Ind. Cas. 22; 7 P. R. 1916; 129 P. W. R. 1915; 46 P. L. R. 1916, *Wazira* v. *Musammat Maryan*, 42 Ind. Cas. 358; 84 P. R. 1917; 151 P. W. R. 1917; 3 P. L. R. 1918, *Khuda Bakhsh* v. *Musammat Fateh Khatun*, 46 Ind. Cas. 679; 13 P. R. 1919; 140 P. W. R. 1918, referred to.

Second appeal from the decree of the District Judge, Ludhiana, dated the 1st August 1918, affirming that of the Senior Subordinate Judge, Ludhiana, dated the 5th February 1918.

Pandit *Sheo Narain*, R. B, for the Appellants.

Bakhshi *Tek Chand*, for the Respondents.

JUDGMENT.—This is a second appeal upon a certificate granted by the District Judge of Ludhiana under section 41 (3) of the Punjab Courts Act. The facts briefly are as follows:—

The last male owner of the land in suit was Dhiana whose relationship with the plaintiffs appears from the pedigree-table printed on page 4 of the paper-book. His widow *Musammat* Mahan Kaur made a gift of her husband's land in favour of her daughters, *Musammat* Dhan Kaur and *Musammat* Ind Kaur, defendants appellants, and the plaintiffs sued for a declaration that this gift would not affect their reversionary rights after the death of the widow. The plaintiffs are, as appears from the pedigree table, the reversioners of Dhiana in the sixth degree. The Courts below have concurrently held that the land in suit is ancestral property of the plaintiffs and that according to custom the plaintiffs are heirs to the exclusion of the married daughters of Dhiana.

In the grounds of appeal to this Court various points have been raised, but the only one argued before us was that of custom, namely, whether the plaintiffs, who are collaterals in the sixth degree of Dhiana, are preferential heirs to his daughters. According to the *riwaj i-am* of 1882 daughters are entirely excluded from inheritance by collaterals no matter how distantly related. According to the *riwaj i am* of 1911, which was prepared by Mr. Dannett, Settlement Collector, they are only excluded by collaterals not more remote than the sixth degree. If there are no collaterals in the sixth degree or nearer, then amongst Hindu *Jats* daughters inherit. A perusal of the *riwaj i-am* shows that it was prepared with great care. Numerous instances are given though there are none exactly on all fours with the present case, *i.e.*, no instances were given where collaterals of the sixth degree excluded daughters from inheritance. Some copies of judgments have been put upon the record by both the parties. P. 9 is a copy of a judgment by Mr. Lewis, District Judge, dated 30th July 1890. In that case the daughters of one Karman sued his collaterals in the sixth degree for possession of his land. It was there held that the collaterals were the heirs according to custom and the plaintiff's suit was dismissed. The daughters rested their claim on Hindu Law by which they said they were governed but it was held that they were governed, by Customary Law. No reference was made to the *riwaj i am* and it appears to have been conceded that if the parties were not governed by Hindu Law the daughters would have no right as against

DHAN KAUR v. SUNDER.

the collaterals. This instance undoubtedly supports the position taken up by the plaintiffs. P. 8 is a judgment of Lala Achhra Ram, District Judge, dated 24th October 1904, in a case where daughters were opposed to collaterals in the seventh degree, and it was held that the latter were preferential heirs. In support of its decision the Court referred to *Raushan* v. *Lehna* (1), but that case was not really in point because there the plaintiff was a nephew of the donor, in other words, a near collateral, and the parties were Arains. D.-2 is a judgment dated 10th July 1903 where it was found that there was no rule that the collaterals from the seventh to the ninth degree were preferred to daughters. This instance is not in point; nor is D.-1, a judgment dated 18th February 19.3, in which it was held that the plaintiffs, who were collaterals in the seventh degree, were not entitled to succeed in the presence of daughters.

Pandit Sheo Narain has referred to *Bholi* v. *Man Singh* (2), in which the question of *onus* in cases like the present was fully considered and it was laid down that the burden of proof as to whether remote collaterals such as of the sixth degree exclude daughters, rests on the party who asserts it. In *Jiwan Singh* v. *Har Kaur* (3) it was held that under Customary Law, where collaterals more distantly related than the fifth, or at any rate, the seventh degree, claim to succeed to ancestral property in preference to a daughter, the *onus probandi* is on them. In this case *Bholi* v. *Man Singh* (2) was approved. Again, in Remark 1 to Article 23 of Rattigan's Digest of Customary Law it is laid down that the seventh degree is sometimes found to be the extreme limit of collateral male relationship which excludes the succession of a daughter, but it is also stated that more usually the fifth degree is found to be the customary limit. We may, therefore, take it that where a collateral is more distantly related than the fifth degree, the initial *onus* is on him to prove that he excludes the daughters and the more remote the collateral is the more heavily does the *onus* lie upon him. In the present case the collaterals are related in the sixth degree, and, therefore, the *onus* upon them would not be a very heavy one.

Now, the plaintiffs rely upon the answer to Question 45 of Mr. Dunnett's *Riwaj i-am* of 1911. According to that collaterals in the sixth degree exclude daughters. In the case *Beg* v. *Allah Ditta* (4) their Lordships of the Privy Council held that the entry in the *riwaj-i-am*, which was not supported by instances, in favour of the succession of a daughter's son, whose father was a *Khanadamed*, in preference to collaterals was a strong piece of evidence in support of such custom which it lay upon the plaintiff's collaterals to rebut. This ruling of the Privy Council was considered in a subsequent decision of the Chief Court in *Wazira* v. *Musammat Maryan* (5). It was held there following *Ohhuttan* v. *Basari Lal* (6) that statements in a *riwaj-i-am* when "opposed to general custom can carry very little weight unless supported by instances." Again in *Khuda Bakhsh* v. *Musammat Fatteh Khatun* (7), it was held that Answer 13 in the *Riwaj-i-am* of the Multan District (unsupported by instances), being a very peculiar one, quite opposed to Customary Law and the method of calculating relationship laid down therein being also peculiar, was not sufficient to shift the *onus* on to the plaintiffs to prove that they are not excluded by a sister. The entry in the *Riwaj-i-am* relied upon by the plaintiffs in the present case can certainly not be said to be opposed to general custom, nor to be a very peculiar one. What is the extreme limit of collateral male relationship which excludes the succession of a daughter has been the subject of numerous decisions and a good deal of doubt has been expressed on the point and in *Jiwan Singh* v.

(1) 86 P. R. 1895.

(2) 86 P. R. 1908; 146 P. W. R. 1908.

(3) 22 Ind. Cas 415; 41 P. R. 1914; 51 P. L. R. 1914; 34 P. W. R. 1914.

(4) 38 Ind. Cas. 354; 45 P. R. 1917; 12 P. W. R. 1917; 21 M. L. T. 310; 32 M. L. J. 615; 19 Bom. L. R. 388; 15 A. L. J. 525; 21 C. W. N. 842; 44 C. 749; 26 C. L. J. 175; 44 I. A. 89 (P. C.).

(5) 42 Ind Cas. 358; 84 P. R. 1917; 151 P. W. R. 1917; 3 P. L. R. 1918.

(6) 30 Ind Cas. 22; 7 P. R. 1916; 129 P. W. R. 1915; 46 P. L. R. 1916.

(7) 46 Ind. Cas. 679; 13 P. R. 1919; 149 P. W. R. 1918.

Har Kaur (3) referred to above it was doubted whether the seventh or the fifth degree should be fixed as the extreme limit. It, therefore, cannot be said that an entry which says that the collaterals in the sixth degree exclude daughters is opposed to general custom. Therefore, having regard to the decision of the Privy Council in *Beg* v. *Allah Ditta* (4) we hold that the entry in the 1911 *Riwaj-i-am* is quite sufficient to shift the initial *onus* from the plaintiffs to the donees-defendants, and we find that the latter have not discharged it.

The appeal accordingly fails and is dismissed with costs.

Z. K & S. D. *Appeal dismissed.*

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 97 OF 1921.

February 6, 1922.

Present :—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Coyajee.

CHUNILAL JAMNADAS—DEFENDANT—APPELLANT

versus

MULCHAND HARJIVANDAS—PLAINTIFF—RESPONDENTS.

Partition decree—Execution by plaintiff—Defendant, right of, to continue proceedings.

Plaintiff obtained a decree for the partition of a house, and applied for execution. A Commissioner was appointed to effect a division of it but before effect could be given to his report the house was burnt down : plaintiff thereupon wanted to drop the proceedings, but defendant objected :

Held, that defendant should be allowed to continue the execution proceedings in order that the property might be partitioned.

First appeal from the decision of the First Class Subordinate Judge at Broach, in Darkhast No. 224 of 1915.

Mr. *G. N. Thakor*, for the Appellant.

Mr. *M. H. Mehta*, for Respondent No. 1.

JUDGMENT.—This was a partition suit in which a consent-decree for partition was obtained on 8th November 1911 from the First Class Subordinate Judge, Broach. The plaintiff, on the 12th March 1915, took out a Darkhast for partition of the suit property and moveables Commissioners were appointed, who submitted a report with regard to ornaments. But with regard to a certain house Mr. Hargovandas was appointed Commissioner to effect a division of it. He made a report, but before the report could be given effect to the house was burnt down. The plaintiff then wanted to drop the execution proceedings, but the defendant objected. The Court allowed the plaintiff to drop the execution proceedings. The result would be that those defendants who wished to continue the execution proceedings could not do so without having to issue a fresh Darkhast. We see no reason why the defendants should not have been allowed to continue the Darkhast in order that the suit property might be partitioned. Therefore, we allow the appeal and direct the Darkhast to continue at the instance of the defendant. The plaintiff to pay the appellant's costs in both Courts.

W. C. A. *Appeal allowed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 991 OF 1919.

January 7, 1922.

Present :—Mr. Justice Scott-Smith and Mr. Justice Harrison.

GULAB—DEFENDANT—APPELLANT

versus

MEHNDI AND ANOTHER—PLAINTIFFS—AND NADU—DEFENDANT—RESPONDENTS.

Reversioner's right to contest alienation, relinquishment of—Reversionary right—Registration Act (XVI of 1908), s. 17—Family agreement—Reversioner undertaking not to challenge alienation of half of ancestral property—Registration, whether necessary—Alienation, contemplated or completed—Consent of next reversioner—Good faith to be presumed—Bad faith to be established.

The right of a reversioner to bring a suit to contest any alienation which a sonless proprietor might make in future arises out of and is, in a sense, ancillary to the reversionary rights But it cannot be said to be an integral part of those rights It is wholly impossible to estimate the value of such a right, which must depend on all the circumstances of the case. If the alienation is for necessity or can be shown to have been for necessity by evidence, true or false, the right is valueless. It varies, moreover, with the prospects of the reversioner to succeed to the land and inversely with the age and health of the owner. [p. 418, col. 2.]

A family agreement by which a sonless proprietor agrees not to alienate half of his land, and his nearest reversioner undertakes not to challenge or object to any alienation which the former might see fit to make of the remaining half of his land, does not require registration and is binding on the sons of the reversioner. [p 418, col. 2]

Kaman v. *Muhammad Ali*, 59 P. R. 1904, *Labhu* v. *Musammat Nihali*, 7 P. R. 1905; 66 P. L. R. 1905;

GULAB v. MEHNDI.

251 P. W. R. 1905 and *Shib Ram* v. *Shib Singh*, 78 P. R. 1908; 138 P. W. R. 1908, followed.

If the bad faith of a reversioner in giving his consent to an alienation is pleaded, it must be established. Good faith must be presumed. [p. 418, col 2.]

Where the next reversioner consents to a contemplated alienation, such consent is as binding and valid as a consent given to a completed transfer. [p. 418, col. 2.]

Second appeal from the decree of the District Judge, Rawalpindi, dated the 16th January 1919, affirming that of the Subordinate Judge, Second Class, Rawalpindi, dated the 23rd August 1918.

Messrs. *Aziz Ahmad* and *N. C. Mehra*, for the Appellant.

Dr. *Nand Lal*, for the Respondent.

JUDGMENT.—The facts of this case are peculiar. One Madat, who had no son, alienated some of his ancestral land to his son-in law. Nadu, his brother, brought a suit of the usual type and thereupon a family agreement was made, in consideration of which Nadu withdrew his suit and Madat undertook that he would not charge one half of the remaining land or the house in which he lived and Nadu further undertook not to challenge or object to any alienation which Madat might see fit to make with regard to the remaining half of the land. Eighteen months later, Madat executed a deed by which he purported to sell one-half of his remaining land to another son-in-law for Rs. 780. Nadu's sons sue for a declaration that this alienation will not affect their reversionary rights and have been given a decree on the finding that the documents in which the agreement was embodied are not admissible, inasmuch as they have not been registered, that the agreement, therefore, cannot be proved and that consideration and necessity have not been established. On appeal Counsel urges that the documents need not be registered and that the consent of the next collateral makes the alienation good against the whole world.

Now, if the two important documents D.2 and D. W.-1 contained any clause by which Nadu relinquished his reversionary rights, it would have been necessary to register them Here, however, all he did was to undertake not to bring a suit to contest any alienation which might be made in future. The right to bring such a suit doubtless arises out of and is, in a sense, ancillary to the reversionary rights. At the same time, it cannot be said to be an integral part of those rights. In the second place, it is wholly impossible to estimate the value of such a right, which must depend on all the circumstances of the case. If the alienation is for necessity or can be shown to have been for necessity by evidence, true or false, the right is valueless. It varies, moreover, with the prospects of the reversioner to succeed to the land and inversely with the age and health of the owner. We find, therefore, that, for these two reasons, the undertaking given by Nadu not to contest any alienation, which his brother might make in future as to one-half of the land, did not require registration.

It is urged by Counsel for the respondents that a consent of this nature given 18 months before the actual transfer takes place is not a consent at all as contemplated in the various rulings quoted, and he contends that consent can only be given to a transaction which is on the verge of completion. We see no force in this argument and there is no reason why a consent given to a contemplated alienation should not be as binding and as valid as a consent given to a completed transfer. It is also urged that, under the circumstances of this case, it must be presumed that Nadu did not act in the best interests of the family and that he deliberately injured the prospects of his sons. We find, on the contrary, that if bad faith be pleaded, it must be established and that good faith must be presumed, and there is nothing in the circumstances of this family agreement which points towards there having been any stupidity, carelessness or malice. Nadu saved one half of the remaining ancestral property and the house which Madat could certainly have charged or even sold, and although it might have been possible to defeat the sale or the alienation by bringing a suit, the result of litigation is always doubtful and we see no reason for not presuming that Nadu acted wisely and with foresight in making this agreement.

We, therefore, find, following *Kaman* v. *Muhammad Ali* (1), *Labhu* v. *Musammat*

(1) 59 P. R. 1904.

Nihali (2) and *Shib Ram* v. *Shib Singh* (3), that the consent of Nadu makes the alienation good against the world. We, therefore, accept the appeal and dismiss the plaintiffs' suit. The costs of the defendants will be paid throughout by the plaintiffs.

W. C. A. & S. D. *Appeal accepted.*

(2) 7 P. R. 1905; 66 P. L. R. 1905; 251 P. W. R. 1905.
(3) 78 P. R. 1908; 133 P. W. R. 1908.

BOMBAY HIGH COURT.
SECOND CIVIL APPEAL No. 112 OF 1921,
February 7, 1922.
Present :—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Coyajee.
SHAMA DURGAJI BHOI—
DEFENDANT—APPELLANT
versus
GANGADHAR NARAYAN MUZUMDAR
PLAINTIFF—RESPONDENT.

Ferry franchise, whether can be acquired by prescription—Grant from Government—Presumption.

A ferry franchise cannot be acquired by mere prescription. Facts must be proved from which, if there is no direct grant from the Government, it could be implied that such grant was actually made. [p. 420, col. 1.]

Nityahari Roy v. *Dunne*, 18 C. 652; 9 Ind. Dec. (N. S.) 435, referred to.

Second appeal from the decision of the Joint Judge, Poona, in Appeal No. 129 of 1920, confirming the decree passed by the Subordinate Judge at Haveli, in Civil Suit No. 145 of 1917.

Mr. *D. A. Tulpurkar*, for the Appellant.

Mr. *Mehendale* (with him Mr. *P. B. Shingne*), for the Respondent.

JUDGMENT.—The plaintiffs sued for a declaration that they alone had a right to ply a ferry between the village of Bhopkhel and Kirkee Bazar, and for an injunction restraining the defendant from plying a ferry between Bhopkhel and Kirkee Bazar. The river Mula runs between these two villages, and until a dam was built in 1872 people were able to cross the river except in the rainy season. That has no longer been possible since the building of the dam. The plaintiffs who are Inamdars of the village of Bhopkhel then began to run a ferry to take people across, and they were receiving the income from the ferry until 1915 when the first defendant began to run a rival ferry under the permission granted by the Superintendent of the Ammunition Factory, ratified by the Collector.

When the plaintiffs objected to the first defendant's plying his ferry, an order was passed by the Collector as follows :—

"In this office No. L. F. 1-853-3 of 25th March 1916 Shama Durgaji Bhoi of Kirkee was informed that the Collector has no objection to Shama plying his ferry between Kirkee and Kalas. The Collector now understands from an application from the Inamdar of Bhopkhel that Shama is working his ferry boat between Kirkee and Bhopkhel. Shama is, therefore, informed that he is not entitled to run a ferry between Kirkee and Bhopkhel without the permission of the Inamdar of Bhopkhel."

Exhibit 22 is the application of the first defendant to the Collector from which it would appear that the limits within which he wished to ply his boat were not definitely stated. The applicant said :

"There is a dam of the river Mula within the limit of the Superintendent of the Ammunition Factory at Kirkee, and he has sanctioned the plying of a boat to convey workmen in the factory. Therefore, I have bought a boat worth Rs. 400. Within the said limit I have been plying a boat for these four or five months. Hence, I have given a written statement in the office of the Mamlatdar, Haveli, Poona. Your Honour should allow me to ply a boat in the aforesaid limit."

So, although the Collector might have sanctioned the plying of a boat by the first defendant during the limits of the waters held up by the dam, when the Inamdar of Bhopkhel objected to the first defendant running a ferry between his village and Kirkee, the first defendant was told he could not do that without the permission of the Inamdar.

Both Courts have decreed the plaintiffs' claim, and the question is, whether the plaintiffs have established a right to a ferry franchise, between these two villages, so that they are entitled to come to Court to ask

the Court to restrain the defendant, or any one else, from infringing that right. It may be conceded that such a franchise cannot be acquired by mere prescription, and that there must be facts proved from which, if there is no direct grant from the Government, it could be implied that such grant was actually made. It is not disputed that Government have the right to grant such a franchise; and we have to consider the evidence in this case and see whether, since no direct grant has been produced, the Courts were entitled to infer that such a grant was actually made. When the dam was built it was obvious that some provision would have to be made for conveying the public from one side of the bank of the river to the other, and that the Government recognised the rights of the Inamdars to a portion of the bed of the river can be seen from the fact that they granted compensation to the Inamdar for the loss which he incurred owing to his no longer being able to derive revenue from the melon grounds in the bed of the river. Government were evidently aware that the Inamdars had started plying a ferry between their village and the Kirkee side of the river bank.

Then an order was passed on 28th July 1879 by the Collector which unfortunately is not forthcoming, but the Mamlatdar gave information regarding this order to the Inamdars by Exhibit 71: "Yadi (memorandum) written to the Inamdar of Bhopkhel, Taluka Haveli from Mamlatdar Taluka Haveli to the effect that you ply a private boat in the river within the limits of the said Mauje and the revenue received was shown in the record. Proceedings in respect thereof went on and at last the order Inward No. 1072, dated 20th July 1879, was received from the Collector. On its strength it is informed that you ply a boat in the river of private ownership for the convenience of people. It should be understood that it is being plied with the permission of the Government." We think that there is sufficient evidence to presume that the Government had granted the franchise to the Inamdars. In addition we have this fact that the Inamdars have been plying this ferry ever since 1879, and it has never been suggested that any one could ply a ferry in competition with them.

In *Nityahari Roy* v. *Dunne* (1), which was a suit brought to establish a right to a ferry franchise and to restrain the working of a rival ferry, the law on the question is fully considered, and at page 657 the learned Judges said :—

"There is no dispute that the Government is in a position, if it likes, to create a franchise. We think that both the documents and the village register prepared in 1861 by the proper authorities are admissible to show that in the year 1859 the plaintiffs made a claim to the franchise, and, on a proper inquiry made by Government, that claim was admitted. The next acknowledgment made by the Crown of the existence of this ferry is to be found on the face of the *thakbast* maps to Deogram and Mohespur. In effect it amounts to this, that a summary inquiry, No. 806, having been instituted, it was found that this Ghat was appurtenant to the villages of Deogram and Mohespur belonging to Khalilabad, and an endorsement was made on the map to this effect under the orders of Government. We thus see that at two distinct and separate times, within the last thirty years, namely, in 1861, and in 1876, the Crown has admitted the right of the plaintiffs to hold a ferry, on the basis that it has been permanently settled with them in the same manner as their estate... We are, therefore, of opinion that the Subordinate Judge was right in holding that the plaintiffs have, from time immemorial, had a franchise granted to them by the Crown which enabled them to claim monopoly of the right to ferry within reasonable limits across the river. The grant itself has not been produced, and Pearapur-Aglapur is at some distance from Deogram. But still in 1859, in 1861, and again in 1876, the monopoly was found by the proper Government Officers to be appurtenant to two villages, namely, Deogram and Mohespur, within the Pergunnah of Khilalabad. There is still another matter for consideration. It is a general principle that ancient grants may be explained by modern user. In this case the user spoken to by the witnesses, which undoubtedly existed, was in the immediate vicinity, if not from the boundary between

(1) 18 C. 652 9 Ind. Dec. (N.S.) 435.

those villages as is found by the Subordinate Judge, and must be taken to be a user supported by the right by which it was claimed. Consequently, although we think that the plaintiffs have established a right of ferry appurtenant to Deogram and Mohespur on the left bank of the river, they have not been able to establish anything more; and we agree with the learned Subordinate Judge that their claim, so far as it asserts that right to establish a ferry beyond the purview of those villages, must be rejected."

It must be admitted in this case that there was no reason to grant a ferry franchise before the dam was built, and so it is not possible to presume a grant from immemorial user. But such a grant can still be presumed from the evidence in the case. We think, therefore, the Courts below were right in holding that the facts in this case raise a presumption that there was a Government grant in favour of the plaintiffs. The appeal, therefore, fails and must be dismissed with costs.

W. C. A.

Appeal dismissed.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 2578 OF 1917.

April 3, 1921.

Present:—Mr. Justice Leslie-Jones and Mr. Justice Broadway.

THE FIRM MOTI RAM-MOHAN LAL, THROUGH NARAIN DAS—DEFENDANT—APPELLANT

versus

THE BHARAT NATIONAL BANK, LD., OF DELHI, THROUGH HARNAM SINGH, ATTORNEY—PLAINTIFF—RESPONDENT.

Equitable mortgage—Deposit of title-deeds—Equitable mortgage, whether enforceable in the Punjab—Sub-mortgagee, whether bound to implead original mortgagor in suit on mortgage—Registration Act (XVI of 1903), s. 17 (1) (b)—Letter depositing title-deeds after mortgage effected, admissibility of, without registration.

As security for a loan defendants executed a pro-note in favour of the plaintiff and at the same time handed over, a number of title-deeds, some of which related to their own property, and some to property mortgaged to them. They also signed and delivered to the defendants a letter which opened as follows: "We, under this writing, deposit with you as security 12 deeds relating to property of the value of Rs. 8,557 mentioned in the list in lieu of a pro-note for Rs. 8,000 in respect of which a separate pro-note has been executed to-day." In a suit on the pro-note to recover the amount thereof and for sale of the properties it was urged, *inter alia*, (1) that there was no such thing as an equitable mortgage in the Punjab; (2) that the original mortagagors should have been impleaded as defendants in the suit, and (3) that the letter with which the title-deeds were deposited required registration, and not being registered it was inadmissible to prove the existence of a mortgage:

Held, (1) that an equitable mortgage by the deposit of title-deeds was recognised, and could be enforced in the Punjab; [p. 422, col. 1.]

(2) that the suit could proceed without impleading the original mortgagors as defendants, and [p. 422, col. 1.]

(3) that inasmuch as the equitable mortgage by the deposit of title-deeds had been effected before the letter was written and as the letter did not embody the terms of the contract, but was written with the object of being used only as evidence of a fact from which the contract was to be inferred, it did not come within the description in section 17 of the Registration Act, and, therefore, it did not require to be registered to render it admissible, [p. 423, col. 1.]

First appeal from a decree of the Senior Subordinate Judge, Gujrat, dated the 20th June 1917.

Dr. *Gokal Chand Narang*, for the Appellant.

Lala *Moti Sagar*, R. S., for the Respondent.

JUDGMENT.—The defendants in this case were admittedly indebted to the Bharat National Bank, the plaintiff, for a sum of Rs. 8,000. The plaintiff has obtained a decree for Rs. 8,792-9-6 with subsequent interest and, in default of payment within three months, for the sale of certain properties, alleged to have been mortgaged with the plaintiff-bank.

The defendants appeal. They have made no objection to the money decree except as regards calculation of interest, and on that point their objection is well-founded. Through an obvious error the Senior Subordinate Judge, while disallowing the plaintiff's claim for interest at 12 per cent. instead of at 9 per cent. after a certain date, nevertheless calculated interest at the former rate. The decree allowing for certain re payments should have been for Rs. 7,864 instead of for the amount

decreed, and the decree will be amended accordingly.

The main question in the case relates to the claim of the plaintiff Bank to bring to sale as such the properties alleged to be mortgaged.

The facts are briefly that the defendants had been in debt to the Bank for some time and the Bank wanted security in addition to a promissory-note, *vide* a letter, dated the 18th February 1913, from the Head Office to the Manager of the Gujrat branch. On the 18th April 1913 the parties met. The defendants then executed a pro-note for a sum of Rs. 8,000 and at the same time handed over a number of title-deeds. Some were of their own property and some of property which had been mortgaged to them by third parties. They also signed a letter in which they also sent and delivered to the plaintiff a letter which opens with the following words:—

"We, under this writing, deposit with you as security 12 deeds relating to property of the value of Rs. 8,537 mentioned in the list in lieu of a pro note for Rs. 8,000 in respect of which a separate pro-note has been executed to-day."

The position of the plaintiff is that the Bank holds an equitable mortgage over the deeds thus deposited. For the defendants several pleas have been put forward. Two of them require but brief notice. One is, that there can be no such thing as an equitable mortgage in the Punjab, a contention which is sufficiently disposed of by referring to *Gurditta Mal* v. *Gulam Ali* (1) and *Mrs. Stewart* v. *Bank of Upper India, Limitation* (2). The second is that before proceeding against properties mortgaged to the defendants by third parties it was necessary to implead the original mortgagors. In this connection Counsel has cited *Ram Jatan Rai* v. *Ramhit Singh* (3), but that ruling was disposed of in the Full Court ruling, *Ram Shankar Lal* v. *Ganesh Prasad* (4) and there is no force in the plea.

The third point of Counsel for the defendants-appellants, who has argued it at considerable length, is that the letter with which the deeds were deposited required registration and that as it has not been registered, the existence of a mortgage cannot be proved. Of the rulings cited in the judgment of the Court below *Dwarka Dass* v. *Danakoti Ammal* (5) is not relevant and *Oo Naung* v. *Maung Htoon Oo* (6) is distinguishable on the ground that in that case it was held to be proved that the equitable mortgage was effected by the deposit of the title deeds before the writing of the letter of deposit took place. The same may be said of *Gokul Dass* v. *Eastern Mortgage and Agency Co.* (7) which has been cited before us by Counsel for the plaintiff-respondent. Counsel for the defendants appellants has laid considerable stress on *Dwarkanath Mitter* v. *Sarat Kumari Dasi* (8) but that case again is distinguishable on the ground that when the letter there discussed was written the parties had not met, and there can have been no parole agreement to make an equitable mortgage.

The ruling from which we have derived most assistance is *Kedarnath Dutt* v. *Sham Lall Khettry* (9). The Division Bench which heard the appeal in that case disbelieved the plaintiff's evidence that the transaction had been completed before the document (a promissory note) was written and delivered. They thought, however, that there was a valid equitable mortgage independent of the document. They pointed out that if the document was one within section 17 of the Registration Act, it was the duty of the parties to see that it contained what section 21 of the same Act required. That had not been done and it was held that the document under consideration was not a writing which the parties had made as evidence of their contract but only a writing which was evidence of the fact from which the contract was to be inferred and that it did not come within description of documents in section 17 of the Registration Act.

The allegation of the defendants in the present case that they deposited the title-deeds only to show that they had sufficient property, though they have ever

(1) 53 P. W. R. 1907.
(2) 34 Ind. Cas. 937; 31 P. R. 1916; 215 P. W. R. 1915.
(3) 27 A. 511; 2 A. L. J. 434; A. W. N. (1905) 76.
(4) 29 A. 385; 4 A. L. J. 273; A. W. N. (1907) 97; 2 M. L. T. 248 (F. B.).
(5) 23 Ind. Cas. 129; 15 M. L. T. 198.
(6) 13 C 322; 6 Ind. Dec. (N. S.) 715.
(7) 33 C. 410; 10 C. W. N. 276; 4 C. L. J. 102.
(8) 7 B. L. R. 55.
(9) 11 B. L. R. 405; 20 W. R. 150.

since left them in the possession of the Bank, is childish, and there can be no doubt that it was the intention of the Bank to secure an equitable mortgage on the properties of which the title-deeds were deposited. In order, moreover, to avoid loss of credit it was in the interests of the defendants themselves to give the plaintiff Bank an equitable mortgage rather than one requiring registration. Having regard to the contents of the letter, dated the 18th February 1913, to which we have already referred, we should be quite prepared to hold that an equitable mortgage had been established, even if the letter, dated the 18th April 913, had never been written. If the letter which is now said to have required registration had been intended to embody the contract thus involving registration which the defendants must have wished to avoid, it would presumably have been drawn up in a form in which it could have been accepted for registration under section 21. It did not, however, contain any description of property, and if it has been presented, it could not have been accepted. There is no apparent reason why, if that letter was intended to embody the contract, it should have been drawn up in a form which would have made its registration, as it stood, impossible, and it appears to us that the writing was intended to be used only as evidence of a fact from which the contract was to be inferred. If so, it does not come within the description in section 17 of the Registration Act, and the whole argument of the appellants fails.

The appeal is, therefore, dismissed except as regards the amount of interest wrongly calculated by the Court below, and the appellants will pay full costs.

W. C. A. *Appeal dismissed.*

PRIVY COUNCIL.

APPEAL FROM THE PUNJAB CHIEF COURT.

January 31, 1 22.

Present:—Viscount Haldane, Lord Phillimore and Mr. Ameer Ali.

PANNA LAL AND ANOTHER—APPELLANTS

versus

NIHAL CHAND SUBSTITUTED FOR THE MARWAR BANK (IN LIQUIDATION)—RESPONDENT.

Construction of document—Surety bond—Personal liability—Document capable of intelligible interpretation—Extrinsic evidence, admissibility of, to affect its meaning.

A trading Company took certain advances from a Bank, the plaintiff in the suit, and by way of security the defendants who were Directors of the Company executed a surety bond in the form of a letter addressed to the Bank, the material portion of which ran as follows: "In consideration of your allowing the Company to overdraw sums not exceeding rupees fifty thousand (on the security of the said Company demand pro-note in your favour) we hereby pledge for the re-payment on demand of the said overdraft." In a suit by the plaintiff to make the defendants personally liable, the defendants contended that they had given the surety bond as Directors of the Company and sought to adduce evidence to prove by reference to other transactions entered into by them that they had not pledged themselves personally:

Held, (1) that the only construction that could be put upon the letter was that the defendants had made themselves personally liable; [p. 425, col. 1.]

(2) that as on the face of it there was no difficulty in giving the letter an intelligible meaning as constituting a personal pledge, no extrinsic evidence was admissible to affect its meaning. [p. 425, col. 1.]

Appeal from a decree of the Chief Court, Panjab, reported as 48 Ind. Cas. 424, affirming a decree of the District Judge, Ambala.

FACTS.—The Marwar Bank instituted the suit to recover money from the appellants as sureties, who pleaded that they were not personally liable. Both the Courts in India decreed the claim. Hence the present appeal.

Mr. *Olauson, K. C.* (with him Mr. *Wallach*), for the Appellants.—The appellants were the Directors of Luxmi Company and signed the surety-bond as such. There was no personal liability. It binds the Luxmi Company and the Luxmi Company alone. A personal decree against the appellants ought not to have been made. The rate of interest agreed upon was only $7\frac{1}{2}$ per cent. There was no binding agreement to pay a higher rate. The Courts were wrong in awarding interest at $8\frac{1}{4}$ per cent.

Messrs. *Langden, K. C.*, and Mr. *Dube*, for the Respondent.

JUDGMENT.

VISCOUNT HALDANE.—The Luxmi Company, Limited, which was defendant in the suit

out of which this appeal arises, but which is no party to the appeal, was a company trading at Ambala and elsewhere as bankers, cotton merchants and general commission agents. It obtained certain advances from the respondents, the Marwar Bank. These advances were made under various circumstances, but at the material date with which their Lordships are concerned it was necessary to obtain some security for the assurance of the Bank and accordingly on the 28th December 1908 the appellants, Lala Panna Lal and Lala Basheshar Nath, and one Lala Ganga Ram executed a security bond, dated the 28th December 1908, in favour of the Manager of the Marwar Bank. Lala Ganga Ram and the appellant Lala Panna Lal were Directors of the Luxmi Company; the other appellant, Lala Basheshar Nath was manager of one of the branches of the Luxmi Company, and was an alternative Director, that is to say, on certain occasions he acted as a Director.

The surety bond which the two appellants executed was in these terms. It was addressed to the Manager of the Marwar Bank, Limited, of Ambala City:

"DEAR SIR,—In consideration of your allowing the Luxmi Company, Limited, to overdraw sums not exceeding in the aggregate of rupees fifty thousand only (on the security of Luxmi Company, Limited, demand pro-note in your favour of date), we hereby pledge for the repayment on demand of the said overdraft, together with interest thereon and of any other sum or sums of money which may be or become due to you from the Luxmi Company, Limited, on any account whatsoever during the continuance of this pro-note. And we hereby declare and agree that the overdraft allowed and intended to be secured by this agreement shall be taken to have been allowed by you entirely upon the faith of and relying upon the declaration signed by us at the foot thereof which declaration solemnly we declare to be true in every respect. It is hereby further agreed and declared that these presents shall remain and be a continuing security to you for the balance of the said account for the time being to the extent aforesaid, notwithstanding that at any time or times the balance of the said account may be in your favour, it being expressly intended that these presents shall be a security for the balance of the said account due by the Luxmi Company, Limited, to you while the said account shall continue open. Signed at Ambala City this 28th day of December, in the year one thousand nine hundred and eight."

It is contended on behalf of the appellants that this security bond did not impose upon them any personal liability, inasmuch as they signed as Directors, which, it is said, meant as Directors binding the Luxmi Company and the Luxmi Company alone. The first difficulty in the way of that contention is a very formidable one. If it were true, the Bank would get no advantage from this security bond, because it had already the liability of the Luxmi Company for the sums which it had advanced to the Luxmi Company. The only materiality of the security bond would be, if it gave some new security and some fresh liability, and, therefore, the natural construction to put upon what is indicated by the use of the imperfect but definite expression 'pledge" is that the fresh liability of the three signatories personally was the new security introduced. Moreover, the whole tenor of the document points to an obligation to pay money. It is suggested that the word "pledge" in the beginning of the second sentence, where the expression is used "we hereby pledge for the re-payment on demand," shows that they meant to refer to some specific and tangible securities which they pledged for the advances, but if that were so, then, as these were omitted and not mentioned, the document was bad because of the omission of what was of its essence. The other construction takes the word pledge as loosely used, to mean that they pledge their personal credit in support of the obligation of the Company. It is said that if one looks at other documents of the kind one will find that this was only a common form intended for cases where there was a pledge of assets, and that if regard is had to the circumstances in other transactions one will find that in other transactions these gentlemen did not pledge themselves personally.

But their Lordships think that this surety-bond which was executed on the specific

occasion must be taken to have been executed for the purpose of the occasion, and that it cannot be assumed that it had reference to any other circumstances of a different date. On the face of it, there is no difficulty in giving it an intelligible meaning as constituting a personal pledge. Their Lordships do not think that extrinsic evidence is admissible in these circumstances to affect its meaning.

Their Lordships are, therefore, of opinion, taking this as it stands, that the appeal fails.

The only other point that arises is as to the rate of interest given from the date of the proceedings until judgment. As to that there is a discretion in the Judges under the Code of Civil Procedure, and both Courts have said that the interest should be $6\frac{1}{4}$ per cent. Their Lordships are not prepared to dissent from that view. For the reasons they have stated, they will humbly advise His Majesty that this appeal should be dismissed with costs.

S. D.

Appeal dismissed.

Solicitor for the Appellants:—Mr. *Hy. S. L. Polak.*

Solicitors for the Respondent:—Messrs. *Lewis & Yglesias.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL 2343 OF 1920.

February 25, 1921.

Present:—Mr. Justice Abdul Raoof.

MUHAMMAD DIN, MINOR, THROUGH *Musammat* DANI AND OTHERS—DEFENDANTS—APPELLANTS

versus

MUHAMMAD AND ANOTHER—PLAINTIFFS AND BAMU AND OTHERS—DEFENDANTS—RESPONDENTS.

Partition—Parties, necessary — Co-owners — Co-sharers—Mortgagee with possession, whether necessary party—Locus standi to object to correctness of partition proceedings—Partition, effect of—Land in possession of one co-sharer before partition allotted to another co-sharer—Adverse possession of co-sharer in possession, when begins.

Only owners and co-sharers are necessary parties to a partition proceeding. A mortgagee with possession is in no sense an owner or a co-sharer and therefore is not a necessary party and consequently has no *locus standi* to object to the correctness of a partition proceeding [p. 426, col. 1.]

Thakar Das v. *Sultan Bakhsh*, 45 Ind. Cas. 405; 2 P. R. 1918 Rev.; 3 P. W. R. 1918 Rev., followed.

Whatever may have been the rights of parties to a partition proceeding before the partition of land, the partition creates new rights. Therefore for howsoever long a period a co-sharer may have been in possession of a piece of land, which in partition is allotted to another co-sharer, his adverse possession begins only from the date of partition. [p. 426, cols. 1 & 2.]

Fateh Din v. *Nikka*, 13 Ind. Cas. 790; 81 P. R. 1911 105 P. L. R. 1912; 261 P. W. R. 1911, followed.

Second appeal from a decree of the District Judge, Ferozepore, dated the 13th August 1920, varying that of the Munsif, First Class, Ferozepore, dated the 13th of April 1920.

Mr. *O. L. Gulati*, for Dr *Nand Lal*, for the Appellants.

Mr. *Brij Lal* for Diwan *Mehr Chand*, for the Respondents.

JUDGMENT.—There are no merits in this second appeal. The plaintiffs sued for possession of certain land on the allegation that it had fallen to their lot under a partition. There were six defendants to the suit including Bila, Mila, Muhammad Din and Lashkar. Lashkar was impleaded as he was alleged to be the mortgagee of the land in suit from Bila and Mila. The defendants entirely denied the partition. On behalf of Mila, Bila and Lashkar a plea was raised that, as Lashkar had not been impleaded as a party to the partition proceedings, those proceedings could not affect the land mortgaged to him. The Court of first instance found the partition proved but gave effect to the plea relating to Lashkar's mortgage. The suit, therefore, relating to the mortgaged land was dismissed by the First Court. On appeal to the lower Appellate Court by the plaintiffs the decree of the First Court was modified and the entire claim of the plaintiffs was decreed.

Muhammad Din, Bila and Mila have come up in second appeal to this Court, and it has been contended on their behalf, in the first place, that there was actually no partition. This plea, however, is concluded by the finding of fact recorded by the two Courts below. The Court of first instance recorded a clear and categorical finding that the alleged partition had actually taken place. That finding has been upheld by the lower Appellate Court.

The next point urged by the learned Counsel is that Lashkar mortgagee with possession was a necessary party to the partition proceedings, and inasmach as he was not impleaded and no notice of the partition proceedings was given to him, those proceedings are binding neither upon the appellants nor on Lashkar. The precise question arose for decision in the case *Thakar Das* v. *Sultan Bakhsh* (1). The Financial Commisioner, Mr. Maynard, considered the sections of the Land Revenue Act to be found in the Chapter relating to the partition very fully, and held that only owners and co-sharers are necessary parties to a partition proceeding. A mortgagee with possession may come under the definiton of landlord, but he is in no sense an owner or a co-sharer. I entirely agree with the conclusions arrived at by the learned Financial Commissioner. Lashkar was not a necessary party, and, therefore, he had no *locus standi* to object to the correctness of the partition proceedings. In this appeal he is not one of the appellants, but, curiously enough, Mila and Bila and Muhammad Din have undertaken to urge pleas on his behalf, and in his interest.

As regards the actual appellants before me it has been contended by Mr. Gulati that they had been in adverse possession of the land in suit long before the actual partition now relied on by the plaintiffs. The partition proceedings came to an end in 1916 and were sanctioned by the Revenue Officer on the 14th September 1916. There is sufficient material upon the record of this case to show that Bila and Mila themselves and Muhammad Din's father were parties to the partition proceedings. On behalf of Mila and Bila, *Musammat* Baga, their mother and guardian, made a statement agreeing to the partition and so did Jalla, father of Muhammad Din. It is, however, contended that, in spite of the partition, the appellants remained in possession of the property in dispute, and their possession from the very commencement had been adverse. This question is concluded by a very clear authority *Fateh Din* v. *Nikka* (2). Whatever may be or may have been the rights of the parties before the partition with regard to the portions of land which were going to be the subject-matter of the partition, the partition created new rights and it was under the partition that these lands were allotted to the plaintiffs. By virtue of the partition the plaintiffs became entitled to the exclusive possession of these lands, and if the defendants continued to be in possession after the partition, their possession no doubt was adverse and wrongful. But they cannot avail of it because admittedly the suit of the plaintiffs is within 12 years from the date of the partition. Moreover, this plea of adverse possession appears to be quite an afterthought. A reference to the papers of the partition proceedings shows that no such plea was set up during the partition proceedings, not even the mortgage to Lashkar was mentioned. It is too late for the appellants now in second appeal to urge this plea.

In view of the above remarks this appeal must be dismissed, and is dismissed with costs.

S D. *Appeal dismissed.*

(1) 45 Ind. Cas. 405; 2 P. R. 1918 Rev; 3 P. W. R. 1918 Rev.

(2) 13 Ind. Cas. 780; 81 P. R. 1911; 105 P. L. R. 1912; 261 P. W. R. 1911.

BOMBAY HIGH COURT.

SMALL CAUSE COURT REFERENCE, MUNICIPAL APPEAL No. M/46 OF 1921.

March 27, 1922.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Shah.

HAJI DAWOOD HAJI ELIAS—APPELLANT

versus

THE MUNICIPAL COMMISSIONER FOR THE CITY OF BOMBAY—RESPONDENT.

City of Bombay Municipal Act (III of 1888), s. 154 (2)—Building, rateable value of—Bath, lavatories and electric fittings, owner, whether entitled to deduction on account of—Electric fittings, whether "machinery."

In assessing the rateable value of a building under the City of Bombay Municipal Act, no deduction should be allowed to the owner of the building for the cost of bath-tubs and lavatories which are annexures: nor should any deduction be allowed for electric lights and fans, which are not "machinery" within the meaning of section 154 (2) of the Act, and, which, when installed by a landlord, become part of the premises and are necessary for the user of the premises by the tenant. [p. 427, cols. 1 & 2.]

Reference by the Chief Judge of the Presidency Small Causes Court, under section 69 of Presidency Small Cause Courts Act (XV of 1882).

Messrs. *Inverarity* and *Taleyarkhan*, for the Appellant.

Sir *Thomas Strangman*, Advocate General and Mr. *Campbell*, for the Respondent.

JUDGMENT.

MACLEOD, C. J.—This is a Reference by the Chief Judge, Small Cause Court, in an appeal before him against an assessment under the City of Bombay Municipal Act. The appellant is the owner of a building at the junction of Warden Road and Nepean Sea Road which is let out in flats under registered leases. The building is fitted up with electric fittings and fans, bath tubs and lavatories; and the question referred to us is:

"Whether in respect of buildings, situated as in this case, deduction in their rateable value should be allowed to the owner, for the reasonable cost of bath-tubs and lavatories and electric lights and fans?"

The learned Judge has also added after the word 'lavatories' the words "with the necessary gas plant." But we are not concerned with gas plant in this case, and those words should be deleted from the Reference.

Now, there can be no doubt that the baths and the lavatories are annexed to the freehold and all electric fittings are also annexed to the freehold, except perhaps such fittings as are attached to plugs in the wall. I should say myself that there can be no doubt as regards the baths and lavatories, that the landlord is not entitled to deduction for the cost of these. Without these conveniences the premises would not be let, unless perhaps a tenant were found to take the premises on a long lease on favourable terms on the understanding that he should put up such fittings himself. But, ordinarily speaking, baths and lavatories must necessarily be put in before tenants can be expected to take the premises. Again, with regard to electric fittings and fans, it may be that the landlord may not attach these conveniences to the premises, and may get tenants to take the premises on the understanding that they should put the fittings themselves. But it is obvious that if the landlord puts in those fittings it will be easier to get tenants. The only reason on which the appellant's claim for deduction can be based is that these fittings should be treated as machinery, which under section 154 (2) of the City of Bombay Municipal Act shall not be included for rateable value of the building. But we have not been referred to any authority under which it is said that electric fittings in a residence come within the term "machinery". It seems to me that when electric fittings are installed by a landlord they become part of the premises and so are necessary for the user of the premises by the tenant.

Therefore, no deduction can be allowed for the costs of such installation.

We, therefore, answer the question in the negative. Costs taxed as on the Original Side to be costs in the case.

SHAH, J.—I agree.

S. D. *Answered in the negative.*

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No. 1457 OF 1921.

December 16, 1921.

Present:—Mr. Justice Abdul Raoof.

INAIT ULLAH—JUDGMENT-DEBTOR—APPELLANT

versus

THE PUNJAB NATIONAL BANK LTD., LYALLPUR—DECREE HOLDER, THE FIRM JAN MUHAMMAD-GHULAM MUHAMMAD OF TOBA TEK SINGH—AUCTION-PURCHASER—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 84—Execution of decree—Sale—Failure to deposit 25 per cent. of purchase-money—Irregularity.

The failure by an auction-purchaser at a sale held in execution of a decree to deposit 25 per cent. of the purchase-money at the time of the sale, as required by r. 84, O. XXI, Civil Procedure Code, is a mere irregularity which does not affect the validity of the sale unless it can be shown that substantial injury is thereby caused to the judgment-debtor. [p. 429, col. 2.]

Ahmad Bakhsh v. *Lalta Prasad*, 28 A. 23°; A. W. N. (1905) 263, *Bhim Singh* v. *Sarwan Singh*, 16 C. 33; 8 Ind. Dec. (N. S.) 22 and *Venkata* v. *Sama*, 14 M. 227; 5 Ind. Dec. (N. S.), 159, relied upon.

Intizam Ali Khan v. *Narain Singh*, 5 A. 816; A. W. N. (1883) 38; 3 Ind. Dec. (N. S.) 279 and *Amir Begam* v. *Bank of Upper India Limited*, 30 A. 273; 5 A. L. J. 336; A. W. N. (1908) 107, dissented from.

INAIT ULLAH v. PUNJAB NATIONAL BANK, LTD., LYALLPUR.

Miscellaneous first appeal from an order of the Subordinate Judge, First Class, Lyallpur, dated the 19th May 1921.

Lala *Mool Chand*, R. S., for the Appellant.

Mr. *M. L. Puri*, for the Decree-holder, Mr. *Nias Ali*, for the Auction-purchaser, Respondents.

JUDGMENT.—The following facts will disclose the nature of the dispute between the parties:—

On the 24th October 1914 the Punjab National Bank obtained a decree absolute for sale against one Inayat Ullah, judgment debtor, the amount of decree being Rs. 7,103-12 8. On the 26th October 1914 an application for execution of the decree was made. By the order dated the 21st October 1916 the house No. 149 was directed to be sold. The sale took place on the 28th November 1916 and the property was sold for Rs. 5,300 in favour of one Jan Muhammad, the highest bidder. One fourth of the sale price, namely, Rs. 1,325 was deposited on the 29th November 1916. According to an application of the auction-purchaser dated the 7th May 1921, page 59 of the record, the amount was tendered on the 28th November 1916 after the sale but could not be deposited owing to the Treasury being closed. It was, therefore, deposited the next day. The balance of Rs. 3,975 was deposited on the 12th December 1916. On the 20th December 1916 the judgment-debtor applied for the setting aside of the sale on the ground of certain alleged irregularities in publishing and conducting the sale. Those objections were disallowed by Diwan Somnath, Senior Subordinate Judge, by an order dated the 3rd December 1917. The objections were set forth in the petition in five paragraphs and were as follows:—

(*i*) that the proclamation of sale had not been duly published, and the details required by law were not entered in it;

(*ii*) that the auction-purchaser, Jan Muhammad, had got the sale finally finished in his name by fraud and collusion with the bailiff;

(*iii*) that the purchaser being a member of the Committee, through his influence, had succeeded in keeping back the purchasers;

(*iv*) that the auction-sale was not duly carried on at the place specified, and it was carried on in such a manner that it had caused loss to the judgment debtor; and

(*v*) that the value of the house was at least Rs. 10,000.

The judgment-debtor, objector, failed to adduce evidence in support of his allegations. The Court held that there was "no evidence on the record nor any ground to suspect that the house has been sold at a less price than it would have fetched ordinarily. There is no evidence of any collusion." It also found that there was no irregularity in publishing and conducting the sale and that several persons were present at the occasion. The Court accordingly came to the following conclusion:—"Every thing appears to have been done in due order, and unless anything is proved to be irregular, irregularity cannot be presumed."

No objection appears to have been raised at the time that the 25 per cent. of the purchase-money was not deposited immediately after the sale, as required by Order XXI, rule 84, Civil Procedure Code, and that the sale was, therefore, void or irregular.

Musammat Begam, wife of Inait Ullah, judgment-debtor, also filed objections against the sale claiming the ownership of the property sold. Those objections were disallowed by an order dated the 6th February 1917. Thereafter she instituted a declaratory suit on the 21st February 1917. During the pendency of the suit on the 23rd June 1917 the auction-purchaser withdrew the $\frac{3}{4}$ths of the purchase-money which had been deposited by him. The suit of *Musammat* Begam was dismissed on the 11th October 1917. On the 1st December 1917 she lodged an appeal in the Chief Court on the 14th December 1917, she applied for the stay of further proceedings in respect of the sale. The Chief Court made an *ad interim* order on the 17th December 1917. Finally, on the 22nd March 1918 by consent of parties the further proceedings were stayed, and the auction purchaser was allowed to withdraw the balance of the sale price, namely, Rs. 1,325. *Musammat* Begam and the Bank were represented by Counsel. Jan Mahomed was present in person, while Inait Ullah, the judgment-debtor, was absent. The money, *viz.*, Rs. 1,325, was actually withdrawn by the judgment-debtor on the 15th April 1918. The appeal of *Musammat* Begam was eventually dismissed

on the 21st January 1921. During the pendency of the suit the Court, by an order dated the 3rd May 1917 had suspended the further proceedings, relating to the sale. After the disposal of the appeal the decree-holder applied on the 20th March 1921 for an order directing the auction-purchaser to put in the sale price for payment to the decree holder. Before this, on the 17th March 1921, the judgment debtor had put in an application objecting to the sale being confirmed, the main objection being that inasmuch as the 25 per cent. of the purchase-money had not been deposited immediately as contemplated by Order XXI, rule 84, Civil Prosedure Code, the sale had become void and could not be confirmed. Those objections were disallowed, and the sale was confirmed by an order dated the 19th May 1921. It is against this order that the present appeal has been preferred.

Eleven pleas were taken in the memorandum of appeal presented to this Court, but only two contentions have been put forward before me, namely, (1) that the auction-purchaser having failed to deposit the 25 per cent. of the purchase-money immediately after the sale the sale became void and ought not to have been confirmed, and (2) that even if the sale was not void the non-payment of the money immediately was a grave and material irregularity which had caused loss to the judgment-debtor, and the sale ought to have been set aside.

In support of the first contention Mr. Mool Chand, the learned Vakil for the appellant, relied upon the case of *Amir Begam* v. *Bank of Upper India, Limited* (1). The learned Judges, who decided the case relying upon the case of *Intizam Ali Khan* v. *Narain Singh* (2), held that owing to the non payment of the $\frac{1}{4}$th of the purchase money immediately the sale was not merely irregular, but was no sale at all.

Another Division Bench in a previous case *Ahmad Bakhsh* v. *Lalta Prasad* (3) had declared the ruling in *Intizam Ali Khan* v. *Narain Singh* (2) to be no longer law, and had held that "the fact that an auction-purchaser at a sale held in execution of a decree did not pay the 25 per cent. of the purchase money required by section 306 of the Code of Civil Procedure at the time of the sale was a mere irregularity which would not affect the validity of the sale unless it could be shown that substantial injury was thereby caused to the judgment-debtor." The attention of the learned Judges, who decided the case of *Amir Begam* v. *Bank of Upper India, Limited* (1), apparently was not drawn to the decision reported as *Ahmad Bakhsh* v. *Lalta Prasad* (3).

A Division Bench of the Calcutta High Court also dissented from the decision in the case of *Intizam Ali Khan* v. *Narain Singh* (2), [see *Bhim Singh* v. *Sarwan Singh* (4)]. They also held that the non-payment of the 25 per cent. was merely an irregularity. The same rule has been laid down by a Division Bench of the Madras High Court in the case of *Venkata* v. *Sama* (5). I must, therefore, hold that the sale was not void and the first contention put forward by Mr. Mool Chand must fail.

As regards the second contention all that I need say is that, on the facts stated above, it is not open to the judgment-debtor to apply for the setting aside of the sale on the ground of material irregularity. He had made an application for that purpose on the 20th December 1916 which was dismissed for want of proof. As already mentioned, the ground now urged was never put forward in that application. Any application to the Court to set aside the sale on the ground of material irregularity or fraud in publishing or conducting it would be long barred by time, and would also be barred by the rule of *res judicata*. It has already been held by Diwan Somnath, Senior Subordinate Judge, that the judgment-debtor has not sustained substantial injury by reason of any irregularity in publishing and conducting the sale. The appeal fails and is dismissed with costs.

Z. K.

Appeal dismissed.

(1) 30 A. 273; 5 A. L. J. 336; A. W. N. (1903) 107.
(2) 5 A. 316; A. W. N. (1883) 38; 3 Ind. Dec. (N. S.) 279.
(3) 28 A. 238; A. W. N. (1905) 263.
(4) 16 C. 33; 8 Ind. Dec. (N. S.) 22.
(5) 14 M. 227; 5 Ind. Dec. (N. S.) 159.

DARASHAH BOMONJI DUBASH v. LIPTON LTD.

BOMBAY HIGH COURT.

SMALL CAUSE COURT REFERENCE IN SUIT No. 2055-21891 OF 1921.

March 27, 1922.

Present:—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

DARASHAH BOMONJI DUBASH—PLAINTIFF

versus

LIPTON LTD.—DEFENDANT.

City of Bombay Municipal Act (III of 1888), s. 147—Landlord and tenant—Tenant sub-letting premises at higher rent than fixed with landlord—Property tax, enhancement of, by Municipality—Landlord, right of, to recover difference from tenant.

Unless there is strong documentary evidence to show that a landlord has contracted himself out of the protection afforded to him by section 147 of the City of Bombay Municipal Act, he is entitled to claim from the tenant the difference in taxes, if the rateable value of the premises exceeds the amount of rent payable by the tenant.

Case stated for the opinion of the High Court by the Third Judge of the Court of Small Causes, Bombay, under section 69 of the Presidency Small Cause Courts Act and under Order XLVI, rule 1, of the Code of Civil Procedure.

Sir *Thomas Strangman*, Advocate-General, for the Plaintiff.

Mr. *Campbell*, for the Defendant.

JUDGMENT.—The plaintiff purchased a certain property in Apollo Street, which had been leased by his vendor on the 29th June 1915 for a period of three years certain and three years optional to Messrs. Lipton & Co. at a monthly rent of Rs. 600, including all rates and taxes whatsoever. Messrs. Lipton & Co. sub-let a considerable portion of the premises at a very high rent, in consequence of which the Municipality raised the assessment for 1920-21 and 1921-22, basing it not on the rent payable by Messrs. Lipton & Co., under the lease, but on the rent received by them from their sub tenants, *plus* a proportionate rent at the same rate for the premises which were in their occupation. The result is that the landlord is called on to pay taxes on the assessment of over Rs. 31,000 instead of under Rs. 7,000; and he claims the protection of section 147 of the City of Bombay Municipal Act. That section says:—

"If any premises assessed to any property tax are let, and their rateable value exceeds the amount of rent payable in respect thereof to the person from whom, under the provisions of the last preceding section, the said tax is leviable, the said person shall be entitled to receive from his tenant the difference between the amount of the property tax levied from him and the amount which would be leviable from him if the said tax were calculated on the amount of rent payable to him."

That is a somewhat involved section; but it means this, that the lessor from whom taxes are leviable under section 146 has a claim against a tenant if the rateable value of the premises exceeds the amount of rent payable by the tenant. The only question is whether the lessor under this lease contracted himself out of the protection afforded to him by section 147. Ordinarily, when the lease was granted, it would be intended that the lessor should be liable to pay the taxes which would be based on the rent payable under the lease, and it is difficult to see that the parties contemplated that in case of an increase in the assessment by the Municipality, the responsibility for paying the tax in accordance with that increased assessment should fall on the landlord and not on the tenant. Regarding the protection afforded by section 147 it seems to us that we should require stronger documentary evidence than we have to satisfy us that the parties intended that, however much the rateable value might be increased in the future over and above the rent payable under the lease, still the landlord would have to pay the whole of the tax.

It is sufficient, therefore, for us to say, in answer to the questions referred, that section 147 of the City of Bombay Municipal Act affords relief to the plaintiff in the circumstances of the case, and that his predecessor in title did not contract himself out of the protection afforded by the section. It is not necessary, therefore, to consider the question whether the plaintiff could have validly contracted himself out of the section.

Costs taxed as on the Original Side to be costs in the case.

S. D. *Answer accordingly.*

MADAN LAL v. LABHU RAM.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2530 OF 1918.

January 6, 1922.

Present:—Mr. Justice Broadway and Mr. Justice Martineau.

MADAN LAL (GOPAL?) AND HARBANS LAL, MINOR, THROUGH *Musammat* SHARM KAUR, HIS MOTHER—DEFENDANTS—APPELLANTS

versus

LABHU RAM AND RATTAN CHAND, MINORS, THROUGH ISHAR DAS, THEIR MATERNAL UNCLE—PLAINTIFFS AND DHARAM CHAND—DEFENDANT—RESPONDENTS.

Hindu Law—Minor—Alienation of minor's property by de facto guardian for benefit of minor—Document attempting to alter rule of succession, validity of—Construction of document—Document disinheriting son, nature of—Registration Act (XVI of 1908), s. 17.

A document recited that from the date of its execution the executant ceased to have any connection with one of his sons, that the latter would have no concern with any of the former's property, and that after the death of the former and his wife the latter would have no rights as a son of the former, and that his other sons would perform the funeral ceremonies:

Held, (1) that the recital that the disinherited son would not have the rights of a son after the executant's death referred to rights of a religious character and not to rights in the property; [p. 432, col. 1.]

(2) that the meaning of the document was that the son was to lose all his rights in the father's property from the date of the execution of the document; [p. 432, col. 1.]

(3) that the document was not a Will, and being unregistered was not admissible in evidence; [p. 432, col. 1.]

(4) that, apart from the question of registration, the document, inasmuch as it contained no mention of a gift of the property being made to any person, and purported to alter the rule of Hindu Law regarding succession, was void. [p. 432, col. 1.]

Purna Sashi v. *Kalidhan Rai*, 11 Ind. Cas. 412; 38 C. 603; 15 C. W. N. 693; 8 A. L. J. 681; 13 Bom. L. R. 451; 14 C. L. J. 1; (1911) 2 M. W. N. 403; 10 M. L. T. 361; 21 M. L. J. 1119; 38 I. A. 112 (P. C.), followed.

An alienation of the property of a Hindu minor by his *de facto* guardian found to be for the benefit of the minor is valid and cannot be questioned in second appeal [p. 432, col. 2.]

Mastu v. *Nand Lal*, 73 P. R. 1890 (F. B.), followed.

Second appeal from a decree of the District Judge, Amritsar, dated the 8th August 1918, reversing that of the Subordinate Judge, First Class, Amritsar, dated the 17th April 1918.

Lala *Mehr Chand Mahajan*, for the Appellants.

Pandit *Sheo Narain*, R. B., for the Plaintiffs and Bakhshi *Tek Chand* and Mr *Madho Sudhan Bhagat*, for *Dharam Chand*, Defendant-Respondent.

JUDGMENT.—The plaintiffs, who are first cousins of defendants Nos. 1 to 3 and of their brother Karam Chand, owned a half share in a shop. The other half was sold to them by defendants Nos. 1 to 3 and Karam Chand by a deed, dated the 3rd September 1916, for Rs. 2,650 of which Rs. 175 were paid at the time of the execution of the deed. The remaining sum of Rs. 2,475 was to be paid by the plaintiffs in a month, but has not yet been paid, and one Para Ram obtained a decree against the plaintiffs for Rs. 618-12-0 on account of the share due to Karam Chand which the latter had sold to him. In the present case the plaintiffs sued for possession of half of the shop on payment to defendants Nos. 1 to 3 of Rs. 1,856 4 0, *i. e.*, after the deduction of Rs. 618 12-0 on account of Karam Chand's share for the sum of Rs. 2,475.

The First Court dismissed the suit on the ground that the sale to the plaintiffs was invalid, inasmuch as Karam Chand was shown in the sale-deed as a joint vendor, whereas he had no share in the shop, having been disinherited by his father Ram Dat under a Will (Exhibit D 1), dated the 27th April 1911.

On an appeal by the plaintiffs the District Judge observed in his judgment that, even if Karam Chand had no share in the shop, this would not have been a reason for dismissing the suit, but, he also held that Exhibit D 1 was not a Will, as, according to its terms, Karam Chand was to lose all his rights in his father's property from the date of the execution of the document, and that, therefore, the document, which purported to extinguish Karam Chand's rights in the property, required registration, and not having been registered was inadmissible in evidence. He held consequently that the plaintiffs were entitled to deduct Karam Chand's share from the consideration payable by them. With regard to the plea that Dharam Chand, defendant No. 1, who had effected the sale on behalf of his minor brothers defendants Nos. 2 and 3, was not competent to do so, the District Judge held that the transaction was for the benefit of the minors, since the shop was very narrow and could not be partitioned, and that in accordance with *Mastu* v. *Nand Lal* (1) the act of the *de facto* guardian could not now be

(1) 73 P. R. 1890 (F. B.).

impeached. He accordingly accepted the appeal and gave the plaintiffs a decree. Second appeals have been preferred to this Court, one by Dharam Chand (No. 3209 of 1918), and one by his brothers, Madan Lal and Harbans Lal (No. 2530 of 1918).

The first question is as to the construction to be placed on Exhibit D-1, which the appellants contend is a Will. It recites that from the day of its execution the executant, Ram Dat, ceases to have any connection with Karam Chand, that Karam Chand will also have no concern with any of Ram Dat's property, and that after the death of Ram Dat and his wife Karam Chand will have no rights as a son and the other sons will perform the funeral ceremonies. We agree with the learned District Judge that the meaning was that Karam Chand was to lose all his rights in his father's property from the date of the execution of the document, and that the recital that he would not have the rights of a son after Ram Dat's death referred to rights of a religious character and not to rights in the property. The document is, therefore, not a Will and the learned District Judge is right in holding it to be inadmissible in evidence for want of registration. It is ineffectual for another reason also, namely, that while it contains no mention of a gift of the property being made to any person, it purports to alter the rule of Hindu Law regarding succession. Such an attempt to alter the mode of succession is void as held by the Privy Council in *Punna Sashi* v. *Kalithan Rai* (2).

It is next contended for the appellants that the name of Karam Chand was entered in the deed of sale as one of the vendors after the execution had been completed, and that the deed is vitiated on that account. The fact is, however, that Karam Chand is mentioned as one of the vendors in the first part of the deed, but further on, as he was not present, it was stated that he was not a party to the sale and that Dharam Chand would get the vendees satisfied so far as Karam Chand was concerned. The evidence of the scribe, Hari Ram, shows that the deed remained with him after Dharam Chand had executed it, and that a few days later Karam Chand came to his shop with the plaintiff Labhu Ram and asked him to add his name to the deed. Hari Ram said he could not do this; so Karam Chand then took the deed and made an addition to it, in which he said that Dharam Chand could not give an assurance to the vendees on his behalf, and that he (Karam Chand) would be paid his share by them. After making this addition to the deed Karam Chand put his signature to it. The deed was produced for registration on the 29th September by the vendees' guardian and Karam Chand, who was present, admitted execution and said that he should be paid Rs. 618-12-0 for his share. Dharam Chand was not present on that day, but he appeared on the 16th October and admitted execution and on the 24th the deed was registered. No objection was raised by Dharam Chand when he appeared before the Registering Officer, and we think he cannot have been ignorant of the fact that Karam Chand had signed the deed, which presumably was read out to him. The addition made by Karam Chand was not, in our opinion, a material alteration which would vitiate the document.

In the appeal by the minors, Madan Lal and Harbans Lal, it is urged on their behalf that the sale is not for their benefit, and that their guardian was their mother, Sharam Kaur, and not their brother, Dharam Chand, who was, therefore, not competent to sell their share in the shop. The learned District Judge has, however, found as a fact that the transaction was for the benefit of the minors, since the shop is a very narrow one which it would be impracticable to partition, and this finding cannot be questioned in second appeal. It is contended that the property was worth much more than the amount for which it was sold, but there is only the statement of the minors' mother in support of this contention. It appears that as the shop could not be partitioned, the parties bid for it at the suggestion of Dina Nath (P. W. No. 2) and the plaintiffs made the highest bid. On the question of guardianship also there is a finding by the District Judge, for he says that as the transaction was for the benefit of the minors the act of the *de facto* guardian cannot be impeached, and this clearly implies a finding that Dharam Chand was the *de facto*,

(2) 11 Ind. Cas. 412; 38 C. 603; 15 C. W. N. 693; 8 A. L. J. 681; 13 Bom. L. R. 451; 14 C. L. J. 1; (1911) 2 M. W. N. 403; 10 M. L. T. 361; 21 M. L. J. 1119; 38 I. A. 112 (P. C.).

guardian. It is contended for the appellants that there is no evidence on the point, but we cannot agree with this contention, as there are statements made by the plaintiffs' witnesses, Dina Nath, Kali Charan, and Dharam Chand, which justify the finding. The sale having been effected by the *de facto* guardian for the benefit of the minors must be held to be valid.

With regard to a plea that *Musammat* Sharam Kaur, the mother of defendants Nos. 1 to 3, spent Rs. 900 on re building the shop, there is nothing but *Musammat* Sharam Kaur's own statement on the point, and we are not prepared to accept it. The appeals, therefore, fail and we dismiss them with costs.

Appeal dismissed.

z. K.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL No. 130 OF 1921.

March 3, 1922.

Present:—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Coyajee.

SIMON REUBEN AND OTHERS—DEFENDANTS—APPELLANTS

versus

Haji Shaikh MAHOMED SHUSTARY—PLAINTIFFS—RESPONDENT.

Specific performance—Agreement to lease—Construction of agreement—Uncertain terms—Agreement "subject to" condition, meaning of—Agreement subject to "usual conditions", meaning of—Specific performance, whether can be enforced.

Plaintiff brought the present suit to enforce the specific performance of an agreement to let certain premises to him. The agreement ran as follows:—

"We agree to rent to Mr. Haji Shaikh Mahomed Shustary the top floor of our building under construction at Plot No. 3 Ballard Estate for a period of five years and five years' option at a monthly rent of Rs. 1,500 only from the date of the completion of the same subject to the conditions and entering into a regular lease. A deposit of three months' rent amounting to Rs. 4,500 only is paid on signing of this contract." Plaintiff obtained a decree in the Trial Court and on appeal by defendant:

Held, (1) that the document sued on was not a concluded agreement which the Court could direct to be specifically performed, because its terms were too uncertain to be reduced to a formal document, and that the document was merely the result of preliminary negotiations which defined a portion of the terms to appear in the lease as eventually settled, while it left a great many of the terms to be agreed upon thereafter; so that the final agreement between the parties depended on a regular lease which was to be executed; [p. 434, col. 2.]

(2) that the effect of the words "subject to" was to introduce a condition or proviso to the effect that the final agreement between the parties depended on a regular lease to be executed later on. [p. 434, col. 1.]

Govind Laxman v. *Hirachand Mancharam*, 53 Ind. Cas. 805; 21 Bom. L. R. 1017, *Winn* v. *Bull*, (1877) 7 Ch. D. 29 at p. 31; 47 L. J. Ch. 139; 26 W. R. 230, *Lloyd* v. *Nowell*, (1895) 2 Ch. D. 744 at p. 746; 64 L. J. Ch. 744; 13 R. 712; 73 L. T. 153; 44 W. R. 43, *Watson* v. *McAllum*, (1903) 87 L. T. 547 at p. 548, referred to.

Obiter:—Where an agreement recites that it is to be subject to "usual conditions," the meaning is that when those conditions came to be recorded, the draftsman would put down the usual covenants to be found in agreements of that nature, and that it would be open to the other side either to alter or add to those conditions, and it would be only when the draft had been finally agreed to that the terms of the lease could be ascertained. [p. 434, col. 1.]

Appeal from the decision of Mr. Justice Kajiji.

Sir *Thomas Strangman*, Advocate-General, Messrs. *Coltman* and *Campbell*, for the Appellants.

Messrs. *Inverarity*, *Mulla* and *Desai*, for the Respondents.

JUDGMENT.—The plaintiff filed this suit for specific performance of an alleged agreement with the first and second defendants to let the third floor of a building on the Ballard Estate. The agreement which he asked the Court to specifically perform is at page 1, Part III, and runs as follows:—

"We agree to rent to Mr. Haji Shaikh Mahomed Shustary the top floor of our building under construction at Plot No. 3 Ballard Estate for a period of five years and five years' option at a monthly rent of Rs. 1,500 only from the date of the completion of the same subject to the conditions and entering into a regular lease. A deposit of three months' rent amounting to Rs. 4,500 only is paid on signing of this contract."

The learned Judge has passed a decree in favour of the plaintiff, directing the defendants to specifically perform the agreement and execute in favour of the plaintiff a lease of the third floor of the building situated on the Ballard Estate for a term of five years from the date of the completion of the said building, with an option to the plaintiff for a further period of five years at a monthly rent of Rs. 1,500, such lease to contain the usual covenants.

The defendants have appealed.

GELA RAM v. DISTRICT BOARD, MUZAFFARGARH.

We are of opinion that the document, Exhibit A, could not be considered as a concluded agreement. First, it would be impossible for the parties to draw up a formal lease in accordance with this document because its terms are too uncertain to be reduced to a formal document, and, secondly, it contains the words "subject to the conditions and entering into a regular lease," which made the "entering into a regular lease" a condition precedent to the parties coming to a definite agreement. The learned Judge has considered that the words "subject to conditions" means "usual conditions", namely, conditions which have to be incorporated in a formal document when prepared by a Solicitor. But the word "usual" is not in the document, and, even if it were, it would only amount to this, that when a formal document came to be prepared, the draftsman could enter in the document the usual covenants which are to be found in leases of office buildings in Bombay, and it would be open to the other side either to alter or add to those conditions, and it would be only when the draft had been finally agreed to that the terms of the lease could be ascertained. But even if the nature of the conditions had been defined, and no room for further discussion was left, the words "subject to entering into a regular lease" would remain to be construed, and it is difficult to see how one could avoid bringing the case within the authority of *Govind Laxman* v. *Hirachand Mancharam* (1). In *Winn* v. *Bull* (2), *Lloyd* v. *Newell* (3) and *Watson* v. *McAllum* (4), it was held that the effect of the words "subject to" was to introduce a condition or proviso. It seems obvious to me, therefore, that this is a document which the Court cannot possibly direct to be specifically performed. It was merely the result of preliminary negotiations which defined a portion of the terms to appear in the lease as eventually settled, while it left a great many of the terms to be agreed upon thereafter; so that the final agreement between the parties depended on a regular lease which was to be executed. The appeal, therefore, must be allowed and the suit dismissed with costs throughout.

(1) 53 Ind. Cas. 805; 21 Bom. L. R. 1047.
(2) (1877) 7 Ch. D. 29 at p. 31; 47 L. J. Ch. 139; 26 W. R. 230.
(3) (1895) 2 Ch. D. 744 at p. 743; 64 L. J. Ch. 744; 13 R. 712; 73 L. T. 154; 44 W. R. 43.
(4) (1903) 87 L. T. 547 at p. 548.

With regard to the deposit, the defendants can apply to the Court of first instance under section 144, Civil Procedure Code. The deposit can be retained for a fortnight after the decree of this Court is sealed, in order to enable them to make that application. If the application is not made, the deposit will have to be returned.

W. C. A. & N. H. *Appeal allowed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1635 OF 1921.

January 30, 1922.

Present:—Mr. Justice Martineau.

GELA RAM—PLAINTIFF—APPELLANT

versus

THE DISTRICT BOARD, MUZAFFARGARH—DEFENDANT—RESPONDENT.

Trusts Act (II of 1882), s 77 (c)—Land given for public purpose—Trust—Public purpose, failure of—Trust, extinction of—Land, whether recoverable by donor.

Plaintiff gave a plot of land to a District Board for the purpose of being used as a connecting road to a public garden planted by the District Board; finding that the garden was not a success, the District Board sold the land on which it was planted to a third person, whereupon the plaintiff brought the present suit to recover the land given by him:

Held, that the land was held by the District Board as a trustee for the public and when the fulfilment of the purpose for which the land was given became impossible, the trust was then extinguished under section 77 (c) of the Trusts Act, and on the extinction of the trust the owner of the land was entitled to recover it [p. 435, col. 1]

Nihal Chand v. *Azmat Ali Khan*, 7 A. 362; A. W. N. (1885) 56; 4 Ind. Dec. (N. S.) 592, followed.

Second appeal from a decree of the District Judge, Multan, dated the 22nd March 1921, affirming that of the Munsif, First Class, Alipur, District Muzaffargarh, dated the 1st October 1920.

Lala *Rama Nand*, for the Appellant.

Mr. *B. D. Qureshi*, for the Respondent.

JUDGMENT.—In 1900 two gardens were planted for the benefit of the public on land belonging to the District Board in a village in the Alipur Tahsil of the Muzaffargarh District, and land was also given by some of the proprietors of the village, including the plaintiff, for the purpose of a road to connect the gardens with the main road. After some years, as the gardens did not flourish, the land on which they had been planted was sold by the District Board of Muzaffargarh to one Mangu Ram.

MAHABIR MISSER v. ASO KUAR.

The plaintiff has now sued the District Board to recover possession of the land, 1 *kanai* 8 *marlas* in area, which he gave up for the road, on the ground that the land is no longer required for the purpose for which it was given. The Courts below have concurred in dismissing the suit, holding that, as the land was dedicated permanently to the public, and the public have been using it as a way ever since, the plaintiff is not entitled to get it back. The lower Appellate Court has also found that 14 *marlas* out of *khasra* No. 704, included in the land in suit, were already a road even before the gardens were made. The plaintiff has filed a second appeal in this Court.

The learned District Judge admits that if the land in suit had been given for the purpose of planting a garden the plaintiff would have been entitled to get it back when it ceased to be required for that purpose, but he thinks that the fact that the land was given, not for the purpose of a garden, but to serve as a road to the garden, makes a difference. I fail to see any material distinction between the two cases. The essential point is that the land has ceased to be required for the purpose for which it was given.

The land in suit having been given for the purpose of being used as a road to connect the main road with the public garden, was held by the District Board as a trustee for the public, and when the land on which the gardens were planted was sold to Mangu Ram and the gardens ceased to exist, the fulfilment of the purpose for which the land in suit had been given became impossible. The trust was then extinguished under section 77 (*c*) of the Indian Trusts Act, II of 1882, and on the extinction of the trust the owner of the property is entitled to recover it. In *Nihal Chand* v. *Azmat Ali Khan* (1) where land had ceased to be used as a public highway, and was granted by the Municipality to persons who proceeded to build thereon, it was held that the owners had a good cause of action against them for the demolition of the buildings and the restoration of the property to its original condition.

I hold, therefore, that the plaintiff is entitled to get back the land, with the exception of the 14 *marlas* which are found to have been a road even before the planting of the gardens.

(1) 7 A. 362; A. W. N. (1885) 56; 4 Ind. Dec. (N. S.) 592.

I do not agree with the appellant's contention that the District Judge has made a mistake with regard to the 14 *marlas*, for the entry in the Settlemnt Record for 1900 supports his finding.

I accordingly accept the appeal, reverse the decrees of the Courts below, and give the plaintiff a decree for possession of 14 *marlas*, namely, 8 *marlas* out of *khasra* No. 704 2 and 6 *marlas* out of *khasra* No. 707-2. The defendant will pay half of the plaintiff's costs throughout.

W. C. A.

Appeal accepted.

PATNA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 203 AND 204 OF 1920.

March 27, 1922.

Present:—Mr Justice DAS.

MAHABIR MISSER—PLAINTIFF—APPELLANT

versus

Musammat ASO KUER AND OTHERS—DEFENDANTS—RESPONDENTS.

Appeal, second—Misreading of evidence—Misconstruction of document not relating to title—Point of law.

The misreading or misconstruction of documents, not documents of title, is not a point of law which would justify interference in second appeal. [p. 436, col. 1]

Appeal.

Mr. *Murari Prasad*, for the Appellant.

Mr. *Harihar Prasad Singh*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit under section 105 of the Bengal Tenancy Act for correction of certain entries made in the finally published Record of Right. We are in this appeal concerned only with two plots, *viz*, plot No. 1140 and plot No. 1138; plot No. 1140 being a house and plot No. 1138 being an orchard. The Court of first instance found in favour of the plaintiff in respect of these two plots of land. The lower Appellate Court, however, has reversed the decision of the Court of first instance.

The plaintiff claims as the *chela* of Janak Das in whose favour, according to him, there was a grant of certain lands by the predecessors in-title of the defendants. Both the Courts have come to the conclusion that the plaintiff is not the *chela* of Janak Das. That finding is a finding

of fact which is binding on me in second appeal. But it is urged on behalf of the appellant that the plaintiff having been in possession of these two plots for some years and having pulled down the old building and built a new house on plot No. 1140 he is entitled to retain possession of these two plots of land. According to him there is no such thing as permissive possession under the Bengal Tenancy Act and that as he was a settled *raiyat* of the village he acquired an occupancy right to these plots by being allowed by the landlord to retain possession of them. Now, in my opinion, the appellant cannot be regarded as a tenant at all. A 'tenant' as defined in the Bengal Tenancy Act "is a person who holds land under another person and is, or but for a special contract would be, liable to pay rent for that land to that person." The learned Judge in the Court below has come to the conclusion that the plaintiff did not hold any land under the defendants and that it has not been suggested that there was any special contract between the plaintiff and the defendants. The plaintiff would, therefore, not be liable to pay any rent for that land to the defendants. The Bengal Tenancy Act is in no sense exhaustive. It may be that the plaintiff, who looked after Janak Das during his lifetime, was allowed by the defendants to retain possession to these plots of land. As regards the case of the plaintiff, that he built the house on plot No. 1140, the lower Appellate Court has found against him. The learned Vakil for the appellant contends that the learned Judge in the Court below misread the documents which were filed on his behalf. That may be so but we are not in second appeal entitled to reverse the decision of the lower Appellate Court merely on the ground that it misread the evidence that was adduced on behalf of the plaintiff. The documents, upon which the learned Vakil for the appellant rely, are not documents of title and accordingly misconstruction of these documents is not a point of law which would justify this Court in interfering with the decision of the Court below.

In my opinion the appeal involves questions of facts and as these facts have been decided against the appellant by the learned Judge in the Court below I must dismiss this appeal and dismiss it with costs. The analogous appeal is not pressed. That appeal, *viz.*, Second Appeal No. 204 of 1920, must also be dismissed but without costs.

S. D. *Appeals dismissed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2198 OF 1917.

May 7, 1921.

Present :— Mr. Justice Abdul Raoof and Mr. Justice Harrison.

BHAGWAN SINGH AND OTHERS — DEFENDANTS — APPELLANTS

versus

NIRANJAN SINGH — PLAINTIFF, RODA AND OTHERS — DEFENDANTS — RESPONDENTS.

Appeal, second—Finding of fact—Erroneous finding based on evidence—Finding, whether may be considered as no finding in fact—High Court, power of, to interfere.

The High Court will not, in second appeal, interfere with an erroneous finding of fact arrived at by an Appellate Court, if that Court had before it evidence in support of the finding. Nor can the finding in such a case be looked upon as amounting to no finding at all. [p 438, col. 2.]

Durga Chowdhrani v *Jewahir Singh Chowdhari*, 18 C. 23; 17 I. A. 124; 5 Sar. P. C. J. 560; 9 Ind. Dec. (N. S.) 16, followed.

Second appeal from a decree of the District Judge, Ludhiana, dated the 13th June 1917, reversing that of the Subordinate Judge, Second Class, Ludhiana, dated the 26th February 1917.

Bakhshi *Tek Chand*, for the Appellants.

Lala *Faqir Chand*, for the Respondents.

JUDGMENT.—This was a suit of the usual type for a declaration to the effect that the sale deed dated the 12th July 1911 executed by the defendants Nos. 1 to 3 in respect of land measuring 9 *bighas* 10 *biswas* and 12 *biswansi* situate in the village of Hiswal in favour of the defendants Nos. 4 to 5 for Rs. 4,000 shall not affect the interests of the plaintiff's reversioners after the death of the vendors, because the land sold was ancestral property and the transfer was made without consideration and necessity. The plaintiff Niranjan Singh is the son of Roda, one of the vendors. The ancestral character of the property was admitted, but consideration and necessity were pleaded. The defend-

ants also pleaded that they had sunk a well on the land in dispute and were entitled to be re imbursed for the costs incurred in the case of the alienation being set aside. The major portion of the consideration for the sale consisted of amounts due on previous mortgages. The Court of first instance found that with the exception of two items of Rs. 350 and Rs. 200, total Rs. 550 the rest of the consideration and the necessity for the alienation had been established. The portion of the consideration unproved being less than 1/7th of the whole consideration, it held that it was not a case in which the sale should be converted into a mortgage. The suit was accordingly dismissed. Both parties appealed; the plaintiff reiterating his objections as to the reality of the consideration and the existence of necessity for the alienation and the defendants objecting to the order of the Trial Court disallowing their costs. The lower Appellate Court after considering the evidence with respect to the different items of the consideration came to the conclusion that only Rs. 2,975 had validly been established and necessity for the alienation to that extent only had been made out. The plaintiff's appeal was accordingly accepted with costs, sale transaction was converted into a mortgage and the plaintiff was authorised to get back the property on payment of the above mentioned amount to the defendants vendees, Bhagwan Singh and Harnam Singh, after the death of the vendors. Out of the unsecured debts the lower Appellate Court disallowed three items, namely, Rs. 105, Rs. 95 and Rs. 350. Out of the secured debts it disallowed the item of Rs. 475 said to have been due to one Nikka under an oral mortgage, the mutation in respect of which was sanctioned on the 22nd March 1911. Altogether Rs. 925 were said to be due to Nikka, namely, Rs. 450 under a registered mortgage and Rs. 475 under an alleged oral mortgage. The item due under the registered mortgage has been allowed by the lower Appellate Court, but that said to be due under the oral mortgage has been disallowed. The plaintiff-appellant in his memorandum of appeal to this Court challenges the findings of the lower Appellate Court in respect of all the four items which have been disallowed by that Court. It has been strongly contended by Mr. Tek Chand that the finding in respect of Rs 475 has been recorded by the lower Appellate Court without taking into consideration the evidence produced by the defendant. He puts his case thus:—that dealings between the vendors and Nikka commenced in July 1907, that in July 1908 and July 1909 balances were struck in the account book of Nikka and were thumb-marked by the vendors, that in July 1910 Rs. 407-11-0 were shown as being due, that on the 9th October 1910 the three vendors appeared before the Revenue Court and got the entry with respect to the alleged oral mortgage made and that the mutation as to the said mortgage was sanctioned on the 22nd March 1911. The learned Vakil further pointed out that Nikka and his son Parema were examined as witnesses to prove this oral mortgage, and that in addition to this Daulat Ram, the writer of the account-book, was also called to prove the entries in the *bahi* and also the thumb marks of the vendors. Roda, father of the plaintiff, was also called as a witness. The learned Vakil contended that if the lower Appellate Court had taken into consideration all this evidence, it could have come to no other conclusions than that Rs. 475, were due to Nikka and that the alleged oral mortgage represented a genuine transaction, and that consequently both consideration and necessity had been established in respect of Rs. 475. Now the finding of the lower Appellate Court in respect of this item is recorded in the following words:—

"Out of the mortgage-money, the item of Rs. 475 seems to be a fictitious one. No oral agreement is satisfactorily proved. No payment is established and no necessity is proved. This item, though it might have been paid by the vendee, is not chargeable on the property as he does not seem to have made proper enquiry as to its being a just antecedent debt. The very report of the *Patwari* makes it suspicious."

It is impossible to say that, in arriving at this conclusion, the learned Judge of the Court below did not consider the evidence adduced on behalf of the defendant to establish this item and the necessity for the transaction. It is quite possible that, if we were to examine the evidence on the point, we may arrive at a different conclusion from that arrived at by the lower Appellate Court, but the question is whether it is open to us to adopt this course. The second appeal section 584 of the old Code of Civil

Procedure was the subject of consideration by their Lordships of the Privy Council in the case of *Durga Chowdhrani* v. *Jewahir Singh Chowdhri* (1), and their Lordships at page 29 made the following weighty pronouncement as to the power of a High Court to interfere with the findings of fact recorded by the first Appellate Court :—

"The lower Appellate Court, it was said, had clearly misapprehended the effect of the Settlement proceedings in 1-64; undue weight had been attached to the registration in Beni Singh's sole name; *the oral evidence had been wholly discarded*; sufficient weight had not been given to the important statement in Beni Singh's petition, or to the separate dealings of his two sons; the Court had thus been led to misconceive the case entirely, and to find for the defendant when the finding should have been for the plaintiff.

"It would be an unprofitable task to inquire how far this contention is well founded, because their Lordships cannot accept the rulings of the High Courts of Calcutta and Allahabad as a correct statement of the law. Nothing can be clearer than the declaration in the Civil Procedure Code that no second appeal will lie except on the grounds specified in section 584. No Court in India or elsewhere has power to add to or enlarge those grounds. It is always dangerous to paraphrase an enactment, and not the less so if the enactment is perhaps not altogether happily expressed. Their Lordships will, therefore, not attempt to translate into other words the language of section 584. It is enough in the present case to say that an erroneous finding of fact is a different thing from an error or defect in procedure, and that there is no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact, however gross or inexcusable the error may seem to be. Where there is no error or defect in the procedure, the finding of the first Appellate Court upon a question of fact is final, if that Court had before it evidence.....in support of the finding."

We are asked in this case to do exactly what their Lordships of the Privy Council have said we cannot do. Mr. Tek Chand admits it frankly that he is impugning a finding of fact but says that he has a right to do so as the evidence adduced by his clients has not been considered and due weight has not been given to it. It is possible that the finding is erroneous and the error committed is gross and inexcusable but, have we the jurisdiction to correct the error by recording a finding of fact ourselves? It is obvious that we have no jurisdiction to do so. In order to get round this finding of fact Mr. Tek Chand has earnestly asked us to hold that the finding recorded by the lower Appellate Court is no finding at all and that, therefore, we can look into the evidence and record a finding ourselves. If this course be open to us to adopt, a High Court may assume jurisdiction to interfere with the finding of fact in any case by simply remarking that the finding of the lower Appellate Court is no finding at all. In our opinion to adopt the course suggested would be highly dangerous and opposed to the spirit of the injunctions laid down by their Lordships of the Privy Council in various rulings. The findings with regard to the remaining items disallowed by the lower Appellate Court have not been seriously challenged. The result is, that the decree of the lower Appellate Court must be upheld. The question of the compensation for improvements is not seriously pressed, nor does it arise at this stage. We accordingly dismiss the appeal with costs.

W. C. A.

Appeal dismissed.

(1) 18 C. 23; 17 I. A. 122; 5 Sar. P. C. J. 560; 9 Ind. Dec. (N. S.) 16.

PATNA HIGH COURT.

CIVIL REVISION No. 20 OF 1922.

May 10, 1922.

Present:—Mr. Justice Coutts and Mr. Justice Das.

Sheikh NAZIR HUSSAIN—PETITIONER

versus

MUHAMMAD EJAZ HUSSAIN—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. XXI, r. 58, ss. 47, 151—Objection application headed under ss. 47, 151—Appeal.

BISHIN DATT v. KRISHEN DATTA.

An objection by the judgment-debtor that the property, against which the decree-holder has filed an application to execute his decree, is *waqf* property, is an objection under O. XXI, r. 58, Civil Procedure Code, even if the objection petition is headed as an application under sections 47, 151, Civil Procedure Code, and an order allowing such objection petition is not appealable.

Kartick Chandra Ghose v. *Ashutosh Dhara*, 12 Ind. Cas. 163; 39 C. 298; 14 C. L. J. 425; 16 C. W. N. 26 and *Upendra Nath Kalamuri* v. *Kusum Kumari Dasi*, 27 Ind. Cas. 323; 42 C. 440; 19 C. W. N. 520; 20 C. L. J. 485, referred to.

Appeal from a decision of the District Judge, Muzaffarpore.

Mr. *Sant Prasad*, for the Petitioner.

Mr. *Syed Muhammad Tahir*, for the Opposite Party.

JUDGMENT.

COURTS, J.—This is an application in revision arising out of an execution matter. It appears that Ejaz Hussain obtained a decree against Nazir Hussain. He filed an application to execute his decree against certain property in possession of the judgment debtor, Nazir Hussain. Nazir objected that the property was *waqf* property. This objection was allowed by the Court of first instance but on appeal to the District Judge that order has been set aside and execution has been ordered to proceed against the property in respect of which the objection was made.

The application made by the judgment-debtor to the Munsif, that the property which had been attached was *waqf* property, was headed as being an application under sections 47 and 151 of the Civil Procedure Code. It is contended, however, that the application was not one under section 47, Civil Procedure Code, but was an application under O. XXI, r. 58, and that consequently no appeal lay to the District Judge and the order passed by him is without jurisdiction. The only question for consideration now is whether the application is one under section 47, Civil Procedure Code, or one under O. XXI, r. 58. To my mind there can be no doubt that the application was in fact one under O. XXI, r. 58; and if authority be needed in support of this view it is afforded by the decisions in the cases of *Kartick Chandra Ghosh* v. *Ashutosh Dhara* (1) and *Upendra Nath Kalamuri* v. *Kusum Kumari Dasi* (2). The contention of the petitioner, that no appeal lay to the District Judge, must, therefore, prevail. The order of the learned District Judge is without jurisdiction and must be set aside. I would accordingly allow this application and set aside his order. There will be no order as to costs.

DAS, J.—I agree.

S. D.

Application allowed.

(1) 12 Ind. Cas. 163; 39 C. 298; 14 C. L. J. 425; 16 C. W. N. 26.

(2) 27 Ind. Cas. 328; 42 C. 440; 19 C. W. N. 520; 20 C. L. J. 485.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 2780 OF 1920.

June 10, 1921.

Present:—Mr. Justice Martineau.

BISHIN DATT AND ANOTHER —PLAINTIFFS—APPELLANTS

versus

KRISHEN DATTA AND ANOTHER —DEFENDANTS—RESPONDENTS.

Specific Relief Act (I of 1877), s. 42—"Birt," right to, whether property—Suit for possession of "birt," whether maintainable.

The so-called right on the part of a "*prohit*" to "*birt*" is, in law, no right at all and does not amount to "property" for the purposes of section 42 of the Specific Relief Act It is a mere *spes successionis* or contingent right, which is dependent for its existence on the pleasure of the "*jajmans*"

Gurdas v. *Bhag*, 11 Ind Cas. 231; 96 P. R. 1911; 148 P. W. R. 1911; 216 P. L. R. 1911, followed.

A suit, therefore, for possession of "*birt*" is not maintainable.

Second appeal from the decree of the District Judge, Kangra, dated the 30th August 1920, affirming that of the Munsif, First Class, Kangra, dated the 24th June 1920.

Lala *Jagan Nath*, for the Appellants.

Mr. *M. L. Puri*, for the Respondents.

JUDGMENT.—The parties are Brahmans, and the plaintiffs sue for possession of "*birt*" which their collateral Ghasi Ram sold, challenging the validity of the sale.

The lower Courts have dismissed the suit, finding (1) that the right to the "*birt*" is not proved to be ancestral, and (2) that the suit

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does not lie. The plaintiffs have filed a second appeal.

The finding by the lower Appellate Court that the right to the "*birt*" is not proved to be ancestral is alone sufficient for the dismissal of this appeal, as the finding is one of fact.

The decision that the suit does not lie is also correct, it having been held in *Gurdas* v. *Bhag* (1) that the so-called right on the part of a "*prohit*" to "*birt*" is, in law, no right at all and does not amount to "property" for the purposes of section 42 of the Specific Relief Act, but it is a mere *spes successionis* or contingent right, which is dependent for its existence on the pleasure of the "*jajmans*".

The appeal is dismissed with costs.

W. C. A.

Appeal dismissed.

(1) 11 Ind. Cas. 231; 96 P. R. 1911; 143 P. W. R. 1911; 216 P. L. R. 1911.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES Nos. 2586 TO 2603 OF 1919.

February 27, 1922.

Present:—Mr. Justice Greaves and Mr. Justice Ghose.

NARAPAT SINGH—PLAINTIFF—APPELLANT

versus

Raja BHUPENDRA NARAYAN SINGH—DEFENDANT—RESPONDENT.

Chaukidari chakran *lands—Resumption by Government*—Putnidar's *right to retain possession on payment of the revenue assessed*—Zemindar, *whether entitled to additional rent*—Putni *contract—Bengal* Village Chaukidari *Act (VI of 1870), s* 51.

On resumption and settlement of *chaukidari chakran* lands a *putnidar* is entitled to obtain possession of the same on payment of the additional revenue assessed by Government and is not liable to pay additional rent in respect of these lands to the *zemindar*, if those lands were included in the original *putni* lease granted to him. [p. 443, col. 1.]

Ranjit Singh Bahadur v. *Kali Dasi Debi*, 40 Ind Cas. 981; 44 C. 841; 21 C. W. N. 609; 32 M. L. J. 585; 15 A. L. J. 860; 25 C. L. J. 499; 19 Bom. L. R. 462; 19 M. W. N. 479; 6 L. W. 101; 2 P. L. W. 1; 22 M. L. T. 489; 44 I. A. 117 (P. C.) and *Ranjit Singh Bahadur* v. *Maharaj Bahadur Singh*, 48 Ind. Cas. 262; 46 C. 173 at p. 180; 16 A. L. J. 964; 35 M. L. J. 728; 23 C. W. N. 198; 25 M. L. T. 8; 29 C. L. J. 19; 1 U. P. L. R. (P. C.) 23; 21 Bom. L. R. 507; 10 L. W. 83; 45 I. A. 162 (P. C.), followed.

Bejoy Chand v. *Krishna Chandra*, 66 Ind. Cas. 357; 34 C. L. J. 275, referred to.

Upon the resumption of *chaukidari chakran* lands by Government the rights of the *putnidar* are those conferred on him by the estate and interest created by the *putni* lease; and it is this right which is kept alive by section 51 of the Bengal Village Chaukidari Act, VI of 1870. Consequently the *zemindar* cannot claim to vary the *putni* by enhancing the rent in respect of lands which were included in the original demise even though the profits of those lands were not taken into account in fixing the rent. [p. 443, col. 1.]

Appeal against a decree of the District Judge, Birbhum, dated the 13th September 1919, affirming a decision of the First Munsif at Rampurhat, dated the 30th September 1910.

FACTS appear from the judgment.

Mr. *B. Chakrabarty*, (with him Babus *Brojlal Chakrabarty* and *Sunil Kumar Bose*), for the Appellant.—The point is this. There was *putni* grant of five *mauzas* in favour of the appellants by a document of 1853. Certain *chaukidari chakran* lands were included within the *putni*, which were resumed by Government under the provisions of Bengal Village Chaukidari Act, VI of 1870. It is not disputed that the lands in question were included in the original *putni patta*. The sole question is whether the *putnidar* in obtaining possession is liable to pay anything more than the Government revenue assessed on these lands. The *putnidars* were receiving services from the *chaukidars* who held these lands and whose duties were partially public and partially in favour of the *putnidars* who took the place of the Zemindars.

The question in each case is mainly a question of contract. Reads the *putni* grant. It is abundantly clear that nothing was reserved to the Zemindar. The first case to which I would draw your Lordships' attention is that reported in *Nalinakhya Basu* v. *Bijoy Chand Mahatap* (1). The next case on which I rely is *Monohar Mukherjee* v. *Kali Das Nandi* (2). Reads the argument of the Vakil for the appellants. Unless the right to additional rent is reserved the Zemindar has no right to it. The Zemindar is not entitled to anything more than what has been assessed upon resumption. Refers to *Nafar Chandra Chandra* v. *Bejoy Chand* (3), *Kasi*

(1) 40 Ind. Cas. 395.
(2) 47 Ind. Cas. 840.
(3) 44 Ind. Cas. 526; 22 C. W. N. 487.

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Newaz Khoda v. *Ram Jadu Dey* (4). *Hari Narain Mozumdar* v. *Mukund Lal Mundal* (5) has been distinguished in *Kazi Newaz Khoda* v. *Ram Jadu Dey* (4). Under the Statute as well as under the grant I am bound to pay the additional revenue but nothing more. There is a case in *Khondkar Mehdi Hossein* v. *Umesh Chandra* (6) which points out that the case in *Hari Narain Mozumdar* v. *Mukund Lal Mundal* (5) does not lay down any general principle. The matter must depend on the contract between the parties and the course of dealing with the property. Refers to *Rajendra Nath Mukerjee* v. *Hira Lal Mukerjee* (7), *Gopendra Chandra Mitter* v. *Taraprosanna Mukerjee* (8).

Babu *Mahendranath Roy* (with him Babus *Hemendranath Sen* and *Priya Sankar Majumdar*), for the Respondent.—The question before your Lordships is a very important one. The Courts here have laid down certain general principles governing cases of this character. The assets upon which the *putni* rent is assessed is based upon the amount of rent collected from the tenants *minus* the collection charges. The first question is who is entitled to the lands. The law on the point is settled. The next question is upon what terms is the *putnidar* entitled to the lands.

[GHOSE, J.—If unless expressly excluded the *chakran* lands pass to the *putnidar*, then on what principle is the Zamindar entitled to rent?]

The reason of the decision on the question of the passing of the *chakran* lands is stated in *Ranjit Singh Bahadur* v. *Kali Dasi Debi* (9).

The questions, rises, is the *putnidar* entitled to hold the *chakran* lands without payment of additional rent? Two views are possible—either the contract was contract or if the rent was fixed with reference to the income derived, the *putnidar* would be entitled to hold it only on payment of additional rent.

[GHOSE, J.—Can the Court make a new contract for the parties?]

It would not be making a new contract but interpreting the contract. And your Lordships cannot lightly brush aside a current of decisions in my favour beginning with *Hari Narain Mozumdar* v. *Mukund Lal Mundal* (5). The contract cannot hold good in respect of lands whose assets were not taken into account in settling the rent. The reasonable view is that the *putnidar* is liable to pay a share of the profits to the Zamindar. The case will not be a case of variation of a contract but will cover a case not contemplated by the parties, so far as the payment of rent is concerned. Refer to *Kazi Newaz Khoda* v. *Ram Jadu Dey* (4), *Ranjit Singh Bahadur* v. *Maharaj Bahadur Singh* (10). I am not arguing that the *putni* grant was a contract to assign and not an assignment. What I am arguing is that the terms of the assignment do not cover a contingency like the present. The question is when the *putni* rent was fixed was the matter in the contemplation of the parties. The highest judicial authority has pronounced that the resumption of the *chaukidari chakran* lands could not have been in the contemplation of the parties at the time of the *putni* grant. Reads *Ranjit Singh Bahadur* v. *Kali Dasi Debi* (9). The question of the liability of the *putnidar* to pay rent in respect of the resumed lands stands quite independent of the assignment of those lands. On the same principle as these lands are liable to assessment of revenue, they are also liable to assessment of rent. Reads *Hari Das Gosvami* v. *Nistarini Gupta* (11), *Rajendra Nath Mukerjee* v. *Hira Lal Mukerjee* (7), *Gopendra Chandra Mitter* v. *Taraprasanna Mukerjee* (8). Refers to *Khondkar Mehdi Hossein* v. *Umesh Chandra* (6). The position is summed up in *Bejoy Chand* v. *Krishna Chandra* (12). Upon precedent as well as on principle it is clear that the Zamindar has the right to claim a portion of the rent realised by the *putnidar* from the tenants over and above the revenue payable to the *chaukidari chakran* fund.

(4) 34 C. 109 at p. 111; 5 C. L. J. 33; 11 C. W. N. 201.
(5) 4 C. W. N. 814.
(6) 41 Ind. Cas. 964; 27 C. L. J. 494; 45 C. 685.
(7) 7 Ind. Cas. 554; 14 C. W. N. 935.
(8) 7 Ind. Cas. 790; 14 C. W. N. 1019; 37 C. 593.
(9) 40 Ind. Cas. 981; 44 C. 84; 21 C. W. N. 609; 32 M. L. J. 65; 15 A. L. J. 390; 25 C. L. J. 490; 19 Bom. L. R. 432; (1917) M. W. N. 459, 6 L. W. 101, 2 P. L. W. 1; 22 M. L. T. 489; 44 I. A. 117 (P. C.).
(10) 48 Ind. Cas. 262; 46 C. 173 at p. 180; 16 A. L. J. 984; 35 M. L. J. 728; 23 C. W. N. 198; 25 M. L. T. 8; 29 C. L. J. 133; 1 U. P. L. R. (P. C.) 23; 21 Bom. L. R. 506; 10 L. W. 8; 45 I. A. 162 (P. C.).
(11) 5 C. L. J. 30.
(12) 66 Ind. Cas. 357; 34 C. L. J. 275.

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Mr. *B. Chakrabarty* in reply.—Until the two decisions of the Privy Council in *Ranjit Singh Bahadur* v. *Kali Dasi Debi* (9) and *Ranjit Singh Bahadur* v. *Maharaj Bahadur Singh* (10) came out there apparently was a considerable amount of doubt with regard to the word 'contract' used in section 51 of Bengal Village Chaukidari Act, VI of 1870. My short point is this. The title to the land passed to the Zamindar at the time of the Permanent Settlement. Confusion has arisen by reason of the idea that there was an acquisition to the Zamindar. Under the Statute it was only clogged with liability to further assessment. The land which was transferred remained the land of the Zamindar. If there was no reservation in the *putni* grant the *putnidar* gets into the shoes of the Zamindar. Read *Ranjit Singh Bahadur* v. *Maharaj Bahadur Singh* (10). There was nothing unexecuted under the *putni* contract. It was a real right conferred upon the *putnidar*. It has to be enforced not by a suit for specific performance of contract but by a suit for possession. Reads *Ranjit Singh Bahadur* v. *Kali Dasi Debi* (9). The confusion has been caused by the expression "transfer after resumption," as if on resumption the Government became owner who transfers to the Zamindar. It is not a new right. It is a confirmation and continuation of an old right created at the time of the Permanent Settlement.

JUDGMENT.—These appeals are preferred by the plaintiff against decisions of the District Judge of Birbhum affirming decision of the First Munsif at Rampurhat.

The suits were brought to recover *khas* possession of certain resumed *chaukidari chakran* lands together with mesne profits. The plaintiff claimed these lands as included in the *putni taluk* granted to his predecessors-in-interest by the first defendant, who is the Zamindar, by a *putni patta* of the year 1853, the Bengali date being the 29th Kartik 1260. It is not disputed that the lands in question were included in the *putni patta* but it is said that these lands were not taken into account in settling the rent payable under the *patta* and that consequently the Zamindar, the respondent, is entitled to a share of the rent derived from settling the resumed lands with tenants. No dispute arises with regard to the payment of the Government revenue which has been assessed on the resumed lands and which, under the terms of the *putni patta*, is payable by the appellant. It is conceded that, from the time of the creation of the *putni* until the lands were resumed, the *chowkidars* rendered private personal service to the *patnidar* and not to the Zamindar.

The First Court declared the appellant's title to the lands in suit and decreed *khas* possession on condition that the appellant paid to the Zamindar in respect of the resumed lands an additional rent to that named in the *putni patta*. The appellant was awarded mesne profits. The District Judge affirmed this decision and remanded the cases to the First Court (1) for determination of the conditions and terms under which the *patnidar* was to hold the lands under the Zamindar, (2) for the ascertainment of mesne profits.

The appellant resists the Zamindar's right to share in the rents and profits derived from the settlement of the resumed lands, firstly, on the ground that the lands are comprised in the *putni patta* and that consequently the rents and profits are his, secondly, on the ground that these rents and profits must be taken as the equivalent of the personal service formerly rendered to him by the *chaukidars* prior to the resumption.

The Zamindar respondent, as already stated, claims a share of the rents and profits as he says that these lands were never taken into account when the *jama* was fixed and he relies on a long series of decisions, to which we have been referred, as establishing the Zamindar's right to a share of the rents and profits, in addition to the amount payable to the *chaukidari* fund under the provisions of Act VI of 1870, unless it can be shown that the lands were taken into account in fixing the *jama* when the *patni* was created. These decisions have recently been considered and followed in the case of *Bejoy Chand* v. *Krishna Chandra* (12) which was decided in December 1920, and no useful purpose would, we think, be served by going through them again. They undoubtedly do support the contention urged before us on behalf of the Zamindar respondent and it is useless to suggest that they are in the main distinguishable from the causes before us. But, with the exception of the case of *Bejoy Chand* v. *Krishna Chandra* (12) above referred to, they were all decided prior to the decisions of the Judicial Committee in *Ranjit Singh Bahadur* v. *Kali Dasi Debi* (9)

and *Ranjit Singh Bahadur* v. *Maharaj Bahadur Singh* (10). By the first of these decisions it was for the first time finally established that the Zamindar at the time of the Permanent Settlement obtained or retained in the *chaukidari chakran* lands situate within the territorial boundaries of a village comprised in his Zemindari an interest capable of being made the subject of a *patni* lease and in *Ranjit Singh Bahadur* v. *Maharaj Bahadur Singh* (10) *ubi supra*, where the nature of the *patnidar's* rights in resumed *chaukidari chakran* lands was considered, it was laid down that upon the resumption of such lands by Government the rights of the *patnidar* were those conferred on him by the estate and interest created by the *patni* lease and that it was this right which was kept alive by section 51 of Bengal Act VI of 1870.

By the joint effect of these decisions the *patnidar's* interest in such lands if, as here, they are comprised in his *patni* is derived from the *patni* itself and from nothing else. This being so it is difficult to see on what principle the Zemindar can claim to vary the *patni* by enhancing the rent in respect of lands which were included in the original demise even assuming that the profits of these lands were not taken into account in fixing the rent. The learned Vakil for the respondent has not been able to suggest to us any principle, although by way of analogy he prays in aid the assessment by Government of additional revenue in respect of these lands. This analogy, however, cannot assist him as the Government's right to make such assessment is derived from the provisions of Act VI of 1870 and is, therefore, a right conferred by Statute.

Under the circumstances stated above we do not think that the decisions relied on by the respondent Zamindar can be taken now to be correct and the case of *Bejoy Chand* v. *Krishna Chandra* (12), (*ubi supra*), admittedly only follows these decisions. We think it would not be correct to say that the *patnidar* is only entitled to obtain possession on terms and that the Court is to assess rent on these lands when it has been held that his title accrued from the time of the *patni* settlement. We agree with the decisions in the cases of *Nalinakhya Basu* v. *Bijoy Chand Mahatap* (1) and *Monohar Mukherjee* v. *Kali Das Nandi* (2). In the result these appeals succeed and we set aside that portion of the decision of the District Judge which remands the cases to the original Court to determine the conditions and terms under which the *patnidar* is to hold the lands under the Zamindar. The rest of the remand order will stand. That portion of the Munsif's decree which imposes on the appellant, as a condition of obtaining *khas* possession, the payment of additional rent to the Zemindar respondent will be set aside. The appellants will be entitled to their costs in this Court and in the lower Appellate Court.

N. H. & B. N.

Order accordingly.

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No. 1384 OF 1920.

April 5, 1921.

Present:—Sir Shadi Lal, Kt., Chief Justice, and Mr. Justice Wilberforce.

Bawa PARDUMAN SINGH—JUDGMENT-DEBTOR—APPELLANT

versus

THE PIONEER JEWELLERY COMPANY, LIMITED, IN LIQUIDATION, AND OTHERS—DECREE-HOLDERS—RESPONDENTS.

Companies Act (VI of 1882), s. 150, 166—Payment order, assignee of, right to enforce.

A person to whom the Liquidator of a Company has transferred a payment order made by the Court under section 150 of the Companies Act, 1882, against a contributory, is entitled to invoke the summary jurisdiction of the Court for the purpose of recovering the money due from the latter; the fact that the Company has been finally dissolved would not prevent the assignee from seeking relief from the Liquidation Court, and render it necessary for him to bring an action for the recovery of the money.

Miscellaneous first appeal from an order of the District Judge in charge of Liquidation Work, Lahore, dated the 8th June 1920.

Lala *Har Gopal*, for the Appellant.

Mr. *S. K. Mukerji*, for the Respondents.

JUDGMENT.—This appeal arises out of proceedings in the winding-up of the Pioneer Jewellery Company; and the questions

of law, upon which we are invited to express our opinion, are:—

(1) Whether a person, to whom the Liquidator has transferred a payment order made by the Court under section 150 of the Indian Companies Act, VI of 1882, against a contributory, is entitled to invoke the summary jurisdiction of the Court for the purpose of recovering the money due from the latter; and

(2) Whether the circumstance that the Company has been finally dissolved prevents the assignee from seeking relief from the Liquidation Court and renders it necessary for him to bring an action for the recovery of the money.

The District Judge has answered both the questions in favour of the assignee, and after hearing arguments we are not prepared to dissent from the view taken by the learned Judge.

As regards the first question, it is to be remembered that the Court had already passed a payment order in favour of the Liquidator, and it is conceded that the latter would have been entitled to recover the money from the contributory by asking the Court to enforce that order in the same manner in which a decree of the Court made in a suit can be enforced, *vide* section 165 of the Indian Companies Act. It is true that a payment order is not a decree, but that section provides that it is to be executed in the same manner in which a decree can be executed. There is no valid reason why the person, to whom the Liquidator has assigned a payment order, should not stand in the shoes of his assignors, and should not avail himself of the remedy which was open to the latter. Whether a person who purchases the assets of a Company before any payment order has been made in respect of those assets should be entitled to the summary remedy prescribed by the aforesaid section is a question which does not arise in this case; and we do not, therefore, consider it necessary to decide whether the judgment in *Doaba Bank* v. *Kundan Lal* (1) which answers this question in the negative is a correct exposition of the law on the subject. As pointed out above, the respondent in this case has got a payment order, and he asks the Court to exercise in his favour the same jurisdiction as it would have exercised at the instance of his predecessor-in title. No cogent reason has been shown for placing the assignee in a worse position.

The second question is not free from difficulty. It is true that section 159 requires the Court to pass an order of dissolution when the affairs of the Company have been completely wound up, and there is authority for the view that unless and until the order of dissolution has been set aside, it prevents any proceedings being taken against the promotors, directors or officers of the Company in respect of any misfeasance or breach of trust, or a creditor proving a debt against the Company, *vide*, Halsbury's Laws of England, Volume V, page 567. But in the case before us the Liquidation Court has already passed an order of payment, and if that Court is in existence, there is nothing in the law to prevent it from enforcing its own order. Though the Company is defunct, the Court has not ceased to exist; and we cannot, therefore, hold that the learned District Judge had no jurisdiction to enforce the payment order made by him.

For the aforesaid reasons we dismiss the appeal with costs.

W. C. A. *Appeal dismissed.*

(1) 59 Ind. Cas. 588; 18 P. W. R. 1921; 3 L. L. J. 80.

PRIVY COUNCIL.

APPEAL FROM THE ALLAHABAD HIGH COURT.

January 24, 1922.

Present:—Lord Buckmaster, Lord Atkinson, Lord Carson, Mr. Ameer Ali and Sir Lawrence Jenkins.

ARAB ALI KHAN *alias* ASHAN ALI KHAN—APPELLANT

versus

MAHMUD ALI KHAN *alias* AGHA ALI KHAN AND ANOTHER—RESPONDENTS.

Benami—*Registered partition-deed — Co-sharers—Burden of proof Limitation and adverse possession—Limitation Act (IX of 1908), Sch. I, Arts. 144, 144.*

The burden of proving that the grant of a share to a person by a registered partition-deed was *benami* for another lies on the person alleging it. [p. 451, col. 1.]

To prove dispossession and adverse possession against such person clothed with all the insignia of beneficial ownership, very strong and reliable evidence should be required. Limitation against a co-sharer does not begin to run until his title is openly denied. [p. 451, cols. 1 & 2.]

Appeal from a decree of the Allahabad High Court, dated the 10th November 1915, reversing that of the Additional Subordinate Judge, Cawnpore.

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FACTS.—The appellant instituted the present suit for declaration of his title and for possession, if the Court thought that he was not in possession. The Trial Judge decreed his claim but the High Court dismissed his suit on the ground that he failed to prove satisfactorily that he was in receipt of rents or profits within twelve years prior to suit. Hence the present appeal.

The facts are fully set out in the judgment of the Judicial Committee.

Mr. *Narasimham*, for the Appellant.—The appellant bases his title upon the registered partition-deed of 1889. In pursuance of that deed, the appellant's name was entered in the revenue registers on the joint application of all the parties to the deed. This entry was continued and not challenged till 1904 when the respondent applied to have the appellant's name struck out from the revenue registers. The ground alleged was that the appellant's name was entered in the partition-deed of 1889 *benami* for Panah Ali Khan through whom the respondent claims the property. The plea that the appellant never received rents nor profits of the property in dispute is opposed to the several statements of Panah Ali himself before 1904 and the accounts produced in the case. These accounts show that the agents of Panah Ali and the appellant remitted moneys to both of them on account of the collections from the suit properties and they were admittedly signed by Panah Ali and the appellant. No adverse possession was set up before 1904 and the suit was instituted in 1911. According to the partition deed of 1889 the appellant was entitled to a one-third share and his name continues on the revenue registers for such share to the present time. The onus of proving that the appellant was only a *benamidar* is on the respondent. *Hardit Singh* v. *Gurmukh Singh* decided by this Board on the 29th January 1918 and *Kuthali Moothavar* v. *Peringati Kunharankutty* (1). There was no proof at all. The High Court judgment is difficult to follow. It seems to have been based on the supposition that the transaction of 1889 must have been of a *benami* character. That is clearly wrong. The reason given by the respondent and Panah Ali before him, to have the appellant's name entered in the partition-deed, was that Panah wanted to defraud his brothers and get a larger share for himself. But Panah even after the death of his brothers admitted that the appellant was his co sharer.

Mr. *Dunne, K. C.* (with him Mr. *Dube*), for the Respondents.—The High Court had not gone into the material point. Our case is that the appellant had no title whatever and that he was only a *benamidar* for Panah. He was never a co-sharer. The Trial Court held against us on this point. The High Court had not found upon it. It had not gone into the question whether the transaction evidenced by the partition deed was real or not. The fact that the appellant was never paid rents or profits is strong evidence that he was not a co sharer.

[LORD BUCKMASTER.—You cannot prove the *benami* nature of the transaction without asking us to accept the reason given by your client that he was committing a fraud.]

Mr. *Narasimham* for the Appellant was not called upon to reply.

JUDGMENT.

LORD ATKINSON.—This is an appeal from a judgment and decree, dated the 10th November 1915, of the High Court of Judicature at Allahabad, which reversed a judgment and decree, dated the 30th April 1913, of the Additional Subordinate Judge of Cawnpore.

The action out of which the appeal has arisen was an ejectment brought by Arab Ali Khan, the appellant, to recover possession of certain property, described in a list attached to the plaint. The defendants filed separate written statements in the usual course. In addition to denying the plaintiff's claim, they pleaded, (1) that the transaction embodied in a certain partition-deed, dated the 13th March 1889, was, on the part of his grand uncle Panah Ali Khan, a *benami* transaction; (2) that it was never acted upon or given effect to, and was void; and (3) that the plaintiff never had possession of the property in dispute and that his claim was barred by limitation and adverse possession. Several issues were framed upon these pleadings by the Additional Subordinate Judge of Cawnpore. Of these the two following are the most material for the purposes of this appeal, (1) Whether the *takeimnama*, dated the 13th March, 1889,

(1) 56 Ind. Cas. 451; 48 I. A. 395; 44 M. 883; 14 L. W. 721; (1921) M. W. N. 847; 41 M. L. J. 650; 30 M. L. T. 42; 26 C. W. N. 666; 24 Bom. L. R. 669 (P. C.).

was an agreement by way of family settlement and was enforced; (2) the compound issue whether or not the plaintiff was in possession of the property sued for within twelve years prior to the institution of the suit, whether the defendant and his predecessors have been in adverse possession of it for more than twelve years, and whether or not the suit is barred by limitation.

On the first issue this learned Judge found that—

"The partition deed of the 13th March 1889 was an agreement for consideration and was entered into by way of a family arrangement, and that it was substantially enforced by the parties thereto, although the oral Will of Ummed Ali Khan mentioned in the deed might never have existed or was never made."

On the second issue he found in favour of the plaintiff that his suit was not barred by time, and made a decree for possession of all the properties mentioned in the list B, annexed to the plaint, with the exception of one Chitaura, and as to another, Garwal, he gave the plaintiff a decree for a 4 annas share. On appeal to the High Court of Judicature at Allahabad, the learned Chief Justice and the Hon. Muhammad Rafique, Judge, thereof held, apparently, that the deed of the 13th March 1889 had been acted upon and was a valid instrument, but reversed the decree of the Subordinate Judge on the ground, as stated in their judgment, that it had been shown to their satisfaction that the plaintiff had never received any of the rents or profits of the land sought to be recovered, but that these were always received by Panah Ali Khan for his own use and benefit. They, therefore, allowed the appeal, set aside the decree of the Court below, and dismissed the plaintiff's suit with costs in both Courts.

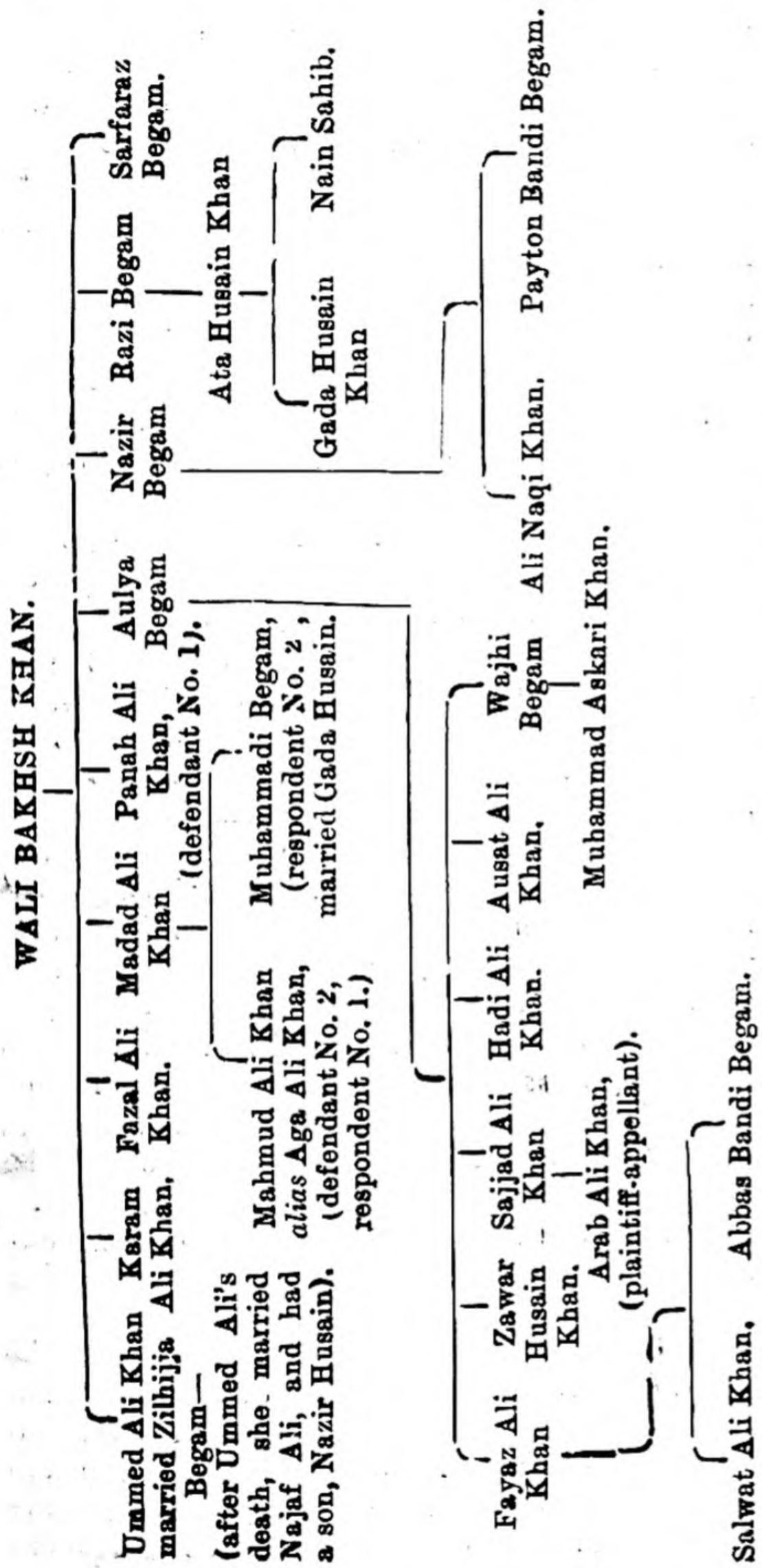
It is not very clear to their Lordships whether the learned Judges of the High Court meant to hold that the transaction carried out by the deed of the 13th March 1889 was as between Panah Ali Khan and Arab Ali Khan a mere *benami* transaction, Arab Ali Khan being the *benamidar*; or whether the plaintiff's right to recover the property in suit, even if he were the absolute owner of it under this partition deed, was, owing to the non receipt of the rent and profits of it, barred by limitation.

From the following passage in their judgment their Lordships are inclined to think that they took the latter view:—

"The defence cannot claim that the deed was never acted upon at all. It undoubtedly was acted upon fully with regard to Fazal Ali Khan and Madad Ali Khan, two of the brothers of Ummed Ali Khan. It was acted also in respect of the plaintiff Arab Ali Khan to this extent, that mutation of names was made in his favour in accordance with its terms. We think that this case should be decided in the plaintiff's favour if we can find on the evidence that he was in receipt of the rents and profits either directly or through Panah Ali Khan. On the other hand, we think that the plaintiff's suit should be dismissed if we come to the conclusion that he never received these rents and profits but that they were always received by Panah Ali Khan for his own use and benefit. It is not pretended that Panah Ali Khan stood in *loco parentis* to Arab Ali Khan. They may no doubt have been (and there is reason for believing that they were) on friendly terms. In fact the case of Panah Ali Khan was that Arab Ali Khan had agreed to lend his name with a view to Panah Ali Khan getting a larger share in the estate of Ummed Ali Khan than he would have got under the Muhammadan Law. But Arab Ali Khan did not live with his uncle Panah Ali Khan. In his evidence he stated that he had lived with his 'mother, father and grandfather.' He also said that after the death of Ummed Ali Khan his business was done by Panah Ali Khan and Fazal Ali Khan. We mention this because if we had found that Arab Ali Khan lived more or less jointly with Panah Ali Khan, the receipt of the rents and profits by Panah Ali Khan might be said to be the receipt thereof for himself and Arab Ali Khan. This, however, is not the plaintiff's case."

With all respect to the learned Judges of the High Court, their Lordships are unable to concur with them in thinking that the evidence, when carefully examined, established either that Arab Ali Khan was by the deed of the 13th March 1889 constituted in respect of the property in suit merely the *benamidar* of Panah Ali Khan or that his right as plaintiff in this ejectment to recover that property was barred

by limitation. The relation in which the parties to this deed stood to each other is shown by the following pedigree :—



Ummed Ali Khan, the eldest son of Wali Bakhsh Khan, died childless on the 26th February 1888, leaving his three brothers surviving him. Aulya Begam, his sister, the grandmother of Arab Ali Khan, predeceased her brother, Ummed Ali Khan. The plaintiff was consequently not one of the heirs of the latter.

On the 11th January 1889 the three brothers Panah Ali Khan, Fazal Ali Khan and Madad Ali Khan, executed an agreement by which they granted a maintenance allowance to one Najaf Ali Khan, and his heirs, and charged the property left by Ummed Ali Khan deceased with the payment of this maintenance allowance. On the 13th March 1889 the same three brothers and Arab Ali Khan executed the deed of partition by which they divided amongst them this same property, a 4-annas share in Mauza Mandauli, part thereof being allotted to Arab Ali Khan.

This is the property in suit.

It is not suggested on behalf of any person interested that Ummed Ali Khan deceased ever made a written Will in favour of Arab Ali Khan, but, with a view possibly of gaining priority over the charge upon the property of the deceased imposed by the deed of the 11th January 1889, it has been stoutly and persistently contended by Arab Ali Khan, and apparently by the brothers of the deceased, that the latter made an oral Will whereby he, amongst other things, devised to Arab Ali Khan the property in suit. The deed of partition of the 13th March 1889 purports to be made to carry out this oral Will, but in neither this case nor in the several other suits referred to in this case has this story as to the making of an oral Will been accepted. Several schedules, styled "specifications," are attached to the partition deed of the 13th March, 1889. One of them deals with the enumerated annas of Mauza Manduli, with Gadhiwa Majhgawan, permanent and fluctuating, of Ummed Ali Khan, all situate in Pargana Ekdala, district of Fatehpur, with Paharpur Mahal Ummed Ali Khan, Chak Teni, situated in Pargana Hatgaon, Khas Manpatti Adhar Singh Taraf Zorawar Singh, Ladhaura and Khairi Rawat, all in Pargana Hatgaon, and with Sichauli Paragana, District Fatehpur and Ranipur Pargana Dhata, District Fatehpur. These names become matters of importance in dealing with the accounts of income and expenditure for the year 1893, which have been given in evidence. The Government revenue of them is stated to be Rs. 2,032-4-0.

This schedule is headed thus —

"Specification of the property which shall

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remain in proprietary possession of Fazal Ali Khan, Panah Ali Khan and Arab Ali Khan *alias* Ehsan Ali Khan without the participation of Madad Ali Khan who shall have nothing to do with it."

Another schedule, dealing with property, the Government valuation of which is stated to be Rs. 1,044 is headed thus:—

"Specification of the property which shall remain exclusively in proprietary possession of Madad Ali Khan, and with which Fazal Ali Khan, Panah Ali Khan and Arab Ali Khan *alias* Ehsan Ali Khan shall have no concern."

A third, dealing with property the Government valuation of which is valued at Rs. 439-13-0, is headed thus:—

"Specification of the property which shall remain in proprietary possession of Fazal Ali Khan without the participation (of any person) and with which Madad Ali Khan, Panah Ali Khan and Arab Ali Khan *alias* Ehsan Ali Khan shall have no concern. This property was given to Fazal Ali Khan by Madad Ali Khan in his lifetime."

The parties interested in this transaction treated it in a most business-like way. In April 1889 these three co-sharers presented a petition to the Assistant Collector of the District of Fatehpur, reciting that an order for the entry of the names of the petitioners, and of Madad Ali Khan, in place of the name of Ummed Ali Khan, had in the year then current been passed in respect of the village named in the title, *i. e.* Mandauli permanent Mahal Ummed Ali Khan Pargana Ekdala, that the mutual dispute had been settled under a compromise dated the 13th March 1889; that the share of Madad Ali Khan had not been maintained in respect of this village and other villages with the exception of certain villages named thereafter; that only the three petitioners were in possession; and that, therefore, the application was presented. It is then prayed that the names of these petitioners might be entered in equal shares, and the name of Madad Ali Khan struck out. There is then added the note: "The deed of compromise is filed with the record of the case relating to Mauza Mandauli." The names of the three petitioners are then given, and they are described as Zamindars in possession of the village. A blank is left for the name of the village because, presumably, it has been already stated.

On the 4th May 1889 the Assistant Collector made an order on this petition by which, after reciting amongst other things that Madad Ali Khan, Fazal Ali Khan, Panah Ali Khan and Arab Ali Khan had been summoned through the Collector of the Allahabad District for the 26th April 1889; that accordingly Panah Ali Khan, for himself and on behalf of Fazal Ali Khan, and Ghazi Bakhsh, General Attorney of Arab Ali Khan, Karim Bakhsh, General Attorney of Madad Ali Khan, presented themselves and stated that Madad Ali Khan was no longer in possession of the property named, that Fazal Ali Khan, Panah Ali Khan, and Arab Ali Khan were in possession of the property in equal shares, and that the names of these persons should be entered according to possession and the deed of partition; that none of the parties produced witnesses in proof of possession, but that it appeared from the registered document that possession had been delivered; that the term of notice had expired and no one had taken objection; and further reciting that the Assistant Collector was of opinion that according to the partition deed the name of Madad Ali Khan should be expunged and the names of Fazal Ali Khan, Panah Ali Khan, and Arab Ali Khan should be entered up against the aforesaid property, and that the record of the case should be sent to the Pargana officer for proper orders. On the 23rd June 1889 an order was made by the Assistant Collector directing the mutation to be effected.

Thus, by the pronouncement of the three surviving brothers of Ummed Ali Khan deceased, Fazal Ali Khan, Panah Ali Khan, and Arab Ali Khan, were by these proceedings based upon the deed of the 13th March 1889 treated as and represented to be the absolute duly registered owners in equal shares in possession of this Mauza Mandauli. In the judgment of the Subordinate Judge at page 418 the following passage is to be found:—

"It is conceded in argument, and cannot of course be denied, that so far as the three brothers of Ummed Ali Khan namely, Fazal Ali Khan, Panah Ali Khan, and Madad Ali Khan, were concerned, the

deed in question was a family settlement and was carried into effect, each brother taking possession of the property allotted to him under the deed."

On the 20th June 1889 Fazal Ali Khan and Arab Ali Khan executed a power-of-attorney appointing one Lala Har Pershad, their Attorney, to, amongst other things, grant leases to their tenants in respect of their Zamindari property, make collections in and manage the same. In this document, which was duly registered by the Special Sub-Registrar of Allahabad on the 20th June 1889, Fazal Ali Khan and Arab Ali Khan are described as Zemindars of villages in the District of Fatehpur, in Cawnpore, and Allahabad, while in the deposition of Panah Ali Khan, dated the 14th July, 1891, made in a suit instituted by him against Shirin Begam, he distinctly states that "Ahsan Ali Khan (which is another name for Arab Ali Khan) is my co-sharer. My brother has given him a 4-annas share." There is no suggestion in this deposition of Arab Ali Khan's being merely his *benamidar* in respect of this 4 annas share or any other share.

In the *khewats* of this Mauza Mandauli for the concluding portion of the year 1889 Fazal Ali Khan, Panah Ali Khan and Arab Ali Khan are stated to be sharers in equal shares of the Mauza. In the column for remarks the dealings with the Mauza are set out in detail. It is stated that by order of the 23rd March 1889 the name of Ummed Ali Khan deceased was struck out and the names of Madad Ali Khan, Fazal Ali Khan, Panah Ali Khan, and Arab Ali Khan were entered in equal shares by right of inheritance, and that by and under the the second order, dated the 8th May 1889, the name of Madad Ali Khan was struck off and the names of Panah Ali Khan, Fazal Ali Khan, and Arab Ali Khan were entered in equal shares, *according to mutual agreement*. These are official documents, and weight must be given to them, at all events as to the reputed rights and interests of Arab Ali Khan in this Mauza.

In the judgment, delivered on the 13th July 1906, of the Additional Commissioner of Allahabad on the application of Mahmud Ali Khan to have the name of Arab Ali Khan removed from the *khewat* in respect of his 5-annas and 4-pies of this Mauza, he states that Panah Ali Khan was then alive, and actually played the part of head of the family; that Fazal Ali Khan was dead, leaving a widow, who had re married; that Madad Ali Khan was also dead, and had left a son, the applicant, who was a minor, Panah Ali Khan being his guardian; and that until the suit in which judgment was given in September 1904—*i. e*, for a period of sixteen years—the legality and genuineness of Arab Ali Khan's title was never doubted or impugned by any of the parties concerned; and that Arab Ali Khan during all that time was recorded as a 5 annas 4-pies sharer, and that his title to be so recorded was never contested till the 4th September 1904. The Additional Commissioner then proceeds to explain how Arab Ali Khan, being thus attacked, caused, on the 25th October 1904, as a counter move, a suit against Panah Ali Khan, Sayed Karamat Hussain, the Lambardar, Shirin Begam (the widow of Fazal Ali Khan) and Bakhsh Begum (the latter woman's second husband), to recover the sum of Rs. 277-14-6, the rents and profits of his share in Mauza Mandauli; that this Lambardar had purchased from Panah Ali Khan on the 30th November 1895 the latter's share of 5 annas and 4-pies in the Mauza; that the purchaser then became Lambardar; while Panah Ali Khan was no longer recorded as co-sharer in the Mauza.

This suit of Arab Ali Khan's was dismissed not at all on the ground that he was not the beneficial owner of his share of 5-annas and 4-pies in the Mauza Mandauli, but because the Lambardar proved that he had always paid the rents and profits of the Mauza to Panah Ali Khan with the consent of Arab Ali Khan himself, and that, therefore, he could not be required to pay these sums twice over. Arab Ali Khan in this suit made a deposition in which he stated that after the death of Ummed Ali Khan, Panah Ali Khan was managing member of the family and was appointed Lambardar; that he continued to make collections, and paid him, Arab, the profits of his share, until September 1904; that he did not remember if he ever got the profits of this very property in dispute (*i.e*, the 5-annas 4 pies share of Mandauli) from Panah Ali Khan, because he used to receive profits

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collectively. He received profits for the last time eight or nine months later, that is to say, May 1905. This is a most important statement having regard to the accounts to which attention will be drawn presently. It will be observed that Panah Ali Khan took no steps to have Arab Ali Khan declared his *benamidar* for the 5 annas 4-pies share, to which the latter claimed to be entitled. He submitted to have his name removed from the register as one of the co-sharers, although, as he subsequently contended, he was then beneficially entitled, in addition, to the share registered in the name of Arab Ali Khan, his *benamidar*.

Their Lordships cannot quite concur in the view taken by the High Court as to the reasons assigned by Panah Ali Khan for having secured a grant in *benami* to be made to Arab Ali Khan. It was not merely, as they apparently supposed, for the purpose of securing for himself a larger share of the estate of his deceased brother than he would have got under the Muhammadan Law. If the grant was made in *benami* at all it must have been made, their Lordships think, for the purpose of, by a mean and knavish trick, defrauding one or both of his brothers. If both of his brothers, Madad and Fazal, were aware of the alleged nature of the gift, then it was perfectly unnecessary to resort to a *benami* grant. The increased share Panah desired to secure could readily and would naturally have been given to him expressly by the terms of the deed. There was no need for concealment or contrivance. If they did not know of his device then the brothers must, owing to their ignorance, have been defrauded of some portion of their rightful shares by the bringing in of the *benami* grantee. Owing to the conflict of evidence which exists upon these crucial points, Panah's conduct, as reflecting on his good faith and credibility, becomes a matter of importance. In a deposition made by him in a suit instituted in 1909 by the heirs of Najaf Ali Khan, Panah Ali Khan, Arab Ali Khan and Mahmud Ali Khan to recover the maintenance allowances originally granted to the deceased, he gives his own account of the transaction. He says that Arab Ali Khan was the son of his sister-in-law, his name was inserted in the deed of partition that he (Panah) might get a larger share, and again he says:—

"Caused Arab Ali Khan's name to be entered in order that I might secure a larger share than those of my brothers. There was no dishonesty about it. It was a matter among brothers. I was the youngest of all the brothers. I had two brothers, Madad Ali Khan and Fazal Ali Khan. Madad Ali Khan had separate property. Fazal Ali Khan agreed that the name of Arab Ali Khan might be *recorded*. Madad Ali Khan took his share of the property and became separate one or two months after Ummed Ali Khan's death."

Both Madad Ali Khan and Fazal Ali Khan were dead at the time this deposition was made. There is no record in any of the legal proceedings, which are proved in evidence in this case, that either of the brothers gave any evidence or made any statement corroborating this story of Panah Ali Khan's. If by the word "recorded" he meant recorded in the register, then it would go to show that Fazal Ali Khan thought that Arab Ali Khan was a genuine co sharer with him, rather than a mere *benamidar* for his brother. If, on the other hand, he meant by *recorded*, inserted in the deed of partition, the story is scarcely credible, because if the brothers agreed that Panah should have a double share, nothing was easier than so to provide in the partition deed. If Arab Ali Khan was made a *benamidar* for Panah Ali Khan, it could only have been for the purpose of over reaching one or both of his (Panah's) brothers, and secrecy was essential to effect that result. In addition, he stated in this deposition, that Arab Ali Khan did not get any portion of the profits of the property, that he never gave him (Arab) a pie of the profits. Arab Ali Khan, however, says, on the other hand, as has been already pointed out, that he was paid these profits not distinctly and separately, but collectively.

There is no proof whatever in the mass of evidence produced in the case that Arab Ali Khan ever stood to Panah in any relation other than that of co-sharer with him in this Mauza Mandauli, which could make Panah liable to pay him money. Yet in the statement of account given in evidence, considerable sums of money are taken credit for by the agent who furnished these accounts, as having been remitted to Panah Ali Khan and Arab Ali Khan. Most of these accounts deal with

the income from Chak Teni, but the interest of Ummed Ali Khan in the Mahal of Chak Teni is according to the specification already referred to, given by the deed of the 13th March 1889 to the three co-sharers. The same remark refers to Exhibit No. 1, an account dealing with the income from Khas Mau. It also is included in this specification. The credits in these accounts begin with a sum of Rs. 47-14-7 stated to be remitted to Arab Ali Khan and Panah Ali Khan. Next a sum of Rs. 58 12-7, next a credit of Rs. 338-15-6, next Rs. 41-2 6, all similarly described. The account in which these items appear is signed in autograph by Panah Ali Khan. The next is a sum of Rs. 58-12-7 similarly remitted. There are several other items of the same kind, and ultimately an entry of a sum of remittance to Panah Ali Khan and Arab Ali Khah of Rs. 3,208-8 0.

These accounts, embracing as they do the income derived from some of the properties granted to the three co-sharers, strongly corroborate Arab Ali Khan's statement that he was paid the income of his one-third share collectively. It is much to be regretted that accounts similar to those given in evidence covering the years from 1893 to 1904 were not produced and given in evidence; but Arab Ali Khan distinctly swears he was paid *collectively* the rent and profits of his share up to 1904, only seven years before the institution of the present suit.

On turning to the *khewat* for the closing period of the year 1889 of the Mandauli, Panah Ali Khan, Fazal Ali Khan and Arab Ali Khan are named as the co-sharers of this village in equal shares. Similar entries are made in the *khewat* for this Mauza for the year 1892 and subsequent years.

The burden of proving that the grant of a one-third share in this Mauza made to Arab Ali Khan was made to him as *benamidar* for his brother rested upon the respondents. In their Lordships' view they have utterly failed to adduce any satisfactory or reliable evidence to discharge that burden. Neither do they think that it has been satisfactorily shown that Arab Ali Khan, clothed as he had been with all the insignia of a beneficial ownership in possession of this one-third share, was before 1904, if even then, dispossessed of the possession of it, or that he has ceased to be in possession of it. Neither are they of opinion that the respondents or their predecessors have been in adverse possession of his share.

Neither the 142 nor the 144 Article of the First Schedule of the Indian Limitation Act, 1908, therefore, applies, and the statutory period of twelve years prescribed by those enactments had not commenced to run (if at all) before the year 1904. The plaintiff's remedy is, therefore, not barred by efflaxion of time. Their Lordships are accordingly of opinion that the decree appealed from was erroneous and should be reversed, that the decree of the Subordinate Judge was right and should be restored, and that this appeal should be allowed with costs here and below and they will humbly advise His Majesty accordingly.

S. D. *Appeal allowed.*

Solicitor for the Appellant.—Mr. *Douglas Grant.*

Solicitor for the Respondent.—Mr. *Hy. S. L. Polak.*

PATNA HIGH COURT.

APPEAL FROM ORIGINAL DECREE NO. 15 OF 1919.

March 7, 1922.

Present:—Mr. Justice Das and Mr. Justice Adami.

Kuar Sri RAMESHWAR NARAIN SINGH—APPELLANT

versus

Rani RIKNATH KOERI—RESPONDENT.

Transfer of Property Act (IV of 1882), ss. 122, 123, 130—Gift—Oral gift—Proof—Rent arrear and current due—Actionable claim, transfer of—Evidence consistent with allegation of plaintiff and denial of defendant—Plaintiff must fail—Maintenance grant, nature of—Savings, when accretions.

The rent arrear and current due, being actionable claims, cannot be transferred by word of mouth, a transfer can only be effected by means of an instrument in writing in accordance with the provisions of section 130, Transfer of Property Act. [p. 453, cols. 1 & 2.]

An oral gift must be proved by satisfactory oral evidence by the person who relies upon such a gift. [p. 454, col. 1.]

A mere intention to give does not operate as a gift, there must be (1) a transfer of property and

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(2) an acceptance by or on behalf of the donee in accordance with sections 122 and 123, Transfer of Property Act. [p 46?, cols 1 & 2.]

Under section 23, Transfer of Property Act, the delivery required in the case of gift of moveables is that described in section 90 of the Contract Act. [p. 460, col 2.]

Godts v. *Rose*, 1855) 17 C. B. 229; 139 E. R. 1058; 25 L. J. C. P. 61; 1 Jur. (N s.) 1173; 4 W. R. 120; 26 L T. (O s.) 240; 101 R. R 663, referred to.

Where the undoubted evidence is consistent both with the allegation of the plaintiff as with the denial of the defendant, the plaintiff must fail. [p. 458, col. 2.]

The substance of a maintenance grant is that it is the rents, issues and profits that are alienated and not the immoveable properties out of which such rents, issues and profits arise, which remain the property of the grantor and annexed to his estate. [p. 459, col. 2.]

In order that there may be accretion there must be an estate to which the accumulation may accrete. Therefore, where a female is in possession of certain villages not as a Hindu widow, but under a lease granted to her by her husband, she has no estate in the villages, but only a maintenance grant, and her savings or accumulations would vest in her heirs and not follow the properties from which they arose. [p. 459, col. 2.]

Isri Dutt Koer v. *Hansbutti Koerain*, 10 C. 324; 10 I. A. 150; 13 C. L. R. 418; 7 Ind Jur. 557; 4 Sar. P. C. J. 459; 5 Ind Dec. (N. s) 217, referred to.

Appeal from a decision of the Subordinate Judge, Ranchi (Hazaribagh).

Messrs. *P. C. Manuk*, *S. K. Bhattacharji* *S. N. Pal.t* and *B. C. De*, for the Appellant.

Messrs. *K. B. Dutt*, *A. T. Sen*, *S. M. Mullick*, and *S. N. Roy*, for the Respondent.

JUDGMENT.

DAS, J.—The main question which we have to deal with in this appeal is whether there was a verbal gift of the cash balance standing to the credit of Rani Ram Kumari at the time of her death by Raja Ram Narain Singh of Ramgarh in favour of his wife, the plaintiff. The admitted facts are these: On the 22nd of December 1897 Raja Ram (Nam?) Narain Singh, the father of Raja Ram Narain Singh, and the father-in law of the plaintiff, made a grant of certain villages in favour of his wife, Rani Ram Kumari. These villages were subsequently placed in charge of the defendant who happened to be the younger son of Raja Ram Narain Singh. It will be convenient to describe these villages as Ram Kumari villages to distinguish them from the villages which Raja Ram Narain, about the same time, granted to the plaintiff and which were also placed in charge of the defendant. Rani Ram Kumari died on the 26th November 1910 and thereupon the Ram Kumari villages reverted to the Raj of which the title was then vested in Raja Ram Narain. On the 17th June 1911 Raja Ram Narain made a gift of the Ram Kumari villages to the plaintiff and placed them in charge of the defendant. The plaintiff alleges that, on or about the 17th June 1911, Raja Ram Narain made a further gift to her of the cash balance standing to the credit of Rani Ram Kumari at the time of her death, and it is her case that the defendant is bound to render an account to her of his dealings with Ram Kumari villages for the purposes of ascertaining what that cash balance was. The defendant in his written statement denied that any gift of the cash balance was made by Raja Ram Narain in favour of the plaintiff. The learned Subordinate Judge has found in favour of the plaintiff and has directed an account to be taken of the dealings of the defendant with the estate of Rani Ram Kumari for the purpose of ascertaining what the cash balance was at the date of the death of Rani Ram Kumari.

Before dealing with the evidence in the case, it will be necessary to consider the case which the plaintiff has made in her plaint. Her case is fully set out in the 3rd paragraph of the plaint and is as follows :—"That in the meantime, Rani Ram Kumari died in 1967 *Sambat* and all the moveable and immoveable properties reverted according to law and usage to the Raj ; that is to say, the Raja for the time being, the plaintiff's husband, became the *malik* of the properties left by her and he used to affix his seal and signature on the receipts, etc., for sometime ; and he allowed all the properties, collection of rent, arrear and current, collection in cash and kind, the collection papers, in short, everything to remain in the defendant's hand. Sometime after, in 1968 *Sambat*, the plaintiff's husband made a gift of all the properties left by the said Rani Ram Kumari, deceased, including the *tawil* in cash and kind, the rent arrear and current due till 1967 *Sambat* to the plaintiff ; he executed a *khorposhnama* in respect of the *mauzahs*. From that time the plaintiff became the *malik* of all the properties

including the savings in cash and kind, mentioned above, and all the papers connected with the said properties. The properties belonging to the plaintiff were from before under the management of the defendant and she allowed those properties as well to remain under his management and he acted as manager till Katik 1970 *Sambat*, when he had, for some reasons, to be removed from the management of all those properties." The case as made in the plaint certainly suggests that the gift of " the *tahvil* in cash and kind, the rent arrear and current due till 1967 *Sambat* " was made as part of the transaction by which the gift of the villages was made. This case, however, was abandoned at the hearing and it was then suggested that although the gift of the villages was made by a registered document on and bearing date the 17th June 1911, the gift of the cash balance was made orally though made on or about the 17th June 1911. Indeed, the abandonment of the case made in the plaint became inevitable when it was discovered that the registered instrument creating the gift of the villages could not be construed so as to include "the *tahvil* in cash and kind the rent arrear and current due till 1967 *Sambat*". The learned Vakil appearing for the defendant protested that, on the pleadings, evidence as to the oral gift was not admissible; but the learned Subordinate Judge overruled the objection and allowed the evidence to be led in regard to the alleged oral gift.

In my opinion the case of the oral gift is inherently improbable. It is admitted that there was a registered instrument in regard to the gift of the villages. It is admitted that the gift of the cash balance was part of the transaction which resulted in the gift of the villages. There is no explanation whatever why the gift of the cash balance should have been made orally when there was no lack of opportunity to make it by the document which brought into existence the gift of the villages, especially when it is remembered that so far at least as part of the gift is concerned, it could only be effected by an instrument in writing signed by the donor. The alleged gift was of "the *tahvil* in cash and kind, the rent arrear and current due till 1967 *Sambat*." It is true that we are not in this suit concerned with the rent arrear and current due; but it is still permissible to enquire whether the rent arrear and current due could be transferred orally to the plaintiff. I have no doubt whatever that they could not; for they were actionable claims and could only be transferred "by the execution of an instrument in writing signed by the transferor or his duly authorised agent". See section 130 of the Transfer of Property Act. It is necessary, therefore, to scrutinize the evidence with some care to see whether, on the evidence in the case, the oral gift has been established.

Next, it is admitted that the account-books which were kept by the defendant were examined regularly by Raja Ram Narain Singh. The evidence is that Raja Ram Narain had in his possession the seal both of Rani Ram Kumari and of his wife the plaintiff and that the account-books were regularly placed before Raja Ram Narain for his examination. Most of the entries in the account-books are in fact sealed with the seals of the ladies and as the seals were admittedly kept by Raja Ram Narain and as admittedly the account-books were placed regularly before Raja Ram Narain, these entries establish, in my opinion, that Raja Ram Narain accepted the accounts, as kept by the defendant, as correct. That being so, we would expect, if the plaintiff's case be correct, the cash balance standing to the credit of Rani Ram Kumari at the date of her death, that is to say, the 26th November 1910 to be transferred to the credit of the plaintiff on that date or soon thereafter. But as a matter of fact the cash balance was never transferred to the credit of the plaintiff's account. The plaintiff challenged the genuineness of the books of account produced by the defendant, but the learned Subordinate Judge has come to the conclusion, and I entirely agree with him, that the books produced by the defendant are genuine and that, to quote the words of the learned Subordinate Judge, "we must take it as a stern fact the deposited cash balance was not entered in the Rani's *rokar* after the *sal tamami*" Now it seems to me incredible that the cash balance whatever it was should not have been transferred to the credit of the plaintiff's account if in fact there was a gift of that cash balance in favour of the plaintiff. The defendant was the custodian of such properties as then belonged to the plaintiff. He had regular

books of account relating to such properties. Those books of account were regularly checked by Raja Ram Narain, the husband of the plaintiff. The matter could not have been overlooked by Raja Ram Narain and it is impossible to take the view that the defendant successfully deceived Raja Ram Narain who, as the documents show carefully scrutinized the plaintiff's accounts as kept by the defendant. In order to succeed it was absolutely necessary for the plaintiff to establish as was undoubtedly her case, that the cash balance was in fact entered in the plaintiff's *rokar* and that the genuine *rokar* has been suppressed. That was her evidence in the Court below, but the learned Subordinate Judge found it impossible to rely on that evidence. That being so the case of an oral gift becomes still more improbable.

Now an oral gift must be established by satisfactory oral evidence: but the oral evidence adduced on behalf of the plaintiff did not make any impression on the learned Subordinate Judge. In the course of his judgment the learned Subordinate Judge said as follows:—"I would not place the least reliance on the evidence of the plaintiff's witnesses touching the loose conversations which had happened several years ago and which they came to reproduce before me. But other facts and circumstances to which I shall presently refer make it fairly clear to my mind that there was indeed a verbal bequest by the Maharaja in favour of his wife which, by some reason or other, was not incorporated in the *khorpoth* deed, contemporaneous as it was and that the Rani came into possession of them in due course through the defendant as her manager or agent". It will be necessary for me to examine the other facts and circumstances, but so far as the oral evidence is concerned, all that I need say is that I entirely accept the view of the learned Subordinate Judge on this point.

It is necessary now to consider the "other facts and circumstances" to which the learned Subordinate Judge has referred. These consist of entries in the books of account of Rani Ram Kumari and of the plaintiff respectively which have been produced by the defendant which, according to the learned Subordinate Judge, establish the case of the oral gift. In order to understand the evidence to which the learned Subordinate Judge refers, it is necessary to remember that we are concerned with three distinct periods in the history of the defendant's management of the Ram Kumari villages. The first period is the period of Rani Ram Kumari which comes to an end with her death which took place on the 10th Aghan 1967 corresponding with the 26th November 1910. The second period has been referred to by the learned Subordinate Judge as the *khas* period, the period during which the title was with the Raj, that is to say, the period between the 10th Aghan 1967 corresponding with the 26th November 1910 and 5th Ashar 1968 corresponding with the 17th June 1911. The third period is the plaintiff's period which began on the 17th June 1911. The defendant has produced the *rokars*, *jinsi* and *nakdi* (grain and cash) of the period both of Rani Ram Kumari and of the plaintiff; but he has not produced any account-books of the *khas* period, his case being that these books were returned to the Raj office and are now to be found in the Raj office. The explanation seems a reasonable one, for there is no reason to think that the books of account belonging to the Raj would remain with the defendant.

Now, the important fact that emerges on a critical examination of the books of account that have been produced by the defendant is that the cash balance standing to the credit of Rani Ram Kumari at the time of her death was in fact not transferred to the plaintiff's *rokars*. This certainly does not support the case of a gift in favour of the plaintiff especially when it is remembered that Raja Ram Narain regularly scrutinized the books of account and sealed practically every entry in the books of account with the seal of the plaintiff. The plaintiff's books of account, therefore, do not furnish any direct evidence of gift; but the learned Subordinate Judge has come to the conclusion that there are entries in the books of account which are consistent only with the case of gift and incapable of explanation on any other hypothesis. It will be necessary, then, to deal with these various entries in order to see whether the finding of the learned Subordinate Judge can at all be supported. In dealing with these entries I will follow the order which was adopted by the learned Subordinate Judge:

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(1) Exhibit 53 (1), Exhibit 21, Exhibit 54, Exhibit 53 (1) is an entry from the *jinsi rokar* of the plaintiff dated the 8th Bhado Sudi 1968 corresponding with the 1st September 1911. This entry shows that there were 856 maunds 22 seers of grain to the credit of the plaintiff's account on the 1st September 1911. Exhibit 21 is an entry from the *jinsi rokar* of Rani Ram Kumari dated the 2nd December 1910 and it shows that on that date 850 maunds of grain were transferred from the account of Rani Ram Kumari to the account of Raja Ram Narain. It will be remembered that Rani Ram Kumari died on the 26th November 1910 and Exhibit 21 supports the case that soon after the death of Rani Ram Kumari the defendant treated Rani Ram Kumari's properties, whether moveable or immoveable, as having reverted to the Raj. Exhibit 54 is the entry from the *jinsi rokar* of the plaintiff dated the 2nd Aghan Sudi 1968 corresponding with the 22nd November 1911. It shows that there was a previous balance standing to the credit of the plaintiff of 1806 maunds 37 seers as per *goswara jinsi rokar* for 1967. The learned Subordinate Judge says that the balance of 1806 maunds can only be explained on the hypothesis that 850 maunds which were transferred to the account of Raja Ram Narain on the 2nd December 1910 were again transferred to the account of the plaintiff sometime between the 2nd December 1910 and the 22nd November 1911. The argument of the learned Subordinate Judge substantially is this: "I find that on 1st September 1911 the plaintiff had 856 maunds of grains to her credit. I find that on the 22nd November 1911 the plaintiff had 1806 maunds of grain to her credit. The difference can be explained only on the hypothesis that that which was transferred to Raja Ram Narain on the 2nd December 1910 was carried forward to her account." The weakness of the argument is that if in fact there was a gift in favour of the plaintiff on or about the 17th June 1911 as alleged by the plaintiff, the transfer would have been made in the books of the plaintiff sometime before the 1st September 1911 and Exhibit 53 (1) would have shown the transfer. Now, the *jinsi rokars* of the plaintiff are before us and it is certainly a remarkable circumstance that there is nothing in these *rokars* which suggests the inference that that which was transferred to the account of Raja Ram Narain was carried forward to the account of the plaintiff. The *khas* period was between the 26th November 1910 to the 17th June 1911. If the plaintiff's case be true then the grains collected during the *khas* period should have been entered in the plaintiff's *rokar* on the 17th June 1911 or soon thereafter, and would certainly have been shown in the entry of the 1st September 1911. The reasoning of the learned Subordinate Judge is based on nothing more substantial than this that 856 maunds *plus* 850 maunds make up a figure which is very near 1806 maunds. I am unable to accept these entries as establishing the case of gift; and my ground is this: that if there was in fact a gift in favour of the plaintiff then the plaintiff's *rokars* would undoubtedly have shown the transfers both of the cash balance and of the grains. That evidence is not furnished by the books of account and I am unable to hold that there was a gift on what appears to me to be an accidental circumstance in the case.

(2) Exhibit 25 (5) and Exhibit 25 (6). These entries purport to show that Rs. 471·1 which stood to the credit of Rani Ram Kumari in her *salami bahi* on the 5th Bhado Badi 1969 corresponding with the 1st September 1912 was carried to the credit of the plaintiffs' account on the 5th Assin 1969 corresponding with the 15th October 1912; but the note showing that the money was carried to the credit of the plaintiff's account was penned through, and there is a side-note to the effect that as no corresponding entry was found in the plaintiff's *salami bahi*, that entry, namely Exhibit 25 (5), was cancelled. The learned Subordinate Judge is of the opinion that this is a deliberate attempt on the part of the defendant to do away with a strong piece of evidence in plaintiff's favour. I am unable to agree with the view of the learned Subordinate Judge. In the first place, there is nothing to show that Rs. 471·1 which was undoubtedly credited in the book of Rani Ram Kumari was, as a matter of fact, collected prior to her death, Rani Ram Kumari died on the 26th November 1910, and the grant in favour

of the plaintiff took place on the 17th June 1911. The entry, Exhibit 25 (5), is dated the 1st September 1912. It is obvious that premiums collected in respect of Ram Kumari villages were entered in the *salami bahi* of Rani Ram Kumari long after her death, for on no other hypothesis can we explain the fact that Rs. 471-1 was credited in her book on the 1st September 1912 though she died on the 26th November 1910. In my opinion, therefore, the entry is inconclusive. It does not establish that a sum of money standing to the credit of Rani Ram Kumari was transferred to the account of the plaintiff. It is one thing to say that a sum of money entered in a book which once belonged to Rani Ram Kumari was transferred to the plaintiff's book; it is quite another thing to say that money belonging to Rani Ram Kumari was transferred to the plaintiff's account. The *salami bahi* of Rani Ram Kumari begins from 1966 and it is obvious that after her death no new book was started by the defendant either in the name of Raja Ram Narain or of the plaintiff. Having regard to the fact that the entry of 1st September 1912 is admittedly after the date of the gift of Ram Kumari villages to the plaintiff. It is impossible to base any argument upon this entry. In the next place, there is no reason to doubt the genuineness of the side-note. All that that note says is that as that Rs. 471-1 was in fact not transferred to the *salami bahi* of the plaintiff as Exhibit 25 (6) purported to show that entry was cancelled. But as a matter of fact the *salami bahi* of the plaintiff does not show that Rs. 471-1 was transferred to her account either on the 5th Assin 1969 or at any other time. The defendant has disclosed the *salami bahis* of the plaintiff. They are Exhibits 68 and 69 and are from 1956 to 1969. If they do not in fact show that there was a transfer of Rs. 471-1 to the plaintiff's *salami bahi* on the 5th Assin 1969 then the side-note was correct, and there is no reason to hold that it was introduced into the book in order to get rid of a damaging entry.

(3) Exhibit 19 (1) and Exhibit 54. Exhibit 19 (1) is an entry dated the 7th Aghan Badi 1967 corresponding with the 23rd November 1910. It shows that Rs. 437-8 was due to Rani Ram Kumari by certain tenants of Mouza Chak, one of the Ram Kumari villages, and that the tenants executed an instalment bond in favour of Rani Ram Kumari agreeing to pay the amount due in certain instalments. Exhibit 54 is an entry dated the 1st July 1912 and it shows that Rs. 29-12 was realized from Mouza Chak and was credited to the plaintiff's account. The agrument of the learned Subordinate Judge is that Rs. 29-12 was due to Rani Ram Kumari's estate but when realised was credited to the plaintiff's account. In my opinion Exhibit 54 does not establish that Rs. 29-12 represented the sum which was due to Rani Ram Kumari under the instalment bonds executed by the tenants in her favour. There was admittedly a gift of the villages including Mauza Chak in favour of the plaintiff on the 17th June 1911 and it may well be that rent became due to the plaintiff between the 17th June 1911 and the 1st July 1912 and that Rs. 29-12 was realized on account of the debt due to the plaintiff between the 17th June 1911 and the 1st July 1912. The entry, in my opinion, is wholly inconclusive.

But even if we assume that Rs. 29-12-0 was realised by the defendant from the tenants who had executed instalment bonds in favour of Rani Ram Kumari, the conclusion is not reached that there was a gift as alleged by the plaintiff. The claim of Rani Ram Kumari to the money covered by the instalment bonds was an actionable claim and it could only be assigned to the plaintiff by an instrument in writing under the provision of the Transfer of Property Act. There was, therefore, no transfer of the claim of Rani Ram Kumari to that money to the plaintiff. But the defendant may well have taken the view, not an unreasonable view, that the gift of the villages to the plaintiff carried with it the right to recover the debt due in respect of these villages. I am, therefore, unable to look upon these entries as establishing the case of gift.

(4) Two rent suits were instituted in 1912 in respect of the Ram Kumari villages: one suit was instituted by Raja Ram Narain in respect of the rent that accrued due prior to the death of Rani Ram Kumari, the other suit by the plaintiff in respect of rent that accrued due after the title to the villages

had vested in her by the gift which took place on the 17th June 1911. The fact that two suits had to be instituted one by Raja Ram Narian and the other by the plaintiff supports the case of the defendant, for if there was in fact a gift by Raja (?) Ram Kumari to the plaintiff of all that Rani Ram Kumari died possessed of or entitled to there is no reason why one of the suits should have been instituted by Raja Ram Narain. But the plaintiff relies upon the fact that money recovered by Raja Ram Narain in execution of the decree obtained by him was credited to the plaintiff's account. Now, in my opinion it is impossible to found any argument on this circumstance having regard to the fact that the suit to recover the amount was instituted by Raja Ram Narain and not by the plaintiff. I shall presently show that the funds which stood in the names of Rani Ram Kumari and of the plaintiff respectively were entirely under the control of Raja Ram Narain and that he dealt with those funds as his own without the slighest regard either to Rani Ram Kumari or to the plaintiff. Just as he withdrew money at his pleasure from those funds so he deposited money to the credit of those funds at his pleasure. The circumstances relied upon by the learned Subordinate Judge merely establish that Raja Ram Narain operated on those funds just as it suited him. It does not, in my opinion, establish that he made a gift of the outstandings in favour of the plaintiff either on the 17th June 1911 or at any other time.

(5) Exhibit 86 (1)—a letter from the defendant to Raja Ram Narain, dated the 2nd Bhado 19[illegible]9 corresponding with the 17th September 1912. In this letter the defendant pointed out to Raja Ram Narain the inconvenience and the expense involved in having to institute rent suits some in the name of Raja Ram Narain and some in the name of the plaintiff and he asked for a *paruana* to be issued to the effect "that the collection and realization of outstanding arrears should be made by institution of suits in the Courts etc." and he added this, "The reason is that the arrears, too, in respect of the Mouzas recently given to the Maharani Saheba, have been assigned to her as her property." The translation is not quite correct. The sense conveyed by the letter is that the assignment of the arrears followed the assignment of the Mouzahs. This is certainly the view which the defendant was putting forward in this letter, and he asked for authority to institute rent suits in respect of rent which accrued due to Rani Ram Kumari in the name of the plaintiff. He took the assignment to be one of law, not one of fact; and according to him since the Mouzahs were assigned to the plaintiff the plaintiff had a right to sue in regard to the arrears of rent in respect of those Mouzahs. I can find no admission by the defendant in this letter that there was a gift of the cash balance to the plaintiff as alleged by the plaintiff.

(6) Exhibit 5 (8). It appears that per order No. 234, dated the 6th Magh Badi 1968 corresponding with the 11th January 1912 Raja Ram Narain had remitted on account of rent due in respect of certain Ram Kumari villages the sum of Rs. 1,227-2. After the death of Raja Ram Narain, the defendant made a claim upon the Court of Wards who took possession of Ramgarh estate on behalf of the minor son of Raja Ram Narain for a very large sum of money and one of the items which he sought to recover on behalf of the plaintiff was Rs. 1,227 2 0 referred to in order No. 234. The learned Subordinate Judge says that "this evidence was depended upon as defendant's admission with regard to the gift;" but, curiously enough, the learned Subordinate Judge does not say whether he accepted this evidence as in any way bearing upon the alleged gift. In my opinion it is obvious that the entry has no sort of bearing on the question at issue between the parties. The remission was made on the 11th January 1912 and there is nothing to suggest that the remission was made in respect of the rent which accrued due to Rani Ram Kumari who had died on the 26th November 1910. The villages were granted to the plaintiff on the 17th June 1911 and it may well be that the remission was granted in respect of the rent which had accrued due to the plaintiff. The entry, therefore, is inconclusive.

(8) Exhibits 88, 51 (4), 87, 51, (3).—The learned Subordinate Judge says that these entries establish that the liabilities of Rani Ram Kumari were paid out of the fund that stood to the credit of the plaintiff's account. These entries purport to show that Rs. 60-12-0 was spent in connection with a pyne of Mouza Mokhrowl and that

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the defendant ordered that the money be paid to Deodip Narain out of the plaintiff's account. The liability of Rani Ram Kumari was in respect of one of the villages which belonged to her. That village was admittedly granted to the plaintiff and the fact that the defendant discharged the liability out of the income which accrued to the plaintiff from the villages granted to her by Raja Ram Narain after the death of Rani Ram Kumari does not, in my opinion, establish that there was an oral gift of the cash balance in favour of the plaintiff. The learned Subordinate Judge says that the defendant could give no explanation whatever. The defendant when he was cross examined with reference to those entries stated, it is true, that he could not say why those payments were made from the plaintiff's properties. It is necessary to remember that he was cross-examined on the 23rd July 1918 with reference to the entries which were of 1910. In my opinion no explanation is necessary when it is remembered that the liability that was discharged by the defendant out of the income of the plaintiff was a liability in respect of the villages which were admittedly granted to the plaintiff after the death of Rani Ram Kumari.

(9) Exhibits 24 and 25 series.—The learned Subordinate Judge says that these entries show "that *salami* monies received by Ram Kumari from 1960 to 1935 were refunded on and the same day Assin 1969, to different persons out of plaintiff's *salami* monies". It is difficult to understand what is exactly meant by the learned Subordinate Judge. The entries, as they stand, certainly do not support the view of the learned Subordinate Judge, but in the argument before us it was attempted to be shown that the *salamis* recovered by Rani Ram Kumari were transferred to the credit of the account of the plaintiff. I have already dealt with this point under paragraph (2). In my opinion these entries do not support the case of the plaintiff.

These are the entries upon which the learned Subordinate Judge has come to the conclusion that there must have been a gift of the cash balance standing to the credit of Rani Ram Kumari's account to the plaintiff by Raja Ram Narain. I am wholly unable to agree with the view which has been taken by the learned Subordinate Judge in this case. The onus is upon the plaintiff to establish the oral gift. Where the undoubted evidence is consistent both with the allegation of the plaintiff as with the denial of the defendant, the plaintiff must fail for the simple reason that she must establish the affirmative of the proposition which she asks us to accept. In the first place the case is inherently improbable having regard to the fact that there was admittedly a registered instrument in respect of the villages. No reason has been assigned why Raja Ram Narain should not have made the gift of the cash balance in writing since he had the time and the opportunity to make a gift of the villages by a registered document. In the second place, the account books which have been disclosed by the defendant and which have been accepted by the learned Subordinate Judge as genuine afford no direct proof of the gift as they should have, had the plaintiff's case been true. There is no reason at all why the cash balance standing to the credit of Rani Ram Kumari should not have been transferred to the account of the plaintiff since the entries were carefully scrutinized by Raja Ram Narain and the defendant must have known that Raja Ram Narain would scrutinize the accounts. In the third place, the oral evidence which has been adduced on behalf of the plaintiff is not such as commended itself to the learned Subordinate Judge. There then remain certain entries in the books of account produced by the defendant, of which those which are relevant are equally consistent with the allegation of the plaintiff as with the denial of the defendant. They do not, in my opinion, lead to inevitable conclusion that there must have been a gift by Raja Ram Narain in favour of the plaintiff. In the absence of a written document and direct evidence as to the gift, the entries in the books of account, if they are to be relied upon as proving the case of the plaintiff, must not only be consistent with the plaintiff's case but must be incapable of explanation on any other hypothesis. In my opinion they are capable of explanation on the hypothesis that there was in fact no gift by Raja Ram Narain in favour of the plaintiff. The question, I am aware, is one of fact; and it is not without strong reason that I would

venture to differ on a question of fact from so careful a Judge as Mr Tulsidas Mukharji. But I consider that I have greater freedom in the matter, since the conclusion reached by the learned Subordinate Judge was not based on his estimate of the oral evidence. In my opinion, the learned Subordinate Judge took no note whatever of the inherent improbabilities of the plaintiff's case. I have anxiously considered them and also the documentary evidence in the case; and I have come to the conclusion that the plaintiff has failed to establish the case which she made in the plaint.

The conclusion reached by me in regard to the question which I have just discussed is sufficient to dispose of the appeal; but as various other questions have been argued before us, I think it necessary to indicate my views in regard to them, especially as the case is likely to travel across the seas. And the first question which arises for consideration is, was Raja Ram Narain competent to make a gift of the undisposed of accumulations of Rani Ram Kumari to the plaintiff? The villages which were granted to Rani Ram Kumari for and by way of maintenance undoubtedly reverted to the Raj on the death of Rani Ram Kumari, and it was undoubtedly within the power of Raja Ram Narain to make a gift of them to the plaintiffs. But the savings effected by her stood on a different footing and would ordinarily vest in her heirs unless it be that they were accretions to the villages and followed them into the hands of Raja Ram Narain. The plaintiff's case, as made in the plaint, is that "all the moveable and immoveable properties" which belonged to Rani Ram Kumari "reverted according to law and usage to the Raj." So far as usage is concerned, the evidence did not satisfy the learned Subordinate Judge; and I am not prepared to differ from the learned Subordinate Judge on this point. But the learned Subordinate Judge thought that the savings followed the properties from which the savings arose and that accordingly they followed the properties into the hands of the Raj. He relied upon the case of *Isri Dutt Koer* v. *Hansbutti Koerain* (1). That was a case where the Judicial Committee had to consider the question of succession to the savings effected by a Hindu widow out of the estate of which she was in possession as and for a Hindu widow's estate. Their Lordships came to the conclusion that such savings could not be regarded as the *stridhan* of a Hindu widow, and that, if she has made no attempt to dispose of them in her lifetime, they follow the estate from which they arose. We are here concerned with an entirely different case. Rani Ram Kumari was in possession of the villages, not as a Hindu widow by right of inheritance, but under a lease granted to her by her husband subject to the payment of rent by her to her husband In truth she had no estate in the villages, but only a maintenance grant; and the substance of a maintenance grant is that it is the rents, issues and profits that are alienated and not the immoveable properties out of which such rents, issues and profits arise which remain the property of the grantor and annexed to his estate. If I am right in my view as to the true nature of a maintenance grant, it is difficult to see how the undisposed of accumulations "follow" the estate, since the title to the estate was never in Rani Ram Kumari, but was always in the grantor. In order that there may be accretion, there must be an estate to which the accumulation may accrete; and as there was no estate which was in the possession of Rani Ram Kumari, I am of opinion that the undisposed of accumulations could not be regarded as having vested in Raja Ram Narain. I hold that Raja Ram Narain was incompetent to make a gift of the undisposed of savings to the plaintiff.

The next question is, assuming that Raja Ram Narain was competent to, and did in fact, make the gift of the undisposed of savings to the plaintiff, did the transaction, as spoken to by the plaintiff's witnesses, operate to pass the title in those savings to the plaintiff. The evidence adduced on behalf of the plaintiff may be summarised as follows: On the fourth day after the death of Rani Ram Kumari, Raja Ram Narain informed the defendant that the Rani's *khorposh* properties reverted to him together with all her goods, cash, grains etc, and asked the defendant to make collection in respect of the resumed villages. To this, the defendant assented. Four or five days after the *sradh* of Rani Ram Kumari,

(1) 10 C. 824; 10 I. A. 150; 13 C. L. R. 418; 7 Ind. Jur. 557; 4 Sar. P. C. J. 459; 5 Ind. Dec. (N. S.) 217.

Raja Ram Narain informed the defendant that he intended to give the resumed villages together with all the goods and cash to the plaintiff. To this the defendant replied that the proposal was a proper one and that he would manage the properties both moveable and immoveable. Stopping here for a moment, it is quite clear that up to this point of time, there was no gift, for all the authorities are agreed that an intention to give does not operate as a gift. The evidence then continues that in Assar following (June 1911), Raja Ram Narain said this to the defendant. "The deed has been executed in the name of the Rani in respect of the villages. You do enter the *khorposh* villages together with the goods left by Rani Ram Kumari and also the collections of the *khorposh* villages made by you in my time in my wife's name in the *rokar*." To this the defendant replied as follows: "The year is going to expire. I will enter all the said properties as directed in the new *bahi* to be opened soon". The question which we have to decide is whether there was a gift by Raja Ram Narain to the plaintiff as a result of what took place in June 1911 between him and the defendant.

Now in dealing with this question, it is necessary to remember that there is no suggestion that the plaintiff took any part in the conversation or accepted the gift or authorised the defendant to accept it on her behalf. There is no suggestion that she dealt with the subject matter of the gift or at any time gave any order to the defendant to deal with the subject-matter of the gift in any way. The unimpeachable documentary evidence in the case establishes that the defendant throughout acted under the direction and control of Raja Ram Narain and that Raja Ram Narain dealt with the properties just as he liked without any reference to the plaintiff: See Exhibits D3, D4, D5, D6, D8, D24, D27, D28, B6, B20, B23.

Now, under the law in India, in order that a transaction may operate as a gift, there must, first, be a transfer of the property which, in the case of moveable property, may be effected either by a registered instrument or by delivery, and secondly, there must be acceptance by or on behalf of the donee. This is the law as laid down in section 122 and section 123 of the Transfer of Property Act. Was there then a transfer of the property to the plaintiff? It is conceded that the transfer was not effected by a registered instrument, but it is contended that, if the property be in the hands of a third person as undoubtedly it was, a request to such person by the donor to deliver is the only delivery possible. Now I do not think that the proposition in the form in which it was stated by Mr. Datt is correct. Section 90 of the Contract Act provides that delivery of goods may be made by doing anything which has the effect of putting them in the possession of the buyer, or of any person authorised to hold them on his behalf. Under section 123 of the Transfer of Property Act, the delivery required in the case of gift of moveables is that described in section 90 of the Contract Act. Admittedly nothing was done which had the effect of putting the property in the possession of the plaintiff, but it was contended that there was constructive delivery to the plaintiff in that the defendant consented to hold them on behalf of the plaintiff.

There is, in my opinion, an obvious weakness in the argument employed, for there is nothing to show that the defendant was authorised to hold the property on behalf of the plaintiff. Illustration (*f*) of section 90 of the Indian Contract Act, taken from *Godts* v. *Rose* (2) will make good my point. That illustration is as follows: "*A* agrees to sell *B* five tons of oil at Rs. 1,000 per ton, to be paid for at the time of delivery. *A* gives to *C*, a wharfinger, at whose wharf he had 20 tons of the oil, an order to transfer five of them into the name of *B*. *C*. makes the transfer in his books, and gives *A*'s clerk a notice of the transfer for *B*. *A*'s clerk takes the transfer notice to *B*. and offers to give it him on payment of the price of the oil. *B*. refuses to pay. There has been no delivery to *B*. as *B*. never assented to make *C*. his agent to hold for him the five tons selected by *A*." As was pointed out by Jervis, C. J., in delivering the judgment in the case from which the illustration is taken "All these cases of delivery of the symbols of property are founded upon that sort of tripartite contract which is adverted to in some of the cases, between the vendor, the vendee, and the

(2) (1855) 17 C. B. 229; 139 E. R. 1058; 25 L. J. C. P. 61; 1 Jur. (N. S.) 1173; 4 W. R. 129; 26 L. T. (o. s.) 240; 104 R. R. 668.

RAMESWAR NARAIN SINGH v. RIKNATH KOERI.

wharfinger....The defendant got possession of it," that is to say, the paper given by the wharfinger acknowledging the order of the plaintiff who was the seller, "by means of a fraud or an accident or mistake, and not with the intention to adopt Humphray," that is to say, the wharfinger as his agent. "The wharfinger seems to have acted upon the notion that the order transmitted to him amounted to an absolute transfer of the property. The distinction now pointed out by my brother Byles and Mr. H. James was not adverted to at the trial. The plaintiff never in fact parted with the property at all". The argument of Serjt. Byles to which reference was made in the judgment was that the delivery was not complete until the vendee had accepted the wharfinger as his agent. This was the view which was accepted by the Court. Crowder, J., in the same case said as follows, 'The plaintiff intended that five tons of the oil which he had at Humphray's wharf should be delivered to the defendant, and he gave an order to the wharfinger to transfer that quantity accordingly Did that bind the goods, and was it equivalent to a delivery to the defendant? The wharfinger, in obedience to the plaintiff's order, did transfer five tons of the oil to the name of the defendant. Was that transfer operative until the defendant had agreed to accept it? I find no authority to show that a mere delivery of an order to the wharfinger, or any act done thereon by the wharfinger, has the effect of binding the vendee, without his acceptance." In this case there is nothing more than an order on the defendant who was in possession of the goods on behalf of Raja Ram Narain to transfer the goods in the name of the plaintiff. There is no evidence that the plaintiff ever assented to make the defendant her agent to hold for her the goods given to her by her husband. In my opinion, the transaction did not operate to transfer the property in the goods to the plaintiff.

It was contended by Mr. Datt that the service of the notice by the plaintiff upon the defendant to make over the account books to her must be taken as her assent to the position occupied by the defendant. But the argument is of no avail, since the notice was served on the defendant after the death of the donor. At the time of the death of the donor, the property in the goods was still in him, and nothing that was done by the plaintiff subsequent to the death of the donor could take away the property from his heir and vest it in her.

The other prerequisite of a gift is also wanting. The Statute requires that there must be acceptance by or on behalf of the donee and during the lifetime of the donor. It is conceded that there was no acceptance by the plaintiff during the lifetime of Raja Ram Narain, but it was contended that there was acceptance by the defendant and that was the same thing as acceptance by the plaintiff. I am unable to accede to this argument, as there is no proof that the plaintiff assented to make the defendant her agent to accept the gift on her behalf. In my opinion the transaction spoken to by the witnesses examined on behalf of the plaintiff did not operate to vest the savings of Rani Ram Kumari in the plaintiff.

There were two other questions discussed by Mr. Manuk before us, the question of jurisdiction and the question of limitation. The argument as to jurisdiction is based on section 129 (7) of the Chota Nagpur Tenancy Act which provides that all suits by landlords and others in receipt of the rent of the land against any agents employed by them in the management of land or the collection of rents of money received or accounts kept by such agents in the course of such employment or for papers in their possession shall be cognizable by the Deputy Commissioner and shall be instituted and tried or heard under the provisions of Chota Nagpur Tenancy Act and shall not be cognizable in any other Court. It was contended that the suit was in substance a suit by a landlord against an agent employed in the management of land or the collection of rents for money received by such agent in the course of such employment. Now, in my opinion, in so far as the plaintiff sought to recover from the defendant an account of the dealings of the defendant with the specific sum of money that stood to the credit of Rani Ram Kumari at the time of her death, the suit was cognizable by the Civil Court of Hazaribagh, for such a suit cannot be said to be a suit by a landlord against an agent for money received by him as such agent. But in so far as the plaintiff sought to re-open the accounts of Rani Ram Kumari in order to show that a much larger sum of money should have been shown to the credit of Rani Ram Kumari at the time

of her death, the suit fell within the class of suits mentioned in section 139 (7) and was cognizable only by the Revenue Court. For what is the right of the plaintiff to re open such accounts? Either she claims in the right of Rani Ram Kumari as the person in whom the right of Rani Ram Kumari to claim an account from her agent is vested, or she has no cause of action at all. Her claim is substantially this: Rani Ram Kumari was undoubtedly entitled to claim an account from the defendant of his dealings with the rents, issues and profits that arose out of the Ram Kumari villages; after the death of Ram Kumari that right devolved on Raja Ram Narain, when Raja Ram Narain made a gift of the Ram Kumari villages to her together with the undisposed of savings effected by her and which were in the hands of the defendant, she obtained the right to obtain from the defendant an account of his dealings with the Ram Kumari villages to discover what those undisposed of savings were. Her claim so put is one which is possible to understand; but then that claim being in the right of Ram Kumari is one which was cognizable by the Revenue Court, and by no other Court; for the relationship between Rani Ram Kumari and the defendant was one of landlord and agent, and the savings whatever they were, represented money received by the agent in the management of land and the collection of rents and in the course of such employment as agent. The suit as constituted undoubtedly invited the Court to go into the accounts of Rani Ram Kumari, and, in my opinion, it was not cognizable by the Civil Court of Hazaribagh.

It was, however, contended by Mr. Dutt that certain specific sums of moneys undoubtedly stood to the credit of Rani Ram Kumari at the time of her death, and that it was competent to the plaintiff to institute a suit in the Civil Court for recovery of those specific sums of moneys. This contention is right; and, if the plaintiff had established her case as to the gift, she would clearly be entitled to a decree in respect of such specific sums of moneys as stood to the credit of Rani Ram Kumari at the time of her death. Admittedly there was a sum of Rs. 19,059 6 to the credit of Rani Ram Kumari at the time of her death. Mr. Dutt contends that he is entitled to recover four other sums of moneys which according to him undoubtedly belonged to Rani Ram Kumari and which he says he has been able to trace into the hands of the defendant. The first is an item of Rs. 23,414-9-0 covered by Exhibit 71-1, an entry in the loan book under date the Jeth Badi 10, 1961. The entry shows that the defendant took a loan of Rs. 23,414-9-0 from the money which was in his hands. The entry bears the seal of Rani Ram Kumari. Raja Ram Narain, therefore, had notice of the loan and it may be assumed that the loan was taken by the defendant with the assent of Raja Ram Narain. When the relationship between the parties is remembered, there is no difficulty in understanding the entry. The question is—is the plaintiff entitled to recover this sum of money by virtue of the gift alleged to have been made in her favour by Raja Ram Narain? In my opinion it is impossible to uphold the contention of the plaintiff. It may be that Raja Ram Narain had a claim to recover this sum of money from the defendant; but an actionable claim can not be transferred by word of mouth; it could only be transferred by an instrument in writing signed by the transferor and admittedly the plaintiff does not base her claim on any instrument in writing signed by Raja Ram Narain. The next is an item of Rs. 30,000 which was given to the defendant as "aid for building a house". Exhibit 31-1 is the entry upon which Mr. Dutt relies. This entry again was inspected by Raja Ram Narain and was sealed by him. We must assume that the aid was in fact given to the defendant and the plaintiff cannot recover this sum of money from the defendant. The next is an item of Rs. 6,000 which was given to the defendant as an "aid". This item does not appear to have been sealed, but the defendant in his evidence states that he took the amount under Raja Ram Narain's order. The entry is Exhibit 32 1 and it is unlikely that the defendant could have appropriated this sum of money without the knowledge of Raja Ram Narain who, as I have already mentioned, regularly inspected the books of account. Lastly there is a sum of Rs. 5,729-6 3 which again was given to the defendant as "aid for building a house". The relevant entry is Exhibit

2-1. The entry does not appear to have been sealed, but as I have said before, it is unlikely that he could have taken this sum of money without the assent of Raja Ram Narain. In my opinion if the plaintiff succeeds on the question of the *factum* and the validity of the gift and if it is established that Raja Ram Narain was competent to make a gift of the undisposed of savings of Rani Ram Kumari to the plaintiff, the plaintiff would be entitled to a decree as against the defendant for the sum of Rs. 19,059-6 0.

Lastly, there is the question of limitation. In my opinion Article 89 of the Limitation Act applies and the plaintiff's suit in so far as it may be considered to be a suit for recovery of such sums of moneys as stood to the credit of Rani Ram Kumari at the time of her death, is not barred by limitation. But so far as the plaintiff invited the Court to re-open the accounts of Rani Ram Kumari in order to show that there was a much larger sum of money standing to the credit of Rani Ram Kumari at the time of her death, the suit is clearly barred by limitation. It is true that Rani Ram Kumari was entitled to claim an account from the defendant as to his dealings with the rents, issues and profits that arose out of the Ram Kumari villages in the hands of the defendant. The agency came to an end with the death of Rani Ram Kumari which took place on the 26th November 1910. Raja Ram Narain had three years from the death of Rani Ram Kumari to maintain an action for account as against the defendant. The suit was brought more than three years after the date of Rani Ram Kumari's death and in so far as the suit is a suit for account of the dealings of the defendant with Rani Ram Kumari's estate, it is clearly barred by limitation. Mr. Dutt contended that the defendant was an express trustee in respect of the funds which belonged to Rani Ram Kumari and which were in his hands. I am unable to agree with this contention.

In the result, I would allow this appeal, set aside the judgment and the decree passed by the Court below and dismiss the plaintiff's suit with costs in both the Courts.

ADAMI, J.—I agree.

S. D.

Appeal allowed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1807 OF 1919.

November 20, 1919.

Present:—Mr. Justice Martineau.

NADAR SHAH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

ISHAR DAS AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1871), s. 20—Limitation Act (XV of 1877), s. 19—Acknowledgment not signed by all mortgagees, effect of.

An acknowledgment of the right of redemption, in order to save limitation, either under Act IX of 1871 or Act XV of 1877, should be made by all the mortgagees. If it is not signed by all mortgagees, it does not hold good even with regard to the shares of those who signed it, if the mortgage is indivisible. [p. 464, col. 1.]

Second appeal from a decree of the District Judge, Montgomery at Lahore, dated the 15th April 1919, affirming that of the Munsif, First Class, Montgomery, dated the 24th June 1918.

Mr. *Badr-ud Din Kureshi*, for the Appellants.

Mr. *Ram Chand Manchanda*, for the Respondents.

JUDGMENT.—The plaintiffs sue for redemption of land which they say was mortgaged about 100 years before suit, and the question in the case is whether limitation is saved by an acknowledgment made by some of the mortgagees in the Settlement Record of 1873. The Courts below have concurred in holding that the acknowledgment is not effectual and that the suit is barred by limitation. The plaintiffs have filed a second appeal in this Court.

The acknowledgment in the Settlement Record of 1873 was signed by six of the mortgagees, namely, Dogar Das, Thakar, Haria Ram, Rupa, Chandi Ram, and Mehru and not signed by the remaining four who were Hukma Ram, Hazuri Ram, Bishan Dial and Ganga Ram and even if Mehru can be regarded as having signed also on behalf of his brothers Hukma Ram and Hazuri Ram, who were minors, it is impossible to get over the difficulty that none of the signatories signed or was competent to sign on behalf of Bishna Dial and Ganga Ram. Although Bishan Dial and Ganga Ram were then described as absentees they had not abandoned their rights, for, in 1879 they took part in a partition in which the land

in suit was included. In order that the acknowledgment might have the effect of saving limitation it was necessary that it should have been made by all the mortgagees. As two of the mortgagees did not sign it, and it is not shown that the others had authority to sign it for them. The acknowledgment is wholly ineffectual, whether the Limitation Act to be applied is Act IX of 1871 or Act XV of 1877. I am further in agreement with the Courts below in holding that as the plaintiffs have not shown that the mortgage took place within 60 years of the date when Act XV of 1877 came into force, the Act applicable is Act IX of 1871 under which an acknowledgment of the right of redemption, in order to save limitation, had to be signed by the mortgagee or by some person claiming under him, there being no provision in that Act by which the acknowledgment would be sufficient if signed by a duly authorised agent of the mortgagee.

It is contended that even if the acknowledgment does not affect the shares of those who did not sign it should hold good as regards the shares of the others. I cannot agree with this contention or with the contention that the mortgage was divisible. There was one single mortgage, and that the fact that each branch of the family was recorded as having a one sixth share would not have entitled the plaintiffs to sue each separately for redemption so also the acknowledgment cannot separate so as to save limitation in regard to the claim for a part of the mortgaged property, while it is ineffectual so far as the claim for the remainder is concerned.

Another argument put forward is that the defendants being the descendants of the persons who signed the acknowledgment in 1873, are estopped from pleading that the absence of the signatures of Bishan Dial and Ganga Ram renders the acknowledgment ineffectual. This argument also does not appear to be correct. I cannot agree that the plaintiff's position has been changed as the result of the acknowledgment given in 1873, and I see no reason why the defendants should be precluded from setting up a plea, which Bishan Dial and Ganga Ram to whose rights they have succeeded, could have raised.

The Courts below have rightly held that the suit is barred by limitation, and I dismiss this appeal with costs.

S. D.

Appeal dismissed.

PATNA HIGH COURT.
APPEAL FROM ORIGINAL DECREE No. 137 OF 1919.
May 25, 1922.
Present :—Mr. Justice Das and Justice Sir John Bucknill, Kt.
Mahant RAGHUNATH DAS—PLAINTIFF—APPELLANT
versus
SHEO KUMAR MISSIR—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 92—Ejectment of mohunt—*Hindu Law—Endowment - Sitamarhi Asthal,* mohunt *of—Marriage—Forfeiture of* mohuntship.

The *mohunt* of the Sitamarhi Asthal does not necessarily forfeit his *mohuntship* by contracting a matrimonial alliance. [p. 477, col. 2.]

Where the plaintiff claims in the plaint, in his own right of succession, possession of properties as well as the position of *mohunt* on the ground that the defendant has forfeited the *mohuntship* by marrying, section 92 of the Civil Procedure Code is no bar to the suit although some of the grounds of his claim are such as would be contemplated in that section. [p. 473, col. 1.]

RAGHUNATH DAS v. SHEO KUMAR MISSIR.

Appeal from the decision of the Sub-Judge, Muzafferpur, dated the 18th December 1918.

Messrs. *S. C. Mitra*, *S M Mullick*, *C. C. Das*, *L. N. Singh* and *Jadubans Sahay*, for the Appellant.

Messrs. *Hasan Imam*, *K. P. Jawasyal*, *K. Sahay* and *H. N. Prasad*, for the Respondent.

JUDGMENT.

BUCKNILL, J.—This is an appeal from the decision of the Subordinate Judge of Muzafferpur, dated the 18th December 1918.

The circumstances under which this litigation has taken place are in themselves simple enough but raised somewhat difficult questions. The defendant is the *mohunt* of an Asthal of considerable historic importance which has been referred to throughout the proceedings as the Sitamarhi Asthal. It appears to have been founded in the year 1549 and to have been situated near a water from which the goddess Sita is believed to have emanated. The first *mohunt* appears to have been one Hiram and since him there have been seven more; the last being the defendant. It is common ground that, ever since the foundation of this establishment, each *mohunt* has appointed as his successor his nephew, and that all the *mohunts* have hitherto been unmarried. What has happened up till now is that each successive *mohunt* has taken his nephew as his *chela* and has been succeeded by him. Although in the plaint in the suit brought by the plaintiff against the defendant there are various allegations, such as of illegal dealing with property attached to the Asthal, the only matter which has been brought before this Court on this appeal is the admitted fact that the defendant has married, and it is alleged by the plaintiff that by having contracted a marriage the defendant has incurred forfeiture of his *mohuntship*; in addition to this question arises the further point as to whether the plaintiff has any legal status for bringing this suit. The plaintiff was admittedly a *chela* of the defendant's predecessor whose name was Bhagwat Das and he claims to be an agnate relative of the defendant; he does not claim to be the defendant's nephew but to be the nephew of one of the second cousins of the defendant; he also is admittedly a *guru bhai* of the defendant, they both having been *chelas* of the defendant's predecessor In 1915 the plaintiff brought his action against the defendant and he asked, *firstly*, that it might be declared that the plaintiff was entitled to the *mohuntship* and *gaddinashini* of the Asthal; *secondly*, that the right of the defendant thereto has become extinct; that he is not entitled to keep the property appertaining thereto and that his possession is unlawful; *thirdly*, that a decree might be passed in his favour awarding him possession and dispossessing the defendant; and, *fourthly*, that an enquiry should be made as to the mesne profits from the date of the defendant's marriage. The defendant raised various defences; *firstly*, that the suit was barred as it had not been brought under the provisions of section 92 of the Civil Procedure Code; *secondly*, that marriage did not entail forfeiture and that the defendant was entitled to marry without incurring any disability; *thirdly*, he denied having dealt illegally with or wasted or mismanaged the property; *fourthly*, he denied that the plaintiff belonged to the family of his predecessor or that he was a *Gotia* or blood relation, and, *lastly*, he disputed, in any case, the claim made by the plaintiff to the succession on the ground that he (the defendant) had initiated several *chelas* who were relatives of the family of previous *mohunts*.

A very large quantity both of oral and documentary evidence, was produced before the Subordinate Judge, who, in the course of a long and elaborate judgment, came to findings to the following effect:—

1. That the fact that the provisions of section 92 of the Code of Civil Procedure relative to the procedure to be adopted where litigation is contemplated in connection with public charities had *not* been adopted was a bar to the plaintiff's suit, in so far as the question of wastage of the Asthal properties was concerned but did not debar him from obtaining relief if the defendant by his marriage had put himself under such disability as would prevent him from continuing to hold his *mohunt hip*.

2. That there had in fact been no wastage by the defendant of the Asthal properties.

3. That the properties in suit were all properties attached to the Asthal and that

if the defendant lost his post as *mohunt* he would lose the properties also.

4. That the plaintiff was not an agnatic cousin or even an agnatic relative of the defendant.

5. That the defendant had initiated Bairagi *chelas*.

6. That the defendant's marriage did not result in forfeiture of his office.

The Subordinate Judge on these findings dismissed the plaintiff's claim with costs. Some of these findings, such as, for example, that on the question of waste, have not been argued before this Court and indeed the case has, I think, been presented to this Court in a somewhat different way to that in which it was placed before the Subordinate Judge. To my mind there are really but two points which have to be considered. These are:—

1. Has the plaintiff any *locus standi* to bring this suit in its present form?

2. If he has, then does the fact that the defendant has married result in his having to give up office as *mohunt* of the Asthal?

Now, with regard to the first question, it is very important to see in what way the plaintiff himself placed his claim in his plaint. He says in paragraph 3 "that for the purposes of appointment of a successor to the reigning *mohunt* the said Asthal is a *maurusi* one, that is to say, that the reigning *mohunt* has the right to appoint one of his Bairagi *chelas* as his heir, representative and successor under a deed or without it by giving him *tilak*, *kanthi*, *chaddar* and *pugri*. It has been the custom of the said Asthal that the reigning *mohunt* has been appointing one of his Bairagi *chelas* belonging to his *girhasti* family as his heir, representative and successor." Now, so far, the defendant admits this and that the statements made by the plaintiff are substantially correct, specifically doing so in paragraph 20 of his statement of defence. The plaintiff, however, then proceeds to say, "it is also the custom of the said Asthal that if the reigning *mohunt* die without appointing his successor or heir or do any act which renders him unfit to remain as such, the eldest of an Vaishnab Bairagi *chelas* who is also his agnate by descent or in case of there being no such Vaishnab Bairagi *chela*, the eldest of his Vaishnab Bairagi *guru bhais* who is his agnate by descent, would be the *gaddinashin* of the said Asthal and would take possession of the properties appertaining thereto." This part of the claim is stoutly denied by the defendant. In paragraph 7 of his plaint the plaintiff claims that, as a *chela* of the defendant's predecessor and as the only *girhasti chela* of that *mohunt* he is the only person who is entitled to become the *mohunt*, on the forfeiture, owing to his (the defendant's) marriage, of the post and the appurtenant properties. It has been pointed out how it would appear that, so long as it was possible, all *mohunts* of this Asthal have taken as their *chelas* and nominated as their successors their agnatic nephews; but there is no evidence whatever, in my opinion, to show (and indeed there *could* be none to show) that if, as in this case, there was no nephew, there was any custom of the Asthal as to who should succeed the *mohunt*; for no occasion has occurred on which any question of what was the proper method of succession had arisen. It seems, therefore, to me to be impossible that there should have been any evidence of custom as is alleged by the plaintiff as to what was the nature of succession where a *mohunt* had no Bairagi *chela* belonging to his agnatic *girhasti* family.

The primary question which has to be carefully considered is, who is, the proper successor to the *mohunt* of this Asthal. As has been mentioned before, the matter hitherto has given rise to no difficulty for the simple reason that each *mohunt* has in fact adopted, as his *chela* and successor, his agnatic nephew. Out of this fact arise several questions: firstly, does this fact constitute a custom which excludes the succession to the *mohuntship* of any one who is not an agnatic relation to the out-going *mohunt*? What is the proper method of succession? I think that it is here of very great importance to see if there is anything in the documentary evidence which helps in a decision upon this point and here must be noted a document (Exhibit E) which is dated 13th of Kartik 1007 F. S. (1599 A. D.) which constitutes a grant, from one Sri Nirpati Singh in favour of the first *mohunt*, who is described as Fakirana Gosain Sri Hira Ram *Mohunt*, of certain Mouzas, in the following terms:—"You shall cultivate, grow

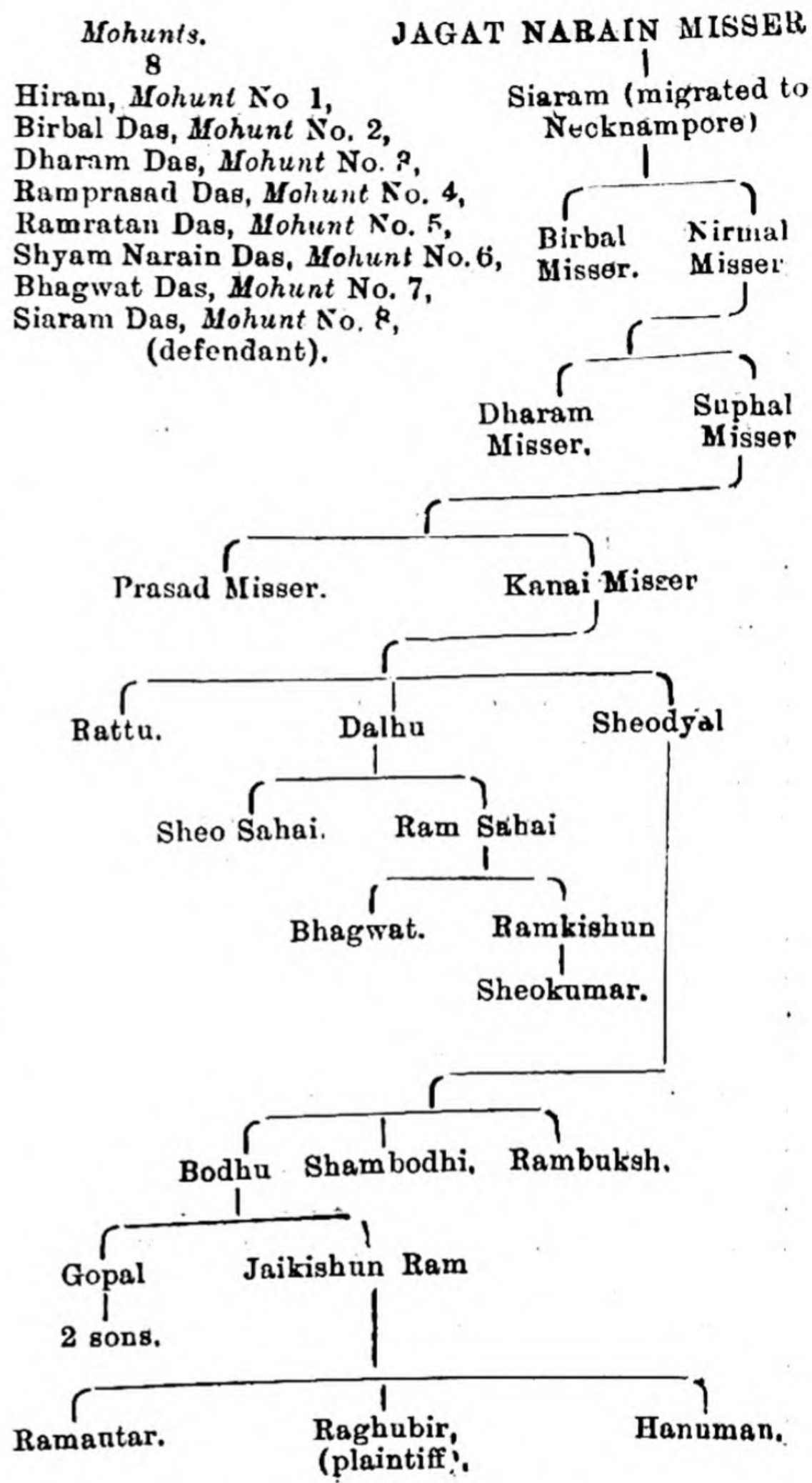
corn and settle the said Mouza and you with your disciples and disciples of disciples shall enjoy the entire produce thereof. The Mouza should be treated as *Bhari jama* and no resistance should be offered." Now, it is perfectly clear that, at any rate, with regard to this endowment it was thought that a not unusual practice would be followed, namely, that each *mohunt* would be succeeded by his *chela*. There is no idea in the mind of the donor that the *chela* successor must necessarily be a relative of the *mohunt*. It is quite intelligible that, as a matter of family interest, it has been the practice very naturally to keep the valuable properties appertaining to this Asthal in the hands of the *mohunt's* family, but it is very difficult to say that it is possible to assert that any exclusive custom has been established which would prevent a *mohunt*, should he so wish, from appointing as his successor a *chela* who is not necessarily a member of his *girhasti* family. The question is whether, if a *mohunt* chose to appoint as his successor one of his *chelas* who is not a relative, the family of the *mohunt* could successfully oppose such an appointment. This point, namely, that there can be no exclusive custom in this Asthal that the devolution of the *mohuntship* must fall upon a blood relative, has been very forcibly urged before this Court by Mr. Hasan Imam, Counsel for the respondent. It is contended by him that, as it is possible here to trace the nature of the original grant of, at any rate, a portion of what now forms the Asthal properties and that as in that document the usual succession from *mohunt* to *chela* is contemplated it is not competent for the donee and his successors to graft on to the conditions of this grant any custom which would restrict the devolution of the incumbency to the *family* And it is also pointed out that in numerous other documents which indicate the manner in which other properties became appurtenant to the Asthal there is nothing to indicate any form of restrictive devolution. I am bound to say that it seems to me that this argument possesses considerable force but when one considers that for 300 years the incumbency has been maintained strictly within the family by the adoption by the reigning *mohunt* of his agnatic nephew I am inclined to think that it would be contrary to good sense to depart from that practice. But there is more than this to be said about the matter. It would appear quite clear that this point was not raised before the Subordinate Judge and is raised now by the respondent as what is practically a new case on appeal and one which the plaintiff has never had a proper opportunity of meeting. The Subordinate Judge writes in his judgment "it is an *admitted* fact that the *mohunts* of Sitamarhi Asthal must be a Gour Brahmin connected with their natural family." Again, in paragraph 20 of the statement of defence it is definitely stated that "the custom and usage alleged by the plaintiff in the first part of paragraph 3, to wit, that the Sitamarhi Asthal is a *maurusi* (one that goes by descent) Asthal and a *chela* related by blood to the reigning *mohunt* succeeds on the demise of reigning *mohunt*, are substantially correct." It is also quite clear from the defendant's own evidence that the tradition and the method of devolution was in fact always normally to be followed if possible and he states "in case I had died immediately after Bhagwat Das's death, Raghubir Das who is a *chela* of Bhagwat Das and who is my agnate's cousin's son (*mohunt* Janki Das's son) would have become the *mohunt* after me." The plaintiff's own case is, of course, based upon the necessity for maintaining the agnatic tradition. To my mind, therefore, there is no doubt that before the Subordinate Judge the whole case proceeded on the common ground that there did exist a definite custom that the *mohuntship* and possession of the properties of the Sitamarhi Asthal were limited primarily to *chelas* who are blood relatives of the deceased or the outgoing incumbent. I do not think, therefore, that it is possible to allow the respondent to raise this question at this stage.

Having now disposed of this point, I think, before proceeding to the next, it is desirable to endeavour to ascertain what is really meant by the use of certain phrases which seem to have been somewhat loosely utilised. We see the words "natural family" "*girhasti* family" and "blood relation," and the question really is, whether they are used as intended to have the same meaning; can they be utilised in the ordinary way to denote cognatic as well as agnatic relationship? Here, again, I think that the case before the Subordinate Judge proceeded on the assumption that an agnatic *chela* of an out-going *mohunt* would take pre-

ference over any other *chela*; and it would seem from what the defendant himself states that if *he* had died *without* having appointed *any chela*, an agnatic *chela* of his *predecessor* would succeed to the post. This, coupled with what I have stated above, shows, I think, that the belief of those connected with the Asthal of whatever party they may be was that, in the event of there being no agnatic *chela* of an out-going *mohunt* any agnatic relative who had been a *chela* of any *mohunt* of the Asthal would succeed. But the matter has to be followed out a little further; the question is whether this insistence on the agnatic succession would, in the event of the out-going *mohunt* having appointed *chelas* who though not agnates were cognatic relatives or who perhaps were not even relatives at all, have the effect that such *chelas* of the out-going *mohunt* would be preferred in the succession to an agnatic relative who was a *chela* of an earlier *mohunt*. This is the natural question which is the next one in this case which rises for consideration, for it is here admitted that the defendant has appointed *chelas*, that these *chelas* are not agnatic relatives but some, at any rate, of them are cognatic relatives. There is really nothing much which can possibly guide one in coming to a definite decision upon this point and perhaps it is unnecessary to say more than that whilst, on the one side, one sees the principle (indicated in the grant) that the *mohuntship* should descend to a *mohunt's chela*, on the other side, one has the strong impression of traditional necessity for keeping the incumbency in the agnatic family. If a cognatic *chela* of the out-going *mohunt* would not be preferred to an agnatic *chela* of a prior one, it is obvious that a *chela* of an out-going *mohunt* who was not even a cognatic relative could not have any priority over a *chela* who was an agnatic relative of a prior one; and, if one cared to explore this matter still further, it might be of importance to ascertain whether *any agnatic* relative, who was properly trained and qualified to be a *mohunt*, would not be preferred to any one else even though he may not have been a *chela* of any of the *mohunts* of the Asthal.

But in addition to this, *i. e.*, a claim as an agnatic relative, the plaintiff also bases his claim not only on being an agnatic relative but also on being a *guru bhai* of the defendant. There is nothing, however, which I can see in the evidence, which can possibly substantiate his claim to succeed to the incumbency merely as a *guru bhai* of the present holder of the position and his status must, apart from any other question, be, in my opinion, dependent upon whether he is or is not in fact an agnatic relative. Now, on this very important question there was a great deal of evidence of an extremely contradictory character and the two stories put forward respectively by the plaintiff and the defendant are completely in conflict. The plaintiff maintains that he is, what I suppose in English terminology would be called, a third cousin of the defendant on the father's side. The defendant, on the other hand, alleges that the plaintiff is not an agnatic relative at all but that he is connected with him by the fact that his (plaintiff's) brother's son married the defendant's niece's daughter. The Subordinate Judge has examined the voluminous evidence at considerable length and with considerable care. He comes to the conclusion that the plaintiff has failed to prove that he is an agnatic relation. I think that it is conceded by the defendant and certainly there is ample evidence to show that the plaintiff was not only a person of considerable importance in the affairs of the Asthal but was connected in some way with him; he was undoubtedly a *chela* of the defendant's predecessor and a *guru bhai* of the defendant. There is however, very little documentary evidence in support of the plaintiff's claim to relationship of an agnatic character. In Exhibit 1, which is a deed dated the 8th December 1904, executed by the *Mohunt* Bhagwat Das in favour of the plaintiff's brother and others, a certain passage occurs which is thus translated, "but Ramantar Missir (this person is admittedly the plaintiff's brother) and others are related to the *girhasti* family of me, the declarant." The important word here is the word 'related' and the Subordinate Judge, who gives the passage in the vernacular, does not consider that the word there used necessarily connotes any agnatic relationship. The learned Subordinate Judge in coming to this conclusion has taken into account

also a passage in Exhibit D which is a deed also made by the *Mohunt* Bhagwat Das on the 9th of December 1904 in which a word occurred which is again translated "related". The two words in the two documents are in fact connected, that in the first being "*rishtamand*" whilst in the latter the word is "*rista*". All that the learned Subordinate Judge can decide on this point with regard to these documents is that the word "*rishtamand*" might include either agnatic or cognatic relatives. However, there is another way in which this document, Exhibit 1, has been utilised by the defendant; it is to attempt to destroy the statement by the defendant that the only relationship between the plaintiff and the defendant is through the plaintiff's brother, Ramautar Missir, by the latter's son's marriage to the defendant's niece's daughter; it is utilised in this way:—it is said by the defendant in his evidence that this marriage took place some 12 or 13 years ago; the defendant gave his evidence in August 1918 and it is pointed out, therefore, that it would seem that Exhibit No. 1, which was dated the 8th December 1904, was probably executed before the marriage and that, if that was really so, there was some connection other than that through the marriage between the plaintiff and the defendant or otherwise he would not have used in that deed the word translated as "related". I am not at all sure, even supposing that it was clearly proved that the marriage took place after the execution of this deed, that the expression in the deed proves anything conclusive, although I think it is not at all improbable that in some way or other the plaintiff was connected with the family of the *mohunts*. But the onus upon him, of course, is to prove his agnatic connection without any doubt. The Subordinate Judge goes through the oral evidence given in favour of the plaintiff at some length and with one or two exceptions specifically refers, I think, to all those witnesses who speak as to the relationship. I have myself made an independent analysis. There is, first of all, the plaintiff himself who says that Bhagwat Das the *mohunt* who was the defendant's predecessor was cousin to the plaintiff's father and he gives a detail of relationship which can be worked out in the following table:—



His brother supports him, but the Subordinate Judge does not feel that he can accept their evidence as in any way reliable or trustworthy as they are such deeply interested parties. There are numerous witnesses who in some sort of way support the plaintiff's story; for example, the plaintiff's witness No. 4, who is a *mohunt*, states that the plaintiff was a nephew of the defendant' predecessor by "natural relationship," but, as is pointed out by the Subordinate Judge, his means of information were simply that he had been told by the defendant's predecessor that a Brahimin of his brotherhood

who had become his *chela* cooked his food; and it is clear that the word "brotherhood" does not necessarily indicate agnatic relationship but merely religious fraternity. Plaintiff's fifth witness is a Zemindar; he also says that the plaintiff is by "natural relation" a nephew of the defendant. He says that he heard that the plaintiff was the defendant's predecessor's nephew from the defendant's predecessor himself; he cannot say when this was nor had he ever seen any genealogical tree. Plaintiff's witness No. 7, who is also a *mohunt*, simply states that the plaintiff was "the nephew of the defendant's predecessor" but he does not say how he acquired this information. Plaintiff's witness No. 8 is a Pundit; he states that the plaintiff is a son of a "cousin brother of Bhagwat Das (*i. e.* defendant's predecessor) in the natural family." This witness states that he was a Pundit at Sitamarhi Asthal but the Subordinate Judge discards his evidence entirely, on the ground that he was not the Purohit at the Sradh of the defendant's father and mother and had presumably no special means of ascertaining the family history. Plaintiff's witness No. 9 was a *chela* of defendant's predecessor; he says that the plaintiff was the nephew of defendant's predecessor by natural relationship but he also states that he had no particular knowledge of the family history and has never seen any genealogical tree. Plaintiff's witness No. 11 is a Zemindar; he simply states that the plaintiff is a nephew of Bhagwat Das by natural relationship. He comes from Necknampur which, he states, was the birth place of the ancestors of Bhagwat Das's family; he states that he knows their genealogical history. Plaintiff's witness No. 17 is a *chela* of the Sitamarhi Asthal; he says that the plaintiff is a son of the cousin of the defendant's predecessor according to natural relationship. The Subordinate Judge does not seem to have mentioned this witness nor the following two of the plaintiff's witnesses, namely, No. 21, who is also a *chela* of the Asthal, and says that the plaintiff is a nephew of the defendant's predecessor by natural relationship and No. 22, another *chela* of the Asthal, who says that the plaintiff was the brother's son or cousin's son of the defendant's predecessor. The Subordinate Judge does not consider that these witnesses belonged to the plaintiff's natural family or that they could have had anything more than a superficial or hearsay knowledge of what they stated. It is perhaps hardly necessary here to observe that two circumstances are here present; the first is, that there is no doubt that the present dispute has split those who are connected with the Asthal into two sides, some of whom vigorously support the plaintiff throughout, whilst others strongly uphold the defendant, whilst secondly it, is, of course, quite easy to obtain persons on either side simply to come forward and speak to a relationship between persons in bold statements which it is almost impossible to controvert except by showing them to be mere matters of hearsay or at any rate to be unsupported by any documentary evidence or derived from any effective authority. Now, I am far from saying that the plaintiff has not, in view of the number of witnesses which he has called and in view of his own evidence, made out some kind of case in favour of his claim to be an agnate of the defendant but he is met by a very large body of evidence given on behalf of the defendant which absolutely contradicts the evidence given on his (the plaintiff's) behalf. The Subordinate Judge considers that the evidence of the witnesses for the defendant is considerably stronger than that given on behalf of the plaintiff and he, therefore, came to the conclusion that the plaintiff was not an agnatic cousin of the defendant and was not connected with him as an agnate at all. The evidence put forward on behalf of the defendant in connection with this point consists of that of defence witness No. 1 who is a *chela*; he states that the plaintiff was not an agnate of defendant's predecessor whose agnates had never lived at Necknampur but whose ancestors were resident at Misraulia in the District of Shahabad. He states further that the defendant's predecessor himself told the witness that the plaintiff was not his agnate. The defendant himself states that his family has many agnatic relations at Misraulia where his agnatic family and ancestors reside and that none of the *mohunts* of Sitamarhi were ever born at Necknampur. He gives a long account of his version of the family-tree which is quite different to that put forward by the plaintiff. He denies flatly that the plaintiff is an agnate

and states that he has no knowledge of Sheo Dayal whom the plaintiff declares was his great grand-father. He says that the only connection between him and the plaintiff is that a daughter of his sister's daughter married the plaintiff's brother's son. The defendant says also that he did see a genealogical table once of his family at their family seat at Misraulia with one *Mohunt* Jagannath Das. This certainly did not contain the descent as claimed by the plaintiff. Finally, he declares positively that he has himself personal knowledge of the nature of the relationship between the plaintiff and himself which is merely that of the marriage. Defendant's witness No. 6 is a *chela* of the defendant's predecessor residing at the Sitamarhi Math. He states that the plaintiff does not belong to the defendant's family, that is to say, his natural family. He also says that the defendant's predecessor, who had adopted the defendant as his *chela* and successor, was anxious that the defendant should marry because there was no other agnatic male member in his family, using these words, "I wish to marry Sita Ram Das (*i. e.*, the defendant) as there is no other male member in my family. Otherwise the *gadi* will go to another family." The defendant's witness No. 9, who is a Zamindar residing in Darbhanga District, says that the defendant's predecessor was anxious that the defendant should marry because there was no other man to succeed him. This witness states that the defendant's predecessor openly stated that the plaintiff did not belong to his (defendant's) family and that it was observable that on the occasion when news of the death of one of Bhagwat Das's family at Misraulia was brought to Sitamarhi, although the defendant and Bhagwat Das observed Asauch, the plaintiff did not do so; and that it was on that occasion that Bhagwat Das stated that the plaintiff did not belong to his family. Defendant's witness No. 10 is the personal servant at Sitamarhi Asthal. He seems to be a hereditary officer, his father and grand-father having served there in the same capacity to previous *mohunts*. He states that the plaintiff does not belong to defendant's family and that he himself never saw the plaintiff observe Asauch in the case of the death of any members of the defendant's family. The next witness No. 11 is a cultivator residing at Janukpur in the District of Muzafferpur; he is from the Misraulia family to which the defendant belongs and he states that none of his ancestors had ever settled at Neeknampur, thus contradicting the plaintiff's story of his descent from Sheo Dayal who is alleged to have migrated from Misraulia to that place. This witness deposes that Bhagwat Das is of his own family and an agnate and he states definitely that the plaintiff is not his or Bhagwat Das's agnate. He says that he can tell the names of his ancestors up to the 11th degree of ascent. The next witness is one of the Purohits of the Sitamarhi Asthal (defendant's witness No. 12); again, this man appears to have occupied an hereditary office as his father and grand-father had undertaken the same duties. He knows that the defendant's ancestors came from Misraulia and that the plaintiff is not an agnate of Bhagwat Das. Defendant's witness No. 13 is a Zamindar living at Misraulia; he gives a long family trail and claims to have had with the *mohunts* of the Asthal a common descent. He knows the plaintiff whom he says does not belong to his family and is not his agnate. He appears to have some considerable knowledge of his own family history. Defendant's witness No. 25 is a cultivator also residing at Misraulia and an agnate relative of the defendant's family; he also knows the plaintiff whom he says is certainly not an agnate of his family. Defendant's witness No. 26 is also a cultivator at Misraulia and again an agnatic relative of the defendant. He supports the other witnesses and denies that the plaintiff is his agnate; he seems to know a good deal of his family history. Defendant's witness No. 32 is a *mohunt* living at Misraulia and an agnatic relative of the defendant; he states that no branch of the family ever settled at Neeknampur, although a branch settled at Janukpur and another at Sitamarhi; the family was settled at Misraulia; he produced a genealogical table (Exhibit M) which he says he obtained from his grand-father. This apparently does not include the plaintiff's family in any way; he denies that the plaintiff is an agnatic relation. Although the Subordinate Judge does not attach much importance to this genealogical tree (Exhibit M) which he thinks could easily have been written out for the purpose, he does attach

great importance to the presence and testimony of such a large number of his family in support of his (defendant's) statements. He points out that it is very strange that not a single man of the Misser family comes from Misraulia to support the plaintiff's allegation. He states that he cannot believe that all these men would have spoken untruly and juggled with the names of their own ancestors in order to support the defendant. There is no doubt that the evidence given in support of the defendant as to the case is distinctly strong. Numerous members of the particular family to which the defendant admittedly belongs and to which the plaintiff desires to show that he also belongs, have given evidence denying that the plaintiff is an agnatic relative. The plaintiff's story that his ancestors, originally residing at Misraulia, migrated to Neeknampur (thus accounting for the practical separation of the branches) does not seem to have been adequately established. The Subordinate Judge has weighed the evidence given on both sides. He has seen the witnesses and he has come to the conclusion that the weight of evidence is undoubtedly in favour of the defendant. Unless I could see very strong reasons for saying that the Subordinate Judge was wrong, I think it would be altogether improper to disagree with the conclusion to which he has come; and, indeed, on reading through and considering carefully the evidence on both sides, I have come to the conclusion that the Subordinate Judge was quite right; I think that the plaintiff by his evidence succeeded in giving to his claim to be an agnatic relation of the defendant some semblance of plausibility; I do not, however, think that the evidence put forward on his behalf is, when it has been so seriously challenged and strongly met, sufficient to prove conclusively his story. If the plaintiff is not an agnatic relative, he, whatever may be the other circumstances or whatever may be the other questions for decision, clearly has no *locus standi* for bringing the present suit. The matter is, therefore, substantially disposed of by the view which I take of this point. As, however, it is possible that the case may go further it is perhaps desirable that I should express my opinion upon certain other points which have been raised. The first of these is whether the plaintiff is debarred from bringing this action because he has not taken the steps which, under certain circumstances, are laid down by section 92 of the Code of Civil Procedure. This section reads as follows:—

"(1) In the case of any alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature, or where the direction of the Court is deemed necessary for the administration of any such trust, the Advocate-General, or two or more persons having an interest in the trust and having obtained the consent in writing of the Advocate-General, may institute a suit, whether contentious or not, in the principal Civil Court of original jurisdiction or in any other Court empowered in that behalf by the Local Government within the local limits of whose jurisdiction the whole or any part of the subject-matter of the trust is situate, to obtain a decree—

"(*a*) removing any trustee;

"(*b*) appointing a new trustee;

"(*c*) vesting any property in a trustee;

"(*d*) directing accounts and inquiries;

"(*e*) declaring what proportion of the trust property or of the interest therein shall be allocated to any particular object of the trust;

"(*f*) authorizing the whole or any part of the trust-property to be let, sold, mortgaged or exchanged;

"(*g*) settling a scheme; or

"(*h*) granting such further or other relief as the nature of the case may require.

"(2) Save as provided by the Religious Endowments Act, 1863, no suit claiming any of the reliefs specified in sub-section (1) shall be instituted in respect of any such trust as is therein referred to except in conformity with the provisions of that sub section."

The Subordinate Judge thought that a *mohunt* of an Asthal being merely a sort of trustee can be removed from his office if he is guilty of violation of his trust and that the plaintiff was barred by section 92 from claiming any relief against the defendant on account of the alleged waste of the trust property but, on the other hand, the Subordinate Judge thought that section 92 did not debar the

plaintiff from obtaining the relief which he sought on the ground that by the defendant's marriage he (the defendant) had forfeited his office. It should be observed that what the plaintiff claims here in his plaint does not altogether contemplate merely matters which are comprised in section 92, for he claims, as in his own right of succession, possession of the properties as well as the position of *mohunt* on the ground that the defendant has forfeited them owing, amongst other reasons, to the fact that he has married. Although it may be that, mingled with this application, there is also a claim based upon an alleged breach of trust, such as is contemplated under section 92, I hardly imagine that a claim for ejectment and possession of the character made in the present case, such claim being based upon an alleged personal right of the plaintiff, is one which can be regarded as falling within the purview of section 92.

I do not think that it is necessary to comment in any way upon the question as to whether the defendant was guilty of any of the charges which were brought against him in connection with waste or misappropriation of the property appertaining to the Asthal, for the point has not been raised here in this Court, although before the Subordinate Judge it was strongly urged but decided by him in favour of the defendant.

The only other question for consideration is as to what, if any, is the effect upon the position of the defendant in relation to his *mohuntship* produced by the admitted fact that he has contracted a marriage alliance. It must be confessed that, when entering upon this question, one finds oneself confronted with considerable difficulties. These difficulties present themselves from more than one direction. In the first place, one is plunged into the extremely intricate sea of observances and traditions which surround the hierarchy of the Hindu priesthood; secondly, one is met with a mass of evidence much of which appears to be entirely contradictory although in some cases adduced by witnesses whose character and credibility one would think were normally beyond criticism. I am trying, however, to think that to a large extent much of what appears to be the conflict between what is stated by some of the witnesses on the part of the plaintiff and some of those on behalf of the defendant is due to the fact that some of the technical religious or semi-religious words which are used by them are not always used in precisely the same sense; and, from what I have been able to gather during the hearing of this appeal, it is certainly the case that some of these phrases are in ordinary parlance often utilized in a somewhat loose fashion. So far as it is of any value, however, in the plaintiff's favour, a start in the consideration of the question may be made by the admitted fact that, from the commencement of the foundation of this Asthal in 1599, all the *mohunts* have been celibates until the defendant, the 8th *mohunt*, chose to marry. There is also no doubt that the fact of his having done so has been the, or one of the, causes which has given rise to this expensive and protracted litigation and has given umbrage to some of those who are connected with the Asthal. It must not, however, be lost sight of that the incumbency of this Asthal is a valuable and coveted possession and probably one from which the incumbent can derive possibly both for himself, his family and his adherents and, for all I know properly, a comfortable livelihood. There is nothing, so far as I can ascertain, in the documents which have been produced in this case to show that any condition of celibacy was extrinsically imposed upon the holders of the *mohuntship*. It may, however, be contended, with some force, that if the custom or usage or tradition of succession by agnatic *chela* (mentioned at an earlier stage of this judgment as obtained since the foundation of the Asthal) is to be regarded as a definite custom now binding upon the institution and which cannot properly and legally be departed from (unless, of course, no agnatic relation qualified for the post existed) and one to which effect must be given, it is difficult to see why this tradition of celibacy extending over a like period should not also be recognised as a custom equally obligatory upon the incumbents of the Asthal. Indeed, in some respects it may be thought that the presumption, in favour of the tradition of celibacy being obligatory, might be considered as stronger than that of the agnatic succession; for whilst the latter can be clearly comprehended owing to the natural desire to retain the benefits derived from the Asthal in the hands of the family

the former is, speaking generally, a departure from the normal and is a self-imposed condition which essentially is not usual in ordinary human life. I have, however, at an earlier stage of my observations already dealt at considerable length with the question as to the binding character and the usage of agnatic succession. I have pointed out that it was a custom which, so far as this case is concerned, had, in my opinion, not been in issue between the parties and that, although I was inclined to think that after so long a period it might be regarded as a tradition which should rightly and properly be always followed, a decision as to this point did not arise in this litigation and should not perhaps be allowed to be raised in this Court. The position with regard to the necessary celibacy of the *mohunts* of this Asthal has, on the other hand, always been, together with the relationship between the plaintiff and the defendant, the principal point at issue between the parties to this litigation. I must admit that in my mind I think that the very fact that none of the *mohunts* of this Asthal have ever married hitherto presents the plaintiff with a strong *prima facie* case; but, on the other hand, it must be remembered that up till now the adoption by each incumbent *mohunt* of his nephew as his *chela* and successor has presented no difficulties. The defendant himself states in his evidence that his predecessor, the *mohunt* Bhagwat Das, observing that this tradition of nepotic succession was in most serious danger of coming to an end desired that the defendant should marry in order, presumably, to retain the *mohuntship* and the benefits derived from the properties appertaining to the Asthal in close agnatic succession contemplating that the devolution would descend upon a son who might be born to the defendant. This testimony may or may not be true but it sounds plausible and, if credit should be attached to it, it shows that the tradition of celibacy was not thought to be more than a self-denying ordinance in no way inviolable and one the practising of which did not affect the tenure of any incumbent who so contracted a matrimonial connection. Although, therefore, at first sight, one would be inclined to think that the fact that for over three centuries no *mohunt* of this Asthal had in fact married constituted a strong presumption in favour of ecclesiastically obligatory celibacy of the holders of the office, I think that it is legally necessary to look at the matter from a somewhat broader point of view and to consider whether as a fact there is any clear reason to think that marriage by a *mohunt* would necessarily result in the extremely grave effect that he should in law be compelled to abdicate or be capable of ejection from his position. I feel very great diffidence in venturing to enter into the tangled paths of the doctrinal and dogmatic rules which govern the priests of the Hindu religion, or in particular, of all those sections of it to which it is supposed that the *mohunt* of this Asthal must adhere, and I am afraid that my efforts so to do must of necessity appear to those who are thoroughly familiar with the subject as somewhat elementary; and I cannot help feeling that in matters of this kind it might be advantageous if the Legislature could devise some tribunal composed of clerics assisted possibly by some chosen from the laity which could deal with questions of this character in a more complete manner than they can be dealt with by persons who may be of a different faith, unversed in such religious or sectarian practices and only schooled in the originary principles of jurisprudence. However, the matter has to be faced and I accordingly venture to give a short summary of what I assume to be a real issue between the parties. The position may roughly be recorded thus :—

A *guru*, a holy man, who was the ancestor of the defendant, migrated from Misraulia, his family home in the Shahabad District in this Province, about the end of the 16th century and took up his station near a tank of water at a place then known as Sulochini but now called Sitamarhi. This locality was a very famous one in Hindu mythology because the belief was that, after the conclusion of the ancient Sagas of Hindu folk and religious-lore, the goddess Sita who had been there transported arose from a crucible unearthed where this water now stands. This Archaic legend seems to correspond to some extent with the western Aryan myth of the birth of Aphrodite. This worthy *guru* evidently succeeded in attracting interest from the great personality of the neighbourhood, for he obtained the grant in November 1599 of the Mauza now known as

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Sitamarhi to which reference has already been made; and, eventually, a building was erected near the tank where the principal deity of the Hindu pantheology worshipped was Sri Jankiji Maharani; this goddess is regarded as the daughter of the god Janaka and the goddess Sita. Prosperity and accretions of property gradually came and the Asthal is now a very important one.

Now, it is agreed that, in connection with the worship of the great god Ram, there have been several revelationists; one of these was named Ramanand whose work lay in the 12th century; a later teacher who appears to have been of a more liberal type was Ramanuj. According to the theory which is put forward on behalf of the plaintiff, the followers of Ramanand are more ascetic than the followers of Ramanuj; and I think that, broadly speaking, this may be regarded as correct. The former, it is said, may not, the latter may, marry. We see the same kind of difference in the priesthood of various branches of the Christian Church in which, though Roman Catholic Priests must be single, the Greek Catholic Clergy need not be so although a Bishop of the Greek Catholic Church cannot be a married man although he may be a widower; whilst, in the Anglican community, there is nothing in the nature of enforced celibacy of any kind. We here come to several moot points relating to phraseology. It is said on behalf of the plaintiff that a *mohunt* who belongs to the Ramanandi sect cannot marry; whilst in regard to the Ramanuji sect it is said that there are two classes the first being called "Acharya," who are, what may be described as, lay teachers and upon whom celibacy is not imposed, the other portion consisting of what are called "Bairagis," who are ascetics and who, having cut off their connection with all worldly matters, must be celibate. It is here that we begin to experience confusion with regard to the use of particular vernacular expressions and it is quite obvious, after reading through the evidence, that many of the witnesses did not mean with precision exactly the same when they were using the same words. The principal controversy arises with regard to several vernacular words with which, to the best of my ability, I shall now try to deal. The first of these is the word "Bairagi"; I suppose that this word means "withdrawn from worldly affairs" and perhaps in its primary sense it was intended to convey the idea of complete asceticism, that is to say, an eremitic life in which the individual cut himself off from his worldly desires and environments and retreated into a condition of isolated contemplation of things divine; but there is no doubt from the evidence before me that this word has long since ceased to have any such restrictive meaning and it would seem that it now almost only has the significance of a person devoted to religion and does not itself in any way contemplate the necessary incidence of celibacy. The next word which gives rise to some difficulty is the word "Birakt." This word is found prefixed to the word "Bairagi" and it would be seen to connote a more rigid asceticism than is indicated by the word "Bairagi" alone. I gather that it essentially means "one who has renounced the world"; but whatever may have been its original meaning, it now seems to be like the word 'Bairagi" used somewhat loosely and I am not sure that "Birakt", even with the conjunction of the word "Bairagi," now necessarily contemplates a non-marriageable state.

The Subordinate Judge, Mr. B. K. Biswas, who is a Hindu himself, has dealt with this matter in very great detail and with a wealth of knowledge of Hindu religious matters with which it is quite impossible for me to compete. He gives the whole history of the Ramanandi and Ramanuji movements; and he comes to the conclusion that the Sitamarhi Asthal was not a Ramanandi but a Ramanuji foundation. He considers the term "Bairagi" as simply denoting one who can restrain his passion and that it is not a phrase descriptive of any particular religious order of which a man must be member in such a fashion that his property can be inherited by others than his blood relations. Like myself, in my groping enquiry, he attaches little legal importance to the expression "Bairagi" which he regards merely as of a loosely descriptive character. It is said, next, that when an individual became a *mohunt* of the Sitamarhi Asthal he changed his family *gotra* whatever it may have been into the celestial *gotra* of "Achyut"; that is to say, he became one of the deity's chosen people. He does

not attach any great importance to this question because he does not think, that as a matter of fact, any such charge took place nor does he think that, at any rate, the last *mohunt* prior to the present defendant ever disassociated himself from his *girhasti* family.

I have already said that there is on both sides in this case a great deal of documentary and oral evidence which bears upon the question of fact as to whether the *mohunts* of this Asthal are condemned or not to celibacy. The documentary evidence is not very convincing; there is some to show that, when an outlying property which appears, perhaps, originally to have belonged to or to be appertaining to the Sitamarhi Asthal (and there are several outlying properties of this big institution), went out of the possession of its incumbent, one of the *mohunts* of Sitamarhi (the 4th) took steps, at the instigation of the widow of the *mohunt* of his outlying temple, to recover the property and to bring it back under the control of the Sitamarhi Asthal; that Sitamarhi *mohunt* does not seem in any way to have been affected by the fact that the incumbent of the Subordinate Institution (admittedly under the control of the Sitamarhi Asthal) had married but on the contrary appears to have made provision for the maintenance of his widow. The 7th *mohunt*, as I have previously mentioned, appears pretty clearly not to have been a supporter of any necessary obligation of celibacy.

When we come to the oral evidence we get much divergence of opinion and much evidence which, although possibly in the main of no doubt honest character, indicates how differently different persons construe religious tenets. The Subordinate Judge has dealt with these witnesses very carefully and with a knowledge which I do not profess to own. He comes to the conclusion that the Sitamarhi Asthal does not belong to the Ramanandi sect but is a Ramanuji foundation and that the *mohunts* of the Sitamarhi Asthal did not altogether, and need not altogether, cut off their connection with their *girhasti* family. He also deals with the important question as to whether under the Hindu Law a property once vested in an individual can be divested on account of subsequent disability. This aspect of the case, I must confess, is to me somewhat novel but at any rate there are possibilities under section 92 of our Civil Procedure Code which seem to enable the difficulty initiated by the Subordinate Judge to be overcome in many respects, particularly with regard to a concern which may be considered as in the nature of a public religious institution. The Subordinate Judge quotes numerous Hindu authorities to show that there is nothing in the Hindu Law to prevent a *mohunt* from contracting a matrimonial alliance and he had no authority produced before him to indicate that by so doing a *mohunt* must necessarily abdicate his incumbency. He points out that it is admitted that no vow of celibacy is taken by any Bairagi *chela* of the *mohunts* of this Asthal; he also says that there are many monastic or religious institutions in this Province the heads of which are, as a matter of fact, celibate, but he does not conclude that the fact of marriage of a *mohunt* necessarily entails a forfeiture of his position. He then proceeds to point out, as is undoubtedly the case, that there are a large number of religious institutions in this Province where the *mohunts* have been married men; he indicates that some of the immediate apostles of Ramanandi of whom, notably, is Sur Siranand Pipa, were married; he also indicates as an important factor that a certain Totadri Swami, who is a witness for the defendant and who is a man of admittedly very great importance in the Ramanuji hierarchy, came from the Deccan, where he occupies a position of the utmost importance, being styled as His Holiness, and visited recently the Sitamarhi Asthal. He thinks that had this Asthal belonged to the Ramanandi sect or its *mohunt* become *patit* (outcaste) by his marriage it would have been altogether impossible for him to pay it a visit. I must admit that I think that the evidence of this gentleman, whose testimony shows the broadminded aspect of religion adopted in modern days by most great prelates, is of the utmost importance in this case and I am sure that it will be useful if I quote some portion of what he says. His name is Swami Ranga Acharya Koil Kandhare Gobardan and he is a Tamil Brahmin residing at Gobardhan and

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Brindaban in the United Provinces; he is a Hindu priest. He is a man of very high religious rank; he takes the view that there are no real differences of doctrine or should not be between the Ramanandi and Ramanuji sects. He is quite satisfied that the *mohunt* of the Sitamarhi Asthal is an Acharya of the so-called Ramanuji portion of his sect. It is obvious from his evidence that this cleric was a man of high position and of very considerable knowledge; a broad-minded modern priest. He says that the Sitamarhi Asthal was founded indeed by a disciple of his own ancestor Ganga Ram and he definitely states that a *mohunt* of Sitamarhi Asthal can continue as a *mohunt* and perform the *puja* of the idols in spite of his having been married. He confirms the suggestion that Birakt and Bairagi should be construed as meaning the same thing and states that the *mohunts* of Sitamarhi Asthal are not of that category. He is himself a married man which in no way interferes with the tenure of his high and important office.

The Subordinate Judge, then, comes to the conclusion that the Sitamarhi Asthal is a Ramanuji Asthal and that the *mohunts* did not disassociate themselves from their family; he goes on to point out what is the real meaning of the word Bairagi and states that there is no Sastric religious prohibition against the marriage of either Ramanandi or Ramanuji Bairagis and, finally, he considers the question whether, in view of the long tradition of celibacy, the fact that this *mohunt* (the defendant) has married entails upon him burden of forfeiture of his office. He appreciates very fully the fact of the tradition for so many years and he then proceeds to examine in detail the evidence which has been adduced on both sides with regard to what happened to a *mohunt* who was not a celibate. He says, and I think rightly, that the plaintiff has failed to show any direct instance where a *mohunt* has been compelled to forfeit his office on account of his subsequent marriage: but, on the other hand, he shows also that the defendant has adduced evidence of the marriage of many *mohunts* of different places some of whom appear to have been even of Ramanandi sect and others of the Ramanuji persuasion. He, therefore, comes to the conclusion, in which I think he is right, that the plaintiff has failed to show in this case that the marriage of a *mohunt* (and that is to say, of the defendant) necessarily entails a forfeiture of his office and he accordingly on that ground amongst others dismissed the plaintiff's suit.

I must congratulate the Subordinate Judge upon an extremely able judgment upon matters of Hindu religion upon which it is difficult for a Christian unversed in these subjects to express any very confident opinion; but it is impossible, unless very cogent argument is produced before this Court to show that the Subordinate Judge was wrong, that this Court should upset his finding upon questions which after all are merely questions of fact. No one realises more than I do the importance which to those interested is attached to the possession of this undoubtedly valuable property and position; I should have personally thought, as a matter of abstract opinion, that the traditions of agnatic succession and celibacy ought, if possible, to have been maintained. That, however, is one of those views which have nothing to do with the legal aspect of any case but which cannot but compel one to think, as I have said before, that the most suitable solution of questions such as this would better be entrusted to the consideration not of the ordinary Civil Courts but of a tribunal composed of ecclesiastical personages (assisted no doubt by some legal chairman) which would decide matters of the nature on lines and with knowledge which might be more satisfactory and more certain than those upon which the High Courts in this country can ordinarily proceed.

In my opinion, therefore, this appeal must be dismissed with costs.

DAS, J.—I entirely agree.

W. C. A.

Appeal dismissed.

BAWA SINGH v. THAKUR SINGH.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2751 OF 1920.

January 6, 1922.

Present:—Mr. Justice Martineau.

BAWA SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

THAKUR SINGH AND OTHERS—PLAINTIFFS

SUNDAR SINGH—DEFENDANT—RESPONDENTS.

Limitation Act (IX of 1908), s. 12—Time requisite for obtaining copies, what is—Finding of fact—Civil Procedure Code (Act V of 1908), O XLI, r. 22—Cross-appeals—Appeal filed beyond time, whether can be treated as cross objections.

Under section 12 of the Limitation Act only the time from the date of making the application for copies up to the date on which the copies are ready for delivery can be excluded. [p. 478, col. 2.]

The finding of a lower Appellate Court as to the time requisite for obtaining copies is one of fact and cannot be attacked in second appeal. [p 478, col. 2.]

Sher Singh v. *Pem Raj*, 48 Ind. Cas. 31; 100 P. R. 1918; 185 P. W. R. 1918, relied upon.

Where a defendant files a cross-appeal, after the period for appealing has expired, he is entitled under O. XLI, r. 22 of the Civil Procedure Code to have his appeal treated as cross-objections to the plaintiff's appeal. [p. 478, col. 2.]

Ramji Das v. *Ajudhia Prasad*, 25 A, 628; A. W. N. (1903) 160, distinguished.

Second appeal from a decree of the District Judge, Gurdaspur, dated the 1st October 1920, varying that of the Subordinate Judge, First Class, Gurdaspur, dated the 23rd December 1919.

Lala *Mehr Chand Mahajan*, for the Appellants.

Lala *Parduman Das*, for the Respondents.

JUDGMENT.—The plaintiffs brought two suits contesting the validity of two mortgages effected by Sundar Singh, one for Rs. 2,500 and the other for Rs. 800. The Subordinate Judge held the mortgage for Rs. 2,500 to be valid to the extent of Rs. 1,322-5-9, and the other mortgage to be valid to the extent of Rs. 425-10-9, and passed decrees accordingly. Both parties appealed to the District Judge. The defendants filed their appeals one day too late, but they added a note that they had not been informed of the completion of the copies for which they had applied till two or three days after the copies were ready, and also asked that if the appeals were time-barred they might be treated as cross-objections in the plaintiffs' appeals. The District Judge dismissed the defendants' appeals as time-barred and also held that as the appeals were dismissed they could not be heard as cross-objections. He then proceeded to hear the plaintiffs' appeals and accepted them, declaring one alienation to be valid only to the extent of Rs. 200 and the other to be valid only to the extent of Rs. 80. The defendants have preferred second appeals to this Court.

The first point taken by them is that in computing the period of limitation for their appeals to the District Court the period from the date of their applying for copies of the judgments and decrees up to the date on which the copies were delivered to them should have been excluded, and that, therefore, the appeals were within time. I am, however, not prepared to differ from the lower Appellate Court's view that only the time from the date of the application up to the date on which the copies were ready for delivery could be excluded. Moreover, the District Judge's finding as to the time requisite for obtaining the copies is one of fact and cannot be attacked in second appeal. See *Sher Singh* v. *Pem Raj* (1).

But the second contention, that the defendants were entitled to have their appeals to the District Judge heard as cross-objections, appears to be correct.

Ramji Das v. *Ajudia Prasad* (2), which is relied upon by the learned Judge in support of the view taken by him, is not in point. What was held in that case was that it is not open to a party who has appealed to file cross-objections after his appeal has been dismissed. The present case is quite different. The defendants did not file cross-objections after the dismissal of their appeals, but they only asked that the appeals which they filed might, in case they were found to be time-barred, be treated as cross-objections in the plaintiff's appeals, and no authority has been cited to show that their appeals could not be so treated.

(1) 48 Ind. Cas. 31; 100 P. R. 1918; 185 P. W. R. 1918.

(2) 25 A. 628; A. W. N. (1903) 160.

I accordingly accept the appeals (Nos. 2751 and 2754 of 1920), set aside the decrees of the lower Appellate Court, and remand both cases to that Court under O. XLI, r. 23, Civil Procedure Code, with the direction that the defendants' appeals to that Court (Nos. 34 and 35 of 1920) be treated as cross-objections in the plaintiff's appeals and disposed of according to law. The Court-fees on the appeals in this Court will be refunded. Other costs will be costs in the cases.

Z. K.

Appeals accepted.

MADRAS HIGH COURT.

FULL BENCH.

SECOND CIVIL APPEAL No. 115 OF 1921.

December 21, 1921.

Present:—Sir Walter Schwabe, Kt., Chief Justice, Mr. Justice Coutts Trotter and Mr. Justice Kumaraswami Sastri.

NALLA TIRUPATIRAJU AND OTHERS—DEFENDANTS Nos. 2 TO 4—APPELLANTS

versus

NANDIKOLLA VENKAYYA *alias* VENKAMMA—PLAINTIFFS—RESPONDENTS.

Hindu Law—Alienation by widow—Compromise decree, whether binding on reversioner—Burden of proof—Reference to Full Bench—Hypothetical questions.

By the Full Bench.—In an action against a Hindu widow on a contract made by the widow, a compromise by which she makes over the estate stands on no different footing from a conveyance by her of the property; and the burden of proving that the compromise is binding on the reversioner is on the alienee. [p. 482, col. 2]

Muthukumarasamy Odayar v. *Subramania Iyer*, 33 Ind. Cas 687; 31 M. L. J. 87, *Kadakkarai Nadan* v. *Nadakkannu Nadan*, 62 Ind. Cas. 752; (1921) M. W. N. 342; 13 L. W. 533, *Srinivasa Aiyer* v. *Thiruvengada Maistry*, 55 Ind. Cas. 588; 10 L. W. 594; 26 M. L. T. 350, *Rajlakshmi Dasee* v. *Katyayani Dasee*, 12 Ind. Cas. 464; 38 C. 639, *Sant Kumar* v. *Deo Saran*, 8 A. 365; A. W. N. (1886) 129; 5 Ind. Dec. (N. S.) 135, referred to.

Per *Schwabe, C. J.*—By the Hindu Law, a widow in possession of property inherited from her husband has a life-interest with power to alienate for necessaries. The reversioners are protected by the rule that if she does alienate the onus is on the alienee to show that the alienation was, in fact, for necessaries. [p. 481, col 2.]

An order of reference to a Full Bench should not ask hypothetical questions or ask the Full Bench, so to speak, to give a dissertation on general principles of law but to do what is quite enough for any Judge to do, to answer the question which directly arises in the case before the Court. [p 483, col. 1.]

Per *Coutts Trotter, J.*—Where a widow represents the estate it would be unreasonable to deny her the same discretion to avoid useless litigation as would be vested undeniably in a male manager. [p. 483, col. 1.]

But that must be subject to this qualification that where the obligation sought to be enforced against the estate is one of her own creation, she stands in exactly the same position with regard to the justification of the compromise as she does with regard to that of her original contract, and is clothed with no higher authority and no less degree of responsibility by the accident that she has superadded to her character of a widow in possession that of a litigant [p 483, col. 1.]

The rule that a widow, as representing the estate, can effectually settle claims arising out of the acts of others, is a salutary one—*ut sit finis litium*. But to give her the same power in relation to her own acts would be to make her, as it were, a judge in her own cause. [p. 483, col 1.]

Per *Kumaraswami, J.*—In considering the question as to whether a compromise arrived at by the widow is binding on the reversioners, the main consideration is whether the suit or claim against the widow is a suit or claim arising out of a contract or transaction entered into by her husband with strangers who claim against the estate or whether the suit is upon a contract or transaction which is entered into by the widow herself. In the former case there can be little doubt that she represents the estate and a *bona fide* compromise by her would bind the reversioners In the latter case there is always the question as to whether she acted in her individual capacity or whether she acted as representing the estate. This question has to be solved in cases where the suit proceeds to trial by the evidence adduced in the case and the findings on the issues. A mere allegation by the plaintiff that the widow acted for the estate or a mere assertion by her that she so acted would not by itself show that she acted in her representative capacity or that the decree is binding on the reversioners [p. 483, col. 2.]

Jugul Kishore v. *Jotendro Mohun Tagore*, 10 C. 985; 11 I. A. 66; 8 Ind. Jur 455; 4 Sar. P. C. J. 553; 5 Ind. Dec. (N. S.) 657, *Kiranbala Debi* v. *Kali Charan Singha*, 32 Ind Cas. 587, *Trilochan Hazra* v. *Bakkeswar*, 14 Ind. Cas. 839; 15 C. L. J. 428, *Veerabadra Aiyar* v. *Marudaga Nachiar*, 8 Ind. Cas. 1072; 34 M. 188; (1910 M. W. N. 799; 9 M. L. T. 235; 21 M. L. J. 320, referred to.

In cases of compromise where the suit is on a contract by the widow or in cases where the cause of action is personal to her, she cannot, by simply consenting to a decree, make that which can only bind her life-interest if the matter rested merely

on a contract or conveyance, bar the reversioners. If there was no decree, the onus would clearly be on the alienee to show necessity and the recitals in the document would not by themselves prove necessity. [p. 484, cols. 1 & 2.]

Brij Lal v *Inda Kunawr*, 23 Ind. Cas. 715; 36 A. 187; 26 M. L. J. 442; 18 C. W. N. 649; 12 A. L. J. 495; 19 C. L. J. 469; (1914) M. W. N. 405; 15 M. L. T. 395; 16 Bom. L. R. 352; 1 L. W. 794 (P. C.), referred to.

A widow cannot do what is beyond her legal powers by simply going to Court and filing a compromise petition or consenting to a decree. [p. 484, col. 2.]

Great North-West Central Railway v. *Charlebois*, (1899 A. C. 114; 68 L. J. P. C. 25; 79 L. T. 35, referred to.

A widow's action in alienating her husband's estate for her private debt or for a purpose which under Hindu Law would not amount to necessity is beyond her powers, and she cannot take advantage of her representative capacity to validate a purely personal transaction. The interposition of a decree by consent would not make any difference as to the onus of proof in such cases. [p. 484, col. 2.]

Khunni Lal v. *Gobind Krishna Narain*, 10 Ind. Cas. 477; 33 A. 356; 15 C. W. N. 545; 8 A. L. J. 552; 13 C. L. J. 575, 13 Bom. L. R. 427; 10 M. L. T. 25; (1911) 1 M. W. N. 432; 21 M. L. J. 645; 38 I. A. 87 (P. C.), *Bhogaraju* v. *Adapalli Seshayya*, 12 Ind. Cas. 123; 35 M. 560; 10 M. L. T. 179, referred to.

Second appeal against a decree of the Court of the Subordinate Judge, Cocanada, in Appeal Suit No. 26 of 1920, presented against a decree of the Court of the Additional District Munsif, Cocanada, in Original Suit No. 102 of 1919.

This second appeal came on for hearing on the 12th and 16th August 1921, upon perusing the grounds of appeal, the judgments and decrees of the lower Appellate Court and the Court of first instance and the material papers in the suit, and upon hearing the arguments of Mr. *A. Krishnaswami Aiyar*, for the Appellants, and of Mr. *P. Somasundaram*, for the Respondents, the Court (Krishnan and Odgers, JJ.,) made the following

ORDER OF REFERENCE TO A FULL BENCH.

The facts necessary for this reference are briefly these. One Davuluri Swami who was the original owner of the plaint properties mortgaged them usufructuarily to the first defendant in 1887 for Rs 171-8-0 and died soon after. On his death his estate passed into the hands of his widow Sathemma. In 1891 she executed a deed of simple mortgage for Rs. 200 in favour of the same person, the first defendant, as a second mortgage on the same properties with some addition. In 1901 she was sued by the first defendant for recovery of the money due on the second mortgage by sale of the mortgaged properties presumably subject to the first mortgage. This suit, Original Suit No. 564 of 1901, was compromised by the widow with the first defendant and it was arranged thereby that the first defendant was to take the properties as sold to him outright in settlement of his claim. The widow thereafter went away to Rangoon and has not been heard of since for many years. The present suit is by the Swami's daughter, the first plaintiff, and an assignee of a half share of her properties, the second plaintiff, and they sue on the footing that the widow is dead and the reversion has fallen in to the first plaintiff, to redeem the usufructuary mortgage granted by the Swami, ignoring the compromise decree and the second mortgage executed by the widow. The defendants set up the compromise in answer to the suit and an issue was framed whether it was binding on the first plaintiff.

On that issue the Subordinate Judge held that the burden of proof was on the defendants, the alienees, to prove that the mortgage-debt and the compromise were binding on the reversioner, and finding that they had not established it on the evidence he set aside the compromise and the sale under it and allowed redemption to the plaintiffs. The learned Vakil for the appellants contends that this view of the burden of proof is opposed to the rulings reported in *Muthukumarsamy Odayar* v. *Subramania Iyer* (1) and *Kadakkarai Nadan* v. *Nadakkannu Nadan* (2). But on the other side the ruling in *Srinivasa Aiyar* v. *Thiruvengada Maistry* (3) is cited in support of it. The two sets of rulings seem to be directly contradictory on this point, the one expressly dissenting from the view taken in the other. In these circumstances we think it right that the question should be authoritatively settled by a Full

(1) 33 Ind. Cas. 657; 31 M. L. J. 87.
(2) 62 Ind. Cas. 752; (1921) M. W. N. 342; 13 L. W. 533.
(3) 55 Ind. Cas. 588; 10 L. W. 594; 26 M. L. T. 350.

Bench. As all the authorities bearing on the question are cited and discussed in the above rulings it is not necessary to refer to them in detail again.

We, therefore, refer to the Full Bench the following questions :—

(1) Which of the two views taken in the above rulings as to the burden of proof is the correct one? and

(2) On whom was the burden of proof in the present case?

This second appeal came on for hearing on the 19th December 1921.

Mr. *A. Krishnaswami Iyer*, for the Appellants.—The learned Subordinate Judge is wrong in throwing 'the burden of proof' of proving necessity in the case on the appellants. They claim title to the property not on the alienation made to them by the widow but on a compromise decree entered into with them by the widow when they sued her on her mortgage. If it is the ordinary case of alienation, no doubt the Subordinate Judge is right in putting the alienees to the proof of the necessity of the transaction. But the present case is different. The widow has under the Hindu Law power to enter into a compromise which is binding on the reversioners. That is decided expressly by this Court in *Muthukumarasamy Odayar* v. *Subramania Iyer* (1) and in *Kadakkarai Nadan* v. *Nadakkannu Nadan* (2). These decisions are sufficient to shift the burden of proof from the alienees on the reversioners.

Mr. *P. Somasundaram*, for the Respondents.—No doubt the proposition enunciated by my learned friend is correct in cases when the suit, in respect of which compromise is effected, is based upon a debt which is binding on the estate. But where the debt itself is binding only on her personal estate, the mere fact that in addition there is the force of a 'suit' and a 'compromise' consequent upon it would not place the matter any higher. The burden is as heavily on the alienees to prove the binding nature of the debt as in any other case [*Srinivasa Aiyar* v. *Thiruvengada Maistry* (3) and *Bhogaraju* v. *Adapalli Seshayya* (4) were then referred to] in support of the argument. To hold otherwise would be really to deny the protection which is afforded to the reversioners under the law. In the case before us, the debt in respect of which the suit was brought was a creation of the widow herself. So the onus is on the appellants to prove the binding nature of the debt. That is so decided by the Subordinate Judge. In fact there is no real conflict between the cases referred to in the referring order.

OPINION.

SCHWABE, C. J.—By the Hindu Law, a widow in possession of property inherited from her husband has a life-interest with power to alienate for necessaries. The reversioners are protected by the rule that if she does alienate, the onus is on the alienee to show that the alienation was, in fact, for necessaries. In this case, the widow Sathemma inherited from her husband Davaluri Swami certain properties, then the subject of a mortgage to the first defendant by the husband. She executed a second mortgage for Rs. 200, which, it is recited in the deed, was advanced for payment of the debts of the husband to the first defendant and for maintenance of the widow. The widow having died, the plaintiffs, the reversioners, wish to redeem the first mortgage. The first defendant's answer to this claim is that a suit was brought in 1901 by the first defendant against the widow to recover the money due on the second mortgage and that the suit was compromised by the widow agreeing that the first defendant should take the property absolutely, as if sold to him, in settlement of his claim.

It is admitted that, apart from the compromise decree, the onus would be on the defendant to show that the second mortgage was, in fact, for necessaries. It is also admitted that, if the widow had sold the property to the first defendant at the date of the compromise, the onus would have been on him to show that the sale was for necessary purposes. But it is contended

(4) 12 Ind. Cas. 123; 35 M. 560; 10 M. L. T. 179.

that the widow, in her representative capacity as manager of the property, had power to compromise the suit, and that it must be taken that she compromised the suit in that capacity, and that, in the absence of evidence adduced by the reversioners to the contrary, she must be taken to have acted properly in so doing.

The result would be somewhat startling for it follows that the whole protection, which the law gives to reversioners in respect of dealings by the widow and which the reversioners had before the compromise, can be taken away by a further act of the very person against whom it is the policy of the Hindu Law to protect, which act in itself amounts to a further alienation.

It is said that there are authorities on this point and it is by reason of their supposed conflict that this case is referred to the Full Bench. I can myself find no such conflict in the cases which are quoted in the order of reference. There are two cases, *Muthukumaraiamy Odeyar's case* (1) and *Kadakharai Nadan's case* (2), which decided that a compromise by a widow of a suit relating to the property inherited from her husband is binding on the reversioners. In both these cases she was sued in her representative capacity as representing the estate, and it may well be that she, in that representative capacity, can bind the estate by a compromise. I am not giving any decision upon that point, which we can deal with when it arises. At present I see no reason to dissent from the view expressed in either of those two cases. But in this case she was not, in fact, sued in her representative capacity. She was sued as a mortgagor on the second mortgage, that is, to enforce a contract made by her, and she compromised that suit by purporting to make over the property to the mortgagee absolutely. This, in my judgment, she cannot do except subject to the rule stated above for the protection of the reversioners. If she could, it would be open to her to adopt simple means for avoiding the rule which is made for the protection of the reversioners. All that she would have to do would be first to mortgage and then, if the plaintiff sued on the mortgage, to compromise by alienation. Thus the whole protection which the Hindu Law has given to reversioners under similar circumstances would be taken away because she went through the formality of compromising an action instead of taking the more simple course of selling the property in her capacity as widow. That this is not permitted is clear from *Srinivasa Aiyar* v. *Thiruvengada Maistry* (3) and, if that case is rightly decided, the question in this case must be answered by saying that the onus is on the mortgagee. I confess that, for my part, after listening with care to the arguments which have been addressed to us on either side, I entirely agree with what is said in that judgment. I also entirely agree with the remarks of Mockerjee, J. in *Rajlakshmi Dasee* v. *Katyayani Dasee* (5) and those of Mahmood, J. in *Sant Kumar* v. *Deo Saran* (6). They seem to me entirely right in principle. It may be that some of the remarks made in these judgments go a little further than was necessary for the decision of those cases. I want to guard myself from being taken to express the view that in no case can a widow compromise a suit and thereby bind the reversioners. I am quite clear that there are cases in which she can do so. But what I do hold is that in an action against the widow on a contract made by the widow, a compromise by which she makes over the estate stands on no different footing from a conveyance by her of the property. In the two cases quoted in the order of reference I find that, at any rate, the original contract was not made by the widow and I find that it is quite clear that the widow had been sued in her representative capacity and, therefore, I think that those cases should not be regarded as conflicting with *Srinivasa Aiyar* v. *Thiruvengada Maistry* (3), and the cases there quoted. If they do conflict, I prefer the decision in the latter case. It follows from what I have said that the answer to question No. 2 is that, in the present case, the burden of proof is upon the defendant.

The other question "which of the two views taken in the above rulings as to

(5) 12 Ind. Cas. 464; 38 C. 639.
(6) 8 A. 365; A. W. N. (1886) 129; 5 Ind. Dec. (N. S.) 135.

the burden of proof is the correct one" is a question which, speaking for myself, I decline to answer. The use of the words "two views taken in the above rulings" is certainly open to comment. The rulings in the cases referred to so far from taking two views are, I think, consistent with each other, and, for that reason, it seems to me to be a question to which no answer is required. I should like to take this opportunity of pointing out that, in my judgment, the order of reference to a Full Bench should not ask hypothetical questions or ask the Full Bench, so to speak, to give a dissertation on general principles of law but to do what is quite enough for any Judge to do, to answer the question which directly arises in the case before the Court.

COUTTS TROTTER, J.—I am of the same opinion, and have little to add. With great respect to the learned Judges who referred the case, I do not think there is any necessary conflict between the decided cases. I quite assent to the principle that where a widow represents the estate it would be unreasonable to deny her the same discretion to avoid useless litigation as would be vested undeniably in a male manager. But I think that that must be subject to this qualification—which exists in the present case—that where the obligation sought to be enforced against the estate is one of her own creation she stands in exactly the same position with regard to the justification of the compromise as she does with regard to that of her original contract, and is clothed with no higher authority and no less degree of responsibility by the accident that she has superadded to her character of a widow in possession that of a litigant. To hold otherwise, it seems to me, would be nothing less than an abrogation of common sense. I think that the rule that a widow, as representing the estate, can effectually settle claims arising out of the acts of others, is a salutary one—*ut sit finis litium*. But to give her the same power in relation to her own acts would be to make her, as it were, a judge in her own cause; she is not solely concerned with her duty to the estate, as may be supposed in the former case, but is obviously liable to a bias in favour of attempting to validate her own act. Such a conclusion would obviously deprive the reversioners of the very protection which the Hindu Law endeavours to give them; and would unquestionably lead to endless collusive compromises, as the present one may well have been. I do not think that such a conclusion has even the superficial merit claimed for it that on its face it is a logical deduction from the fact that she has a discretion as to settling claims which do not arise out of her own acts.

In the view I have taken of this case, I agree with my Lord that it is not necessary for us to answer the second question propounded, as, I think, the answer to the first resolves the supposed conflict between the authorities.

KUMARASWAMI SASTRI, J.—On the facts of this case I am of opinion that the onus lies on the alienees to prove that the compromise-decree is binding on the reversioners. In considering the question as to whether a compromise arrived at by the widow is binding on the reversioners, the main consideration is whether the suit or claim against the widow is a suit or claim arising out of a contract or transaction entered into by her husband with strangers who claim against the estate or whether the suit is upon a contract or transaction which is entered into by the widow herself. In the former case there can be little doubt that she represents the estate and a *bona fide* compromise by her would bind the reversioners. In the latter case there is always the question as to whether she acted in her individual capacity or whether she acted as representing the estate. This question has to be solved in cases where the suit proceeds to trial by the evidence adduced in the case and the findings on the issues. A mere allegation by the plaintiff that the widow acted for the estate or a mere assertion by her that she so acted would not by itself show that she acted in her representative capacity or that the decree is binding on the reversioners. It has been held in numerous cases that where her husband's property is sold in execution of a decree against her and the question as to the *quantum* of interest conveyed under the decree passed against her is raised, it has to be determined by the nature of the claim, the evidence ad-

duced and the findings in the case. As pointed out by their Lordships of the Privy Council in *Jugul Kishore* v. *Jotendro Mohun Tagore* (7), if the suit is simply on a personal claim against the widow, then a sale in execution will merely pass the widow's qualified interest and the reversionary interest will not be bound by it. If, on the other hand, the suit is against the widow in respect of the estate, or on a cause of action which is not a mere personal cause of action against the widow, the whole estate will pass. I may also refer to *Kiranbala Debi* v. *Kali Charan Singha* (8), *Trilochan Hazra* v. *Bakkeswar* (9) and *Veerabadra Aiyar* v. *Marudagi Nachiar* (10). Where there are findings of fact as to the claim, it is easy to determine with reference to the proceedings how she acted and how far the decree will bind the reversioners; but in cases where there are no findings and where we have to rest merely on the allegation of the plaintiff or of the widow, it seems to me difficult to hold that because an allegation is made by one side or the other, the reversioners ought to be bound by the consent-decree passed in the suit by the alienee against the widow. In cases where a person wants to bind the estate on a personal contract or transaction by the widow, he invariably alleges that what she did was for the benefit of the estate and is binding on the reversioners and in cases where the widow deals with the estate and borrows monies for her personal use, allegations are made of necessity to show the binding nature of the debt on the reversioners. It seems to me that in cases of compromise where the suit is on a contract by the widow or in cases where the cause of action is personal to her, she cannot, by simply consenting to a decree, make that which can only bind her life interest, if the matter rested merely on a contract or conveyance bar the reversioners. If there was no decree, the onus would clearly be on the alienee to show necessity and the recitals in the document would not by themselves prove necessity. In *Brij Lal* v. *Indar Kunwar* (11), their Lordships of the Privy Council observed at page 183*: "The onus of supporting a sale from a Hindu widow is undoubtedly on the purchaser. In the present case the appellant has adduced no evidence to prove such legal necessity as would bind the husband's estate. He has relied simply on the recitals in the schedule attached to the sale deed. Recitals in mortgages or deeds of sale with regard to the existence of necessity for the alienation have never been treated as evidence by themselves of the fact. And it has been repeatedly pointed out by this Board that to substantiate the allegation there must be some evidence *aliunde*." It is clear that a widow cannot do what is beyond her legal powers by simply going to Court and filing a compromise petition or consenting to a decree. I need only refer to *Great North-West Central Railway* v. *Charlebois* (12). It is also clear that the widow's action in alienating her husband's estate for her private debt or for a purpose which under Hindu Law would not amount to necessity is beyond her powers, and she cannot take advantage of her representative capacity to validate a purely personal transaction. The interposition of a decree by consent would not, in my opinion, make any difference as to the onus of proof in such cases. Where the pleadings show that both the plaintiff and the widow asserted that the alienation was for purposes binding on the reversioners, there can be no substantial dispute as to the legality of the act of the widow as binding on the reversioners so as to make the legality of her act a point substantially in issue and a fair subject of compromise. As pointed out by their Lordships of the Privy Council in *Khunni Lal* v. *Gobind Krishna Narain* (13), the true test to apply to a transaction which is challenged by reversioners as an alienation not binding on them is whether

(7) 10 C. 985; 11 I. A. 66; 8 Ind. Jur. 455; 4 Sar. P. C. J. 653; 5 Ind. Dec. (N. S.) 657.
(8) 32 Ind. Cas. 587.
(9) 14 Ind. Cas. 839; 15 C. L. J. 423.
(10) 8 Ind. Cas. 1072; 34 M. 188; (1910) M. W. N. 799; 9 M. L. T. 235; 21 M. L. J. 320.

(11) 23 Ind. Cas. 715; 36 A. 187; 26 M. L. J. 442; 18 C. W. N. 649; 12 A. L. J. 495; 19 C. L. J. 469; (1914) M. W. N. 405; 15 M. L. T. 395; 16 Bom. L. R. 352; 1 L. W. 794 (P. C.).
(12) (1899) A. C. 114; 68 L. J. P. C. 25; 79 L. T. 35.
(13) 10 Ind. Cas. 477; 33 A. 356; 15 C. W. N. 545; 8 A. L. J. 552; 13 C. L. J. 575; 13 Bom. L. R. 427; 10 M. L. T. 25; (1911) 1 M. W. N. 432; 21 M. L. J. 645; 38 I. A. 87 (P. C.).

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the alienee derives title from the holder of the limited interest or life-tenant. If the claim is based on an alienation by the widow or on a contract by her, the onus must be on the alienee to show that circumstances existed which entitled her to transfer her limited estate. I agree with the view taken in *Bhogaraju* v. *Adapalli Seshayya* (4) and *Srinivasa Aiyar* v. *Thiruvengada Maistry* (3), that a decree passed against the holder of a woman's estate on compromise between her and her creditor would be binding on the reversioners only in cases where the contract of compromise itself entered into by her would bind them. *Muthukumarasamy Odayar* v. *Subramania Iyer* (1) and *Kadakkarai Nadan* v. *Nadakkannu Nadan* (2), referred to by the learned Referring Judges, were not cases of a contract entered into by a widow alienating property and a compromise by her. *Muthukumarasamy Odayar* v. *Subramania Iyer* (1) was a case where the last male holder purchased two items of property in a Court sale. They were claimed by the fourth defendant by virtue of private sale to him. A suit filed by the fourth defendant was dismissed in the First Court and in the District Court. A compromise was entered into by the widow when the case was in the High Court. *Kadakkarai Nadan* v. *Nadakkannu Nadan* (2) was a suit by a daughter to question an alienation made by her mother and the suit was compromised. There are no doubt observations in these cases which suggest that the compromise would be binding, irrespective of whether the suit was simply on a personal claim against the widow in respect of the estate or on a cause of action which is not a mere personal cause of action against the widow: and if the learned Judges intended to decide that the compromise was binding in all cases, I would respectfully dissent from them.

My answer to the reference is that the burden of proof lies on the alienee in the present case.

M. C. P.
S. D. *Reference answered.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1548 OF 1918.

January 11, 1922.

Present:—Justice Sir William Chevis, Kt., and Mr. Justice Abdul Qadir.

Rani SURAJ KAUR, THROUGH BAGGA SINGH, HER *mukhtar-i am*—DEFENDANT—APPELLANT

versus

NAGINA SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), ss. 11, Expl. IV, 47—Punjab Tenancy Act (XVI of 1887), s 50—Sale of proprietary rights to occupancy tenants—Sale set aside—Possession awarded to proprietor—Suit by tenants to establish occupancy rights, whether barred—*Res judicata—*Jurisdiction of Civil and Revenue Courts.*

Plaintiffs were occupancy tenants of certain land of which *N.* was the proprietor *N* sold the proprietary rights to the plaintiffs and died some time after the alienation. Defendant who succeeded *N.* brought a suit to impugn the sale on the ground that it had been effected without consideration and necessity and was awarded a decree for possession of the land. In execution of that decree defendant obtained actual possession of the land and turned the plaintiffs out The latter objected that they were entitled to retain possession of the land as occupancy tenants, but their objection was disallowed. Upon this they sued for restoration of their occupancy rights:

Held, (1) that section 50 of the Punjab Tenancy Act was not applicable to the case inasmuch as the plaintiffs had been dispossessed in execution of a decree; [p. 486, col 2.]

Akbar Hussain v. *Karm Dad*, 48 Ind. Cas. 8; 90 P. R. 1918 (F. B.), distinguished

(2) that the suit was not barred by the provisions of section 47 of the Civil Procedure Code; [p. 486, col. 2.]

(3) that the suit was not barred by the provisions of Explanation IV to section 11 of the Civil Procedure Code, inasmuch as the plaintiffs were litigating under a different title from that under which they litigated in the previous suit. [p. 486, col. 2.]

Second appeal from a decree of the Additional District Judge, Ambala, dated the 13th February 1918, reversing that of the Subordinate Judge, First Class, Rupar, District Ambala, dated the 26th August 1917.

Mr. *Kanwar Narain*, for Pandit *Shee Narain*, R. B., for the Appellant.

Mr. *Jai Gopal Sethi* and Mr. *C. L. Gulati*, for the Respondents.

JUDGMENT.—The plaintiffs, Dharm Singh, Mastan Singh and Gatu Singh, sons of Sobha, were occupancy tenants of certain

land in Ambala District, of which Rani Narain Kaur was the owner. She sold her proprietary rights to them and died sometime after the alienation. On her death, Rani Suraj Kaur, her step-mother, succeeded to her estate and she brought a suit against the vendees to impugn the sale, which, she said, was without consideration and necessity. She succeeded in getting the sale set aside and was awarded a decree for possession of the land. In the execution of that decree she was given actual possession of the land in dispute. The plaintiffs urged that she was entitled only to proprietary possession and that, even if the alienation in their favour was invalid, they were still entitled to remain in possession of the land as occupancy tenants, but their objections were disallowed and they were turned out of the land. Then they brought the present suit for restoration of their occupancy rights. Rani Suraj Kaur pleaded that the plaintiffs were not occupancy tenants and also that the suit did not lie. The Court of first instance found, on the strength of entries in the Revenue Records, that the plaintiffs were occupancy tenants but dismissed the suit on the ground that the question in dispute being one "between a decree-holder and the judgment-debtors no fresh suit lies," that is to say, section 47, Civil Procedure Code, barred the suit. The plaintiffs appealed against this decision and their appeal was accepted by the District Judge, who held that the Rani was entitled only to possession as a proprietor and had no right to deprive the plaintiffs of their occupancy rights. He observed that the plaintiffs were being sued in the previous case in the capacity of vendees proprietors, and the question of their occupancy rights was not in any way concerned in those proceedings". He gave them a decree for restoration of occupancy rights by actual possession of the land in dispute. Against this decree Rani Suraj Kaur has come up to this Court in second appeal and her case has been argued before us by Mr. Kanwar Narain.

This appeal was referred to a Division Bench on two points, (1) That the suit was barred by section 11, Explanation IV, of the Civil Procedure Code, because it was incumbent on the present plaintiffs as defendants in the previous suit to plead that even if their title as vendees of the land was found to be defective they were entitled to retain possession of it as occupancy tenants; and (2) that when Rani Narain Kaur sold the land to the plaintiffs their rights of occupancy merged in the proprietary rights and it is open to question whether those rights were revived or not upon the setting aside of the sale. This latter point has not been argued before us and the learned Counsel has contented himself with pressing the first point only. He referred, in passing, to section 50 of the Punjab Tenancy Act and the Full Bench ruling of the Punjab Chief Court, reported as *Akbar Hussain* v. *Karm Dad* (1) and urged that the Civil Courts had no jurisdiction to try this case because the plaintiffs were dispossessed tenants suing their landlord to recover possession as tenants, but we do not think section 50 can help him as it applies to a tenant dispossessed and "otherwise than in execution of a decree," which is certainly not the case here. He also referred to section 47, Civil Procedure Code, as barring this suit but, as pointed out by Mr. Justice Scott-Smith in his note referring this appeal to a Division Bench, the rulings cited by the lower Appellate Court are good authority for holding that section 47, Civil Procedure Code is not applicable to the case before us.

As regards section 11, Explanation IV, Civil Procedure Code, it is contended that as the present plaintiffs failed to set up the plea of occupancy rights when the suit for possession was brought against them the decision in the previous case is *res judicata*. This argument seems plausible at first sight but the main obstacle in the way of Explanation IV operating as a bar to the present suit is that one of the necessary conditions for the application of section 11 itself is not fulfilled, *i.e.*, the plaintiffs are not "litigating under the same title." At the time of the preivous suit the present plaintiffs were sued as vendees and the sole question in dispute was the validity of the sale. There was no reference at all to their status as occupancy tenants. They are now suing in the capacity last mentioned, and clearly they are litigating under a different title.

(1) 48 Ind. Cas. 8; 90 P. R. 1918 (F. B.).

We hold, therefore, that the suit is not barred by section 11, Explanation IV, Civil Procedure Code. The plaintiffs have been rightly given a decree for restoration to possession of the land in dispute as occupancy tenants. We uphold the decree of the lower Appellate Court and dismiss this appeal with costs.

Z. K.

Appeal dismissed.

ALLAHABAD HIGH COURT.

ORIGINAL CIVIL SUITS NOS. 1 AND 2 OF 1921.

March 9, 1922.

Present:—Mr. Justice Piggott and Mr. Justice Walsh.

B. SASHIL CHANDRA DAS—APPLICANT

versus

MESSRS. SAKHAMAL BANSIDHAR—OBJECTOR.

Acceptance—Conditional acceptance—Contract—Clause in indent authorising sale of goods after notice—Reference to arbitration—Arbitrator's jurisdiction to decide questions of law and fact on which his jurisdiction depends—Arbitration Act (IX of 1899)—Contract Act (IX of 1872), s. 33—Contingent contract—Uncertain future event.

An importer of piece-goods accepted an order "subject to revision and confirmation by mail if required." It was established by evidence regarding the ordinary course of business that the words "if required" in the said condition meant "if required by some telegraphic mistake between England and India for which neither of the contracting parties was responsible"; no such mistake occurred:

Held, that there was a complete and binding contract. [p. 489, col. 2.]

First Appeal No. 438 of 1917, decided on December 2, 1920, distinguished.

Per *Piggott, J.*—A special clause in an indent, which provides that, in the event of buyer's failure to accept the seller's draft and to pay it at maturity, the importer can sell the goods by public auction, after due notice, and claim the difference between the selling price and the contract price, does not bar a reference to arbitration until goods are sold by public auction after notice. [p. 490, col. 2.]

An arbitrator can interpret such a clause and decide that its non-compliance does not bar a claim for damages. [p. 490, col. 2.]

Per *Walsh, J.*—The decision of the question whether there has been a completed contract so as to bind the parties to submission in writing, does not rest with arbitrators. Questions of fact and law, upon which the jurisdiction of arbitrators depends, are for the Courts [p. 491, col 2]

Baijnath Kalooram and Alibhoy Mahomed, In the matter of an arbitration between, 53 Ind. Cas. 439; 24 C. W. N. 567, referred to.

Messrs. *L. M. Banerji* and *I. B. Banerji*, for the Applicant.

Messrs. *B. E. O'Conor, G. W. Dillon, S. N. Sen, K. N. Katju* and *Durga Prasad*, for the Opposite Party.

JUDGMENT.

PIGGOTT, J.—These are connected applications to file two awards, purporting to be made on November 12th, 1920 at the close of proceedings taken under the Indian Arbitration Act in connection with a trade dispute between two firms. It is one of a number of connected applications which would, in the ordinary course of things, have been filed in the Court of the District Judge of Cawnpore; but were transferred to this Court with the consent of the parties to be disposed of in the exercise of its original jurisdiction, because of the importance to the commercial community of some of the questions involved.

The firm in whose favour the awards have been made, that of Sushil Chandra Das & Co., which may conveniently be spoken of as the plaintiff firm, are importers of piece goods from Manchester. The defendant firm, that of Sukha Mal-Bansi Dhar, deals in the said goods but does not import on its own account. On August 24th, 1918 the defendant firm placed in the hands of the plaintiff firm two indents drawn up on a form published by the Delhi Piece Goods Association; one indent was for one hundred bales of red shirtings, the other for twenty five bales of white Lawns. On September 2nd, 1918 the plaintiff firm wrote intimating their acceptance of the former order, and on September 4th, 1918 they similarly accepted the latter. It is admitted that the conclusion of the Armistice on November 11th, 1918 was followed by a heavy fall in the price of piece goods on the Indian market. On November 24th, 1918 the defendant firm wrote to the firm begging the latter to arrange with their supplier at home to expunge these orders from their books," and offering to pay "nominal damages" in return for this favour. Further correspondence followed; and on January

20th, 1919 the defendant firm wrote repudiating liability on the ground that there had never been any completed contract of sale between the parties. The plaintiff firm claimed to have the dispute referred to arbitration under the terms of clause 15 of the conditions endorsed on the printed form of tender which the defendant firm had used. The latter took up the position that, inasmuch as there had never been any completed contract between the parties, it necessarily followed that they were bound by no agreement to refer anything to arbitration. One attempt at obtaining a decision through a single arbitrator failed, the District Judge holding that the conditions necessary to entitle the one arbitrator nominated by the plaintiff firm to proceed to the delivery of an award had not been fulfilled: this order was upheld by this Court in a judgment dated August 9th, 1920. A supplementary award, which the same arbitrator had delivered while the proceedings relating to the filing of his first award were pending, was finally withdrawn by the plaintiff firm from the Court of the District Judge, on the very proper view that it had become ineffective owing to the decision affirmed by this Court's order of August 9th 1920. The plaintiff firm, however, has proceeded upon certain principles laid down in the order above referred to: it has assumed that the submission to arbitration is effective and subsisting, and has accordingly made another attempt to carry it into effect. On August 20th, 1920 they sent the other side notice that they desired to submit the entire dispute to arbitration and again nominated Mr. J. O. Roberts, President or Chairman of the Committee of the Delhi Piece-Goods Association, as their arbitrator. The defendant firm, under protest and without prejudice to their contention that they were not bound to go to arbitration at all, nominated Mr. A. C. Khosla. The two arbitrators held a single meeting, at Delhi, on September 27th, 1920. Mr. Khosla suggested the adjournment of the proceedings to a later date on the strength of a telegram which he had received, to the effect that the party nominating him was not ready with its evidence. Mr. Roberts took a very strong view that the defendant firm was merely trying to evade any effective arbitration, or in any case to spin out the proceedings until the expiration of a period of three months from the date of this Court's order of August 9th, 1920 should enable them to withdraw a considerable sum of money which they had deposited in the District Judge's Court: he definitely refused to adjourn and the arbitrators separated without having decided anything. A memorandum of their proceedings on that date was drawn up and signed by both of them. There has been a conflict of evidence between Mr. Roberts and Mr. Khosla as to whether or not they ever got so far as discussing the merits of the dispute, or the appointment of an umpire to adjudicate on the same upon their failure to agree: they certainly did differ on the question whether they should or should not proceed at once to pronounce a decision upon the materials available, and they did separate without appointing an umpire. Mr. Roberts proceeded at once to draw up a paper which has been loosely described as his "award"; it is of course a statement of his opinion on the dispute drawn up for the consideration of the umpire. On October 1st, 1920, Mr. Khosla similary drew up a statement of his own. The plaintiff firm applied to the Committee of the Delhi Piece Goods Association to appoint an umpire. Notice of the application was sent to the opposite party; and on October 30th, 1920 Mr. Gur Prasad Kapur wrote to them to say that he had been appointed umpire and had fixed November 12th 1920 for deciding the matter. On that date he delivered the two awards sought to be filed; they adopt in its entirety the opinion formed by Mr. Roberts and award the plaintiff firm an ascertained sum by way of damages for the breach of contract of which the defendant firm is held guilty.

The objections taken to the filing of the award may now be stated and disposed of *seriatim*.

(*i*) It is contended that there was never any completed contract between the parties, and consequently no binding agreement to submit disputes arising out of the contract to arbitration. This argument is based upon the wording of the two letters of September 2nd and September 4th, 1918 by which the plaintiff firm intimated their acceptance of the two indents received from the defendant firm. In each case the letter begins with the words:—"We have the pleasure to accept your indent": then follow particulars which are a mere repetition of the conditions

specified in the indent under reply, and finally comes the phrase upon which the dispute has hinged:—"the above-mentioned acceptance is subject to revision and confirmation by mail if required". For the plaintiff firm Mr. Sushil Chandra Das himself has gone into the witness box and given evidence as to the ordinary course of business. He was a somewhat confused witness, and over ready to make sweeping assertions which subsequently required qualification: but I have no doubt he was trying to speak the truth to the best of his ability. He repudiated the suggestion, which his own Counsel had put forward, to the effect that the indents signed by the defendant firm must be regarded as completing and recording a contract, inasmuch as they were acceptances of offers orally made on behalf of the plaintiff firm. Nevertheless, I am satisfied that there had been negotiations between the parties and a provisional agreement arrived at before the signatures of the defendant firm were put to the two indents. The mere fact that the written entries on the indent forms, apart from the printed matter, are in the handwriting of the manager or agent of the importing firm is strong corroboration of the evidence of Sushil Chandra Das on the point. The indents are in effect premises by the defendant firm to take delivery of certain goods and to pay for them at certain rates, subject to certain specified conditions, and subject also to the plaintiff firm's intimating within the prescribed period (twelve days in the case of indent No. 898 and five days in the case of indent No. 899) that they had ascertained by cable from their Manchester correspondents that the latter could supply the goods to enable the plaintiff firm to perform its part of the contract according to its terms. The reply of the plaintiff firm in each case is to the effect that the necessary cable has been sent and reply received, and that the bargain is concluded, subject only to this reservation, that the terms may have to be revised or the bargain confirmed on arrival of the English mail containing the reply of the Manchester correspondents. Such "revision and confirmation" is to remain open until the arrival of the mail, "if required". In their context these words can only be understood as meaning, "if circumstances should arise making such revision or confirmation necessary". The circumstances contemplated by both parties are clearly stated in the sixteenth clause of the printed form of indent, a clause which, by virtue of the signature of the defendant firm, became part of the contract between the parties. This clause stipulates that:—"It is distinctly understood between the sellers and the buyers in India that offers if accepted by telegram are subject to revision and confirmation by mail only if any mistake has been made in the telegram." The following statements made by Sushil Chandra Das in his deposition seem to me obviously true in fact and a correct statement of the nature of the contract entered into, as it was understood by both parties:—

"In this transaction there was no mistake in the cables to England between me and my English correspondents. When the mail is received from England and shows that there has been no mistake in the cables, there is nothing for me to confirm to the purchasing firm. The acceptance by cable binds me to everything, to all the terms stated in the indent, except in the event of a telegraphic error in transmission."

That is to say, there was a complete and binding contract between the parties, subject only to the possible discovery that an event had occurred which was not within the control of either party, an error by the telegraph department in the transmission of the cables sent by the plaintiff firm to its home correspondent, or received by the former from the latter. This event did not occur and the discovery was never made.

I am not impressed with the argument that this Court has already come to a decision upon the question now in issue in another litigation, namely in First Appeal No. 438 of 1917, decided on December 2nd 1920. In that case the reservation in the letter of acceptance did not contain the qualifying words "if necessary", and the Court had not before it the evidence available to us as to the regular course of business.

In the present case I have no doubt the parties were absolutely *ad idem* when the plaintiff firm wrote and the defendant firm received the letters of September 2nd and September 4th 1918, that there was a completed contract, and that under this contract the defendant firm is under an

obligation to submit this dispute to arbitration in the manner provided by the printed conditions on the indent form.

(*ii*) Another point taken is that the awards sought to be filed are null and void because the umpire who delivered them had not been properly appointed in accordance with the terms of the submission. The contention is that the Committee of the Delhi Piece Goods Association had no jurisdiction to appoint an umpire until the two arbitrators nominated by the parties had not only failed to agree as to the merits of the dispute but had also differed as to the choice of an umpire. There has been some conflict of evidence between Mr. Roberts and Mr. Khosla as to what passed between them on September 27th 1920; but I am satisfied that enough had occurred to give the Committee of the Delhi Piece-Goods Association, under the rules accepted by the parties, jurisdiction to appoint an umpire. The arbitrators had differed in such conclusive fashion as to put it beyond doubt that they were not going to deliver a joint award. The refusal of Mr. Roberts to adjourn the arbitration proceedings was equivalent, under the circumstances, to a refusal to meet Mr. Khosla again; and the arbitrators had separated without nominating an umpire.

(*iii*) I find no force in the contention that there could be no arbitration upon this agreement, because the submission therein contained had somehow "spent itself" in Mr. Robert's abortive award dealt with in this Court's decision of August 9th 1920, or because his supplementary award was lying unadjudicated upon, in the Court of the District Judge when the present arbitration proceedings began. This Court pronounced a clear opinion against the former contention in its order (there were two distinct orders) of August 9th 1920; I think the orders then passed are binding on the parties, but even if they are not I remain of the same opinion. The parties are under a binding agreement to refer this dispute to arbitration in accordance with the terms of the agreement itself; the obligation continues until it has been carried out.

(*iv*) Another point taken has been pressed upon us from two different points of view. In the printed form of indent upon which the defendant firm endorsed their order there is a special clause (3) dealing with the rights of the importing firm in the event of the purchasers (the firm signing the indent) failing to take up the seller's invoice as a draft to be accepted on presentation and paid at maturity. The importers are authorised to sell the goods by public auction, after due notice, and to claim for the difference between the selling price and the contract price. It was put to us that this clause contains the stipulated penalty under the contract for any failure on the part of the buyers in India to accept delivery, and that it operates as a condition precedent to the arbitration clause (15), so that no reference to arbitration could take place until the plaintiff firm had given due notice and had actually sold the goods by public auction. From another point of view we were asked to hold that it amounted to "misconduct" on the part of the umpire to assess the damages payable by the defendant firm upon a different basis and without compelling the importers to prove at least an actual re-sale of the goods whether by public auction or otherwise. I am quite satisfied that the provisions of clause (3) of the indent form are not a condition precedent to the operation of clause (15). The latter opens with the words: "Any claim or dispute arising in connection with this contract, including claims or disputes in connection with non delivery," and these words are, in my opinion, decisive. It also seems to me that the provisions of clause (3) do no more than authorise the importers to take certain action in a certain event, without thereby shutting them out from any other remedy lawfully open to them. Finally, I regard the question as one for the determination of the arbitrators (or umpire), whose decision is "final and binding on both parties", the umpire was within his jurisdiction in interpreting the terms of the contract and in deciding that the plaintiff firm could support a claim for damages apart from the special provisions of clause (3).

(*v*) There was some further argument addressed to us against the proceedings of Mr. Roberts and of the umpire with a view to founding a charge of "misconduct" against the latter. I think it unnecessary to say more than that nothing approaching a case of "misconduct" was, in my opinion, made out.

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For these reasons I would overrule all the objections of the defendant firm and order the two awards in question to be filed so that they may become operative as decrees of Court, the said defendant firm to pay all costs, including fees in this Court on the higher scale.

WALSH, J.—I agree in holding that the respondents, Sukhamal Bansidhar, submitted in writing to arbitration, and that no case is made out for refusing to file the award.

The main question turns upon the interpretation of the two alleged letters of acceptance written by Sushil Chandra Das, dated the 2nd and 4th September respectively. In terms these acceptances are conditional. But the condition contains a latent ambiguity in the words "if required". Required by whom, or what? The parole evidence as to the previous course of business satisfies me that the words meant, and were understood and intended by both parties to mean, "if required by some telegraphic mistake between England and India for which neither of the contracting parties was responsible". The elliptical form of words adopted had frequently been used and acted upon in previous contracts between the same parties. In other words, it meant "subject to the operation of clause 16 of the terms of your offer." It is a dangerous mode of acceptance. It is in fact tautologous. The operation of clause 16 could not be excluded if an absolute acceptance had been given, unless its exclusion had been expressly stipulated for. The condition is, therefore, what is generally known as a condition subsequent. The case seems to me to be covered by section 33 of the Indian Contract Act. The "uncertain future event" was the discovery of some telegraphic error. The happening of that event became impossible when the mail confirmed the original terms as communicated by telegram, and the contract thereupon became enforceable. This case is clearly distinguishable upon the facts from the case, First Appeal No. 438 of 1917, decided by a Bench of this Court where the words "if required" did not occur so that the condition was in general terms, and a question in fact arose as to a change of colour in the goods to be supplied under the indent.

I do not agree with the contention urged before us by the applicants that the decision of the question whether there has been completed contract so as to bind the parties to submission in writing rests with the arbitrators. Questions of fact and law upon which the jurisdiction of the arbitrators depends are for the Courts. If *Bai nath Kalooram and Alibhoy Mahomed, In the matter of an arbitration between* (1) decided otherwise, I disagree with the decision.

On the other hand, I think that, once the contract is proved, the interpretation of its terms, such as clause 3 of this contract, is a question for the arbitrators alone.

There seems to me to have been jurisdiction to appoint the umpire in the case, though I strongly disapprove of the conduct of Mr. Roberts, who, as an arbitrator and a partisan, who had formed strong view, should not have consented to preside over the meeting which appointed the umpire. His position as President of the Delhi Piece-Goods Association makes it undesirable that he should act as arbitrator at all in disputes where he may be called upon to intervene also in a *quasi* judicial capacity as the presiding official of the Association which appoints the umpire. If I were convinced that the umpire had allowed himself to be influenced in arriving at his decision by anything done by Mr. Roberts other than that may be legitimately done by an arbitrator in laying his view of the controversy before an umpire, I should hold that there had been misconduct, but I recognize that the position was rendered a difficult one by the conduct of the respondents themselves and of their arbitrator. They are clearly bound by the arbitration clause, and they did their best to wreck the proceedings.

S. D. *Orders accordingly.*

(1) 59 Ind. Cas. 439; 24 C. W. N. 567.

MADRAS HIGH COURT.

CIVIL APPEALS NOS. 193 AND 202 OF 1920.

October 6, 1921.

Present :—Mr. Justice Spencer and Mr. Justice Ramesam.

IN APPEAL NO. 193 OF 1920.

T. S. MOHAMED HUSSAIN SAHEB BAHADUR AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

MOHAMED ABDUL RAHIM BEG SAHEB AND OTHERS—DEFENDANTS—RESPONDENTS.

IN APPEAL NO. 202 OF 1920.

Mirza MOMAMED KHALEEL RAHEMAN SAHEB AND ANOTHER—DEFENDANTS—APPELLANTS

versus

T. S. MOHAMED HUSSAIN SAHEB BAHADUR AND OTHERS—PLAINTIFFS—RESPONDENTS.

Muhammadan Law—Religious Endowments Act (XX of 1863), s. 14—Inams for religious services—Liability of service-holders to account for income—Inam property, whether divisible among trustees.

In the case of an *inam* granted for the performance of religious services, it is not necessary that the service-holder should strictly account for his disposal of the produce of the lands attached to the charitable object. [p. 493, col. 1.]

The emoluments of a religious office are subject to partition among the holders of the office or joint trustees like any other family property though the office is joint and the co-trustees all form one collective trustee. [p. 493, col 2]

Ramanathan Chetty v. *Murugappa Chetty*, 27 M. 192 at p. 199; 13 M. L. J. 341, referred to.

Appeal from the decree of the Court of the District Judge, Guntur, in Original Suit No. 7 of 1917, dated the 19th December 1919.

Mr. *V. S. Narasimhachariar* for Mr. *P. Venkataramana Row*, for the Appellants in A. No. 193 of 1920.

Messrs. *T. R. Ramachandra Aiyar*, for Appellants in No. 202 of 1920.

Mr. *A. Krishnaswami Aiyar*, for Respondents in both.

JUDGMENT.

SPENCER, J.—This suit (Original Suit No. 7 of 1917) was brought under section 14 of Act XX of 1863, Religious Endowments Act, for (1) a declaration that the properties in the schedules to the plaint belong to the great *musjid* at Guntur (2) the removal of the defendants from the trusteeship of the *musjid* and for appointing a new trustee in their place and (3) a direction that the defendants should account for the income of the trust property for twelve years and other appropriate reliefs.

The District Judge found that this mosque was founded by orders of the Sultan of Hyderabad, that Haji Abdul Razack and his heirs were appointed *muttawallis* or trustees with the duties of *Peish Imam* and *Khateeb* attached and that they were to enjoy the lands and do the religious services from generation to generation.

He held further that so long as the defendants and their heirs performed the duties of that office, they had a right to enjoy the produce of the lands and need not account for it. He came to the conclusion that the only breach of trust committed by the defendants was that they allowed dwelling houses to be constructed in the mosque compound and for this he ordered that rent should be levied at the rate prevailing in the Municipality, in order to prevent a title being acquired by the occupants of the houses adverse to the trust. The Judge found that the only act of malfeasance was that they divided up the lands attached to the offices among themselves and he directed that the lands should be restored to the combined office of *muttawalli*, *Peish Inam* and *Khateeb*. Mr. Narasimhachariar for the appellants argued that the grant in this case was a grant to the mosque, that the *inam* was a *devad yam inam*, that the whole income of the lands should be spent on purposes connected with the worship and that the defendants were bound to account for the manner in which they spent it.

The principal evidence produced on the plaintiff's side consisted of certain *Inam* Registers which are Exhibit C, D, K-3 and K-4. On the defendants' side, certain *parwanas* or grant-deeds were produced and have been marked as Exhibits I to IV. It appears from Exhibit D that at the time of the *Inam* Settlement certain *dumbalas* were produced which are not now forthcoming and that the *parwanas* now exhibited were not produced at that time. Mr. Narasimhachariar argued that Exhibits I to IV, even if conceded to be genuine, are not shown to relate to the suit property. He argued that there was no evidence that Pattipad village mentioned in Exhibit I corresponded to Mallayapalem in the *Inam* Register (Exhibit C). In Exhibit D the

grantor is stated in column 11 to be Vasireddi Venkatadrirayudu. The original grantee is given in column 13 as Khaji Rahitullakhan and the present owner is entered as Muzavar Davied Beg. Now, we have ascertained from the District Manual of Kistna District that Vasireddi Venkatadrirayudu ruled between 1773 and 1816 and that in 1710 the Subedar of the Deccan bestowed Kondavidu Sirear on the Vasireddi family. Rahitullakhan, the original grantee's name, must be a mistake for Rahitullah's mosque and Davied Beg in column 16 of Exhibit D was (as it appears from K. 3) the grandson of Abdul Razack in whose name the grant appears in Exhibit 1. In Exhibit K (3), a statement given at the time of the *inam* inquiry in *Fasli* 1269, Abdul Razack is mentioned as *Sannadar*. In the *inam* fair register of Mallayapalem village (Exhibit C) the grantor is stated to be Baptlal Jung of Hyderabad in *Fasli* 1185. This is evidently a mistake for Basulat Jung of Hyderabad, who is the grantor mentioned in Exhibits II, III and IV. At the back of Exhibit III there is a plan of the compound enclosing the mosque which shows the position of the buildings and this corresponds to the plans filed by the parties in the case. On the whole, we are of opinion that from the name of the grantor Basulat Jung, the name of the grantee Abdul Razack, the date which is 1155 *Hijri*, the extent which is 10 *kuchels* both in Exhibits C, and in IV*a* and the plan at the back of Exhibit C, there can be no doubt that Exhibits 1 to IV as well as Exhibits C, D, K-3 and K-4, relate to the suit mosque. It was not disputed at the trial that the defendants are the heirs of the original grantee Abdul Razack. The result is that the District Judge's conclusion that the grant was made to the defendants' family for the upkeep of the mosque and its buildings and for the performance of the services was correct. Exhibit K-4 contains a statement in the "Remarks" column that altogether there was an *inam* of 500 acres for the performance of services of this mosque, and that it is in the possession of Davied Beg.

Being an *inam* for the performance of religious services, it is not necessary that the service holder should strictly account for his disposal of the produce of the lands attached to the charitable object. The lands are granted for his maintenance and the maintenance of his heirs subject to the condition of his keeping up the mosque and performing services regularly. This is the rule followed by Government (see Board's Standing Order 52, rule 111, which declares that *inams* granted for religious objects, such as, for the support of temples and mosques, are as a rule continued to the present holders, and their successors, and are not subject to further interference, as long as the buildings or institutions are maintained in an efficient state and the services continued to be performed according to the conditions of the grant).

We see no objection to the lands being temporarily divided up among the holders of the office or joint trustees as the descendants of the original trustee become, if the division is for better convenience in the performance of their duties. As Bhashyam Iyengar, J., observes, in the case of a Hindu temple, in *Ramanathan Chetty* v. *Marugappa Chetty* (1), the emoluments of an office are subject to partition like any other family property though the office is joint and the co-trustees all form one collective trustee.

As regards the buildings in the mosque compound they are apparently for the habitation of those who perform service in the mosque. It is not shown that they interfere with the performance of the worship.

The District Judge's order that the occupants should pay rent cannot be supported. If the trustees are not liable to account for the income, they should not be directed to pay rent to themselves. The appeal must, therefore, be dismissed.

In the objection memorandum the first defendant has raised the objection that he is not liable to pay the costs of the plaintiffs when he succeeded in the suit. No doubt, he brought the suit on himself by his application to the municipal authorities in which he alleged that the lands and buildings were the exclusive property of the mosque and that he had no personal rights whatever in them. He resorted to this declaration in order to escape payment of the municipal tax. He, therefore,

(1) 27 M. 192 at p. 199; 13 M. L. J. 341.

deserved to have to pay his own costs in the suit. But having been successful, it was not just to make him pay the costs of the plaintiffs also when the suit substantially failed. The lower Court's decree in respect of costs will be modified by directing that each party will pay their own costs throughout.

The connected Appeal No. 202 of 1920, which is by defendants Nos. 3 and 4 in which they persisted in their appeal memorandum in maintaining that the defendants had acquired full rights of ownership by adverse possession in respect of the suit lands and in maintaining that the Judge was wrong in holding that the grants were made for the performance of services at the mosque, though it must be admitted that the defendant's Vakil abandoned this position at the hearing of the appeal, must be dismissed with the exception only that the lower Court's decree will be modified by omitting the direction as to the levy of rent by first defendant from the other defendants for the use of the buildings occupied by them as dwelling houses. Each side to bear their own costs.

A declaration will be added to the decree to the effect that the mosque is a public mosque and that the emoluments belong to the office-holders for the time being subject to the due performance of their duties in the mosque.

RAMESAM, J.—I agree,

M. C. P. *Appeal dismissed.*

PATNA HIGH COURT.

LETTERS PATENT APPEALS NOS. 73 AND 76 OF 1921.

May 10, 1922.

Present:—Sir Dawson Miller, Kt., Chief Justice, and Mr. Justice Mullick.

GUNPAT RAO BANKA PURI—APPELLANTS

versus

RAJ KUMAR SINGH—RESPONDENT IN APPEAL No. 73.

Remand—Power of High Court to remand on point covered by existing issue.

Where an issue is raised in the Court of first instance on a particular point and the parties have adduced evidence upon the same, and there is a distinct finding of both the Trial Court and the first Appellate Court upon that point, it is not open to the High Court to remand the case for a re-hearing upon the same point. [p. 496, col. 2.]

Appeal from a decision of Mr. Justice Jwala Prasad.

Mr. *S. C. Mitter*, for the Appellant.
Mr. *N. N. Sen*, for the Respondent.

JUDGMENT.

MILLER, C. J.—The question for decision in these appeals is whether the learned Judge of this Court in second appeal was justified in remanding the case to the Trial Court for the hearing and determination of an issue which he considered had not been properly raised or tried in the first instance. The facts of the case shortly are: that the defendant No. 4, *Musammat* Sareba Kuar, in the years 1908 and 1910 obtained a mortgage interest under a *rehan* deed of certain property which constitutes part of the property in suit. She was recorded in the Record of Rights as being usufructuary mortgagee and Tulsi Singh, her husband's brother's son, was recorded as being an under-*raiyat* of the property. In the year 1911 a further holding was purchased in the name of Sareba Kuar and she was recorded as holding the *raiyati* interest in that property with Tulsi Singh as under-*raiyat*. In 1916 Sareba Kuar transferred both these properties, that is, her mortgage interest and her *raiyati* holding to the plaintiff. Subsequently the plaintiff, being under the impression that Tulsi Singh was the under-*raiyat*, sued him for rent. In that suit

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Tulsi Singh contended that he was not an under-*raiyat* of the property at all, that in fact he was a co-sharer with the other members of the family and that the property had only been purchased in the name of Sareba Kuar as *benamidar* for the family. The rent suit which was brought in 1917 was decided in favour of Tulsi Singh and against the present plaintiff, and in so far as that decision acts as *res judicata* in finding that Tulsi Singh was not an under-*raiyat* the decision is not disputed in the present case.

The present suits were instituted in May 19.8 claiming recovery of possession of the holding and of the *rehan* property. In the plaint the plaintiff sets up a case that the property in suit in fact belonged to Sareba Kuar and was purchased by her as her own property but as an alternative case he pleaded that the defendants Nos. 1 and 2, who were Raj Kumar Singh, the brother-in-law of Sareba Kuar, and Tulsi Singh, his son, had given the plaintiff to understand by their words, deeds and acts that the *Musammat* was the real *rehandar* in the one case and tenant in the other and that it was upon the strength of these proceedings and evidence that the plaintiff purchased the *rehan* property and the other property from *Musammat* Sareba Kuar.

When the case came for trial various issues were raised for determination which are not material for present purposes, but Issue No. 4 was whether Sareba Kuar was owner of the disputed property or a *farzidar* of the other defendants. The case all along made by the defendants was that Sareba Kuar was really their *farzidar* and that the property never belonged to her from start to finish. Issue No. 6, which is the important issue to be considered in the appeal, was to this effect:—"Whether the deed of transfer by Sareba Kuar in favour of the plaintiff is valid and binding on the other defendants". The case put forward at the trial on behalf of the plaintiff, which arose upon that portion of the pleadings which I have referred to and upon the sixth issue which I have just set out, was that under section 41 of the Transfer of Property Act even if the defendants Nos. 1 and 2 were the real owners of the property in suit they had in fact in their representations and their acts induced the plaintiff to believe that Sareba Kuar was the real owner of the property and they had thereby impliedly consented that she, who was undoubtedly the ostensible owner, should transfer the property to the plaintiff. Her name was entered in the Record of Rights as the owner and she in fact was allowed to keep possession of the title deeds and these facts were known to the plaintiff but in order to show that he had complied with the provisions of section 41 of the Transfer of Property Act he called evidence to show that he had taken reasonable care to ascertain that the transferor had power to make the transfer. That evidence consisted of that of a *patwari* of the village, and his evidence was to the effect that he had made enquiries and he had informed the plaintiff as to the nature of the enquiries he had made. In considering the Issue No. 6 the only question which the learned Munsif dealt with was this question of whether the provisions of section 41 of the Transfer of Property Act had been complied with in this case and having considered the evidence put forward on behalf of the plaintiff, *viz.*, that of the *patwari* he was not satisfied that the plaintiff had taken proper care to ascertain whether Sareba Kuar was really in possession of the property or not, and, therefore, having found that the property in fact belonged to the other defendants Nos. 1 and 2, he dismissed the plaintiff's suit. It is important to bear in mind that that was the only question which was discussed in deciding the sixth issue.

The matter then went on appeal to the District Judge and the learned District Judge took a different view on the facts from that arrived at by the Munsif. He pointed out that the *patwari* Lalji Lal stated that he had made enquiries on behalf of the purchaser and that he had learnt that Sareba Kuar was the real *rehandar* and that witness was not in fact cross-examined by the defendants. He was the *patwari* of the village and after the transfer was completed he was engaged as a servant of the plaintiff. The Munsif had considered that his evidence was not trustworthy because he was not at the time he was alleged to have made the enquiries a servant of the plaintiff but only became so afterwards. The learned District Judge did not consider that this was sufficient ground for rejecting his evidence and he thought that the village

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patwari was a very likely man to have been employed to make enquiries of this sort and accepting his evidence, as he did, the learned District Judge came to the conclusion that the case under section 41 of the Transfer of Property Act had been made out. I may mention that apart from this question of enquiries there were many other circumstances in the case which led the Court to come to the conclusion that Sareba Kuar had been holding it as the ostensible owner.

From that decision the defendants appealed to the learned Judge of this Court. The learned Judge came to the conclusion that, as there had been no direct issue raised as to whether section 41 of the Transfer of Property Act applied or not, he doubted whether the attention of the parties had been properly drawn to it or whether they had called the evidence upon that point which they would have done if the issue had been more distinctly raised, and, therefore, he remanded the case back to the Trial Court to re-hear the issue No. 6 with special reference to the question arising under section 41, and gave the parties leave to adduce further evidence. He further ordered that the District Judge on receiving the decision upon this issue of the Munsif should give his opinion upon it and remit it to the High Court. The only question which has been argued in appeal before us to-day is whether or not upon the facts, which I have stated, the learned Judge was justified in remanding the case. That must depend, in the first instance, upon whether the plea arising under section 41 of the Transfer of Property Act was sufficiently raised in the pleadings; and, secondly, whether it was sufficiently raised by the issues settled before the trial. In my opinion there can be no doubt that in the paragraph of the plaint, which I have refered to, this issue, although perhaps not very scientifically put, was clearly raised, *viz.*, that it was with the consent express or implied of the defendants that Saraba Kuar was the ostensible owner of the property and that, in these circumstances, they cannot complain if she had transferred the property to a *bona fide* purchaser. Again, when the case came for trial, as I have pointed out, although the sixth issue did not in terms mention section 41 of the Transfer of Property Act, it could hardly have had reference to any other question than that which I have just referred to and which alone is dealt with by the learned Munsif in determining the issue. The issue no doubt was a little wider than was necessary merely to include a point arising under section 41 but the issue, as framed, clearly admitted of the question being decided in the case and I can see myself no other reason at all why this issue should have been raised except for the fact that it was foreshadowed in the pleadings and the parties had notice of it. In these circumstances it seems to me that the matter having been raised and determined by the first Appellate Court it was not within the competence of this Court in second appeal to remand the case for a re hearing upon this very issue. Had the issue not been determined then obviously it would have been within the competency of this Court to remand the case for that purpose. But where you have an issue raised which is quite sufficient for the purpose, and you have evidence upon that issue and you have a distinct finding both by the Trial Court and the first Appellate Court I do not think, with great respect to the learned Judge, that it is any longer open to him to refer the case back for re-hearing upon that very point. In my opinion these appeals should be allowed, the decrees appealed from should be set aside and the decrees of the learned District Judge on first appeal should be restored. The appellant is entitled to his costs throughout.

MULLICK, J.—I agree.

P. D.

Appeal allowed.

SARAJUL HAQUE v. EMPEROR.

PATNA HIGH COURT.

CRIMINAL REVISION No. 535 OF 1920.

November 29, 1920.

Present:—Mr. Justice Jwala Prasad.

SARAJUL HAQUE—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 403, Expl. (2)—Derelict animal—Possession—Misappropriation—Duty of finder of property.

A person who takes possession of a derelict animal of which no owner can be discovered, is not guilty of any offence, and cannot be convicted of an offence under section 403 of the Penal Code.

A person, finding a property of which, from the nature of it, there must be an owner, must take reasonable care of it and endeavour to find out the owner; but he is not bound to adopt extraordinary means for the discovery; nor is he bound to be out of pocket in discovering the owner by means of advertisement.

Criminal revision against an order of the Deputy Magistrate, Muzafferpur, dated the 21st August 1920, affirming in appeal the conviction and sentence of the accused by the Honorary Magistrate, Muzafferpur.

Mr. *S. P. Varma*, for the Petitioner.

JUDGMENT.—The petitioner, Saraj-ul-Haque, has been convicted and sentenced to pay a fine of Rs 60 under section 403 of the Indian Penal Code by the Honorary Magistrate of Muzafferpur. On appeal the Deputy Magistrate has upheld the conviction and sentence.

The property misappropriated is a cow. The cow was "wandering here and there for the last three or four years." On the 3rd Magh last the accused took the cow to Aklu Pashi, P. W. No. 3, and gave it to him on what is called Pusia, telling him that he had purchased the cow for Rs. 10. The cow gave birth to a calf on the following day. A fortnight after the Chowkidar (P. W. No. 2), finding the cow in the possession of Aklu enquired of him as to how he was in possession of the same. Aklu told him that he got the cow from the accused Saraj-ul Haque. The Chowkidar enquired from the accused and he told him that he had purchased the cow from one *Musammat* Jhallo. Jhallo, however, denied having sold the cow and the Chowkidar, therefore, reported the matter to the President of the Beat. The accused produced a receipt purporting to have been given by Jhallo to him relating the purchase of the cow from her.

The Courts below rejected the defence and held that it was not proved that the accused purchased the cow from Jhallo. They held, however, that the cow was an unclaimed property and was roaming about. That the accused took possession of it and made it over to Aklu and after she had given birth to a calf sold it to one Choolhai for Rs. 22, "out of which Rs. 11 was paid to him with promise to pay the balance a little while after."

The question is whether, upon the facts found, by the Courts below the charge of criminal misappropriation has been brought home to the accused. The cow in question was roaming about in the village for the last three or four years and the ownership was not at all traced to any body. Mere taking of such a property will not be any offence, but the person taking possession of it would be guilty if he appropriated it "to his own use when he knows or has the means to discover the owner, or before he has used reasonable means to discover and give notice to the owner and has kept the property a reasonable time to enable the owner to claim it" (*vide* Explanation (2), section 403, of the Indian Penal Code). It depends upon the circumstance of each case whether the conditions laid down in that Explanation have been fulfilled or not.

The Courts below are of opinion that it was the duty of the accused, being the Dafadar, to impound the cattle or to inform the Police so that the cattle might be sold and the sale proceeds deposited in the custody of the authorities. No doubt a person, finding a property of which, from the nature of it, there must be an owner, must take reasonable care of it and endeavour to find out the owner; but he is not bound to adopt extraordinary means for the discovery nor is he bound to be out of pocket in discovering the owner by means of advertisement. In the present case the cattle was wandering in the village openly for a considerably long time. The Chowkidar himself swears that he used to see the cattle ownerless for the last three or four years. Thus every body in the locality apparently knew that the cattle in question was wandering in the village. There was, therefore, no particular obligation in

the present case on the part of the Dafadar to inform the Police. The accused took charge of the cattle at a time when she was about to give birth to a calf, made it over to Aklu and just on the day following she actually did give birth to a calf. I do think that the accused really believed that there was no owner of the cow or that it had become derelict. He was, in the circumstances of the case, perfectly right in treating it as being the property of nobody. Consequently, there could not be possibly any intention of dishonestly misappropriating, for he never had intended to cause wrongful loss to anybody, since the ownership of the cow was not traced for a long time. In arriving at the aforesaid conclusion, I have considered all the authorities, both English and Indian, on the subject and the valuable note under the section in Gour's Indian Penal Code, Volume II.

I, therefore, hold that, on the facts found by the Courts below, no charge of criminal misappropriation can be laid against the accused. I accordingly set aside the conviction and sentence and acquit the accused. The fine, if paid, must be refunded.

W. C. A.

Conviction set aside.

ALLAHABAD HIGH COURT.
CRIMINAL REVISION No. 456 OF 1921.
November 5, 1921.
Present:—Mr. Justice Stuart.
MUHAMMAD ATA AND OTHERS—PETITIONERS
versus
EMPEROR THROUGH *Musammat* NANNHON—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 379—Theft—Crops sown in another's field—Removal by latter—Offence.

A person who cuts and takes away crops sown by another, is guilty of theft. The fact that the crops in question stood upon fields in the cultivatory possession of the person removing them and were sown there without any right is of no consequence.

Criminal revision against an order of the Magistrate, First Class, Meerut, dated the 30th March 1921.

Mr. *Raza Ali*, for the Applicants.

Mr. *K. R. Dang*, for the Opposite Party.

JUDGMENT.—The charge against the applicants was that they had committed theft by cutting and taking away the crop sowed by *Musammat* Nannhon. The Trial Court found distinctly that the crop in question had been sown by *Musammat* Nannhon and cut by the accused without any right. They were thus guilty of theft which may have been a technical theft. They were convicted accordingly. In appeal the point was raised that the crop in question stood upon fields which were in the cultivatory possession of the applicants themselves. The Magistrate who heard the appeal directed an enquiry upon that point. He had no right to direct an enquiry. If he liked he could have taken further evidence. There was not the slightest necessity to direct an enquiry as it was proved that the crop in question had been sown by the complainant. The Patwari and Janki Prasad prove this. It is not of the least consequence whether the complainant has or has not good title to the cultivation of the fields in question. It is sufficient if she sowed the crop. Now there is good evidence that she sowed the crop and that the applicants cut the crop. I see no reason to disbelieve this evidence. The convictions are, therefore, good. The sentences are not excessive. I dismiss this application.

N. H.

Application dismissed.

RAMPABITAR SINGH v. KASIM ALI KHAN.

PATNA HIGH COURT.

CRIMINAL MISCELLANEOUS CASE No. 73 OF 1920.

November 8, 1920.

Present:—Mr. Justice Jwala Prasad.

RAMPABITAR SINGH AND OTHERS—PETITIONERS

versus

KASIM ALI KHAN—COMPLAINANT—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 202, 203, 204 — Complaint—Preliminary enquiry by Police declaring complaint to be false—Magistrate directing regular trial and sending for charge sheet—Order ultra vires—*Civil matter—Criminal Courts, jurisdiction of.*

Where a Magistrate directs an inquiry by the Police under section 202 of the Criminal Procedure Code, into a complaint, and the Police submit a report that the case is false; that the matter in dispute between the parties is one for the Civil Courts to determine, and that a Civil suit between the parties relating to that matter is pending, the Magistrate has no jurisdiction to direct the submission of a charge sheet, merely because in his opinion it is desirable to ascertain the truth

Criminal revision against the order of the Sub-Divisional Officer, Gaya, dated the 4th October 1920.

Messrs. *S. P. Varma* and *S. S. Bose*, for the Petitioners.

Mr. *G. C. Pal*, for the Opposite Party.

JUDGMENT.—The Rule must be made absolute. Mr. Pal, appearing on behalf of the opposite party, concedes that the order of the Magistrate dated the 4th October 1920 directing charge sheet to be sent up cannot be supported. The Magistrate himself was not satisfied with the complaint and was of opinion that "it involves a civil dispute." He accordingly directed the Police to make preliminary enquiry.

The Police made a thorough enquiry into the matter and concluded its report in the following words:—"Under the circumstances noted above the accused fully proved his statement and under the circumstances noted above all these facts and circumstances and documentary evidence, etc., clearly show that the complainant himself wanted to realise the said amount twice and attempted to deceive the accused party. I, therefore, submit final report false under section 420-417, Indian Penal Code, purely a civil dispute matter for which Suit No. 56 of 1920 is pending in Court. The complainant, in my opinion, seems to be liable for the prosecution under this section."

The Magistrate passed the following order:—"Police report seen. The matter should, I think, be thrashed out in regular trial. Let charge sheet be sent up." The basis of the Magistrate's order is, therefore, the Police report, but the report does not justify the order.

Again, the enquiry by and the report of the Police was under section 202 of the Code of Criminal Procedure. No order for submitting charge sheet could be made by the Magistrate. The Magistrate could only pass an order under section 203 or 204 of the Code of Criminal Procedure. The order of the Magistrate is, therefore, *ultra vires.*

The Magistrate apparently passed the order, because, in his opinion, as stated in his explanation, it was desirable that the matter should have been thrashed out in a regular trial. The Police reported the case to be false and was of opinion that the complainant was guilty of bringing a false case. I do not think that the accused should be put to any harassment simply because it may be desirable to find out the truth. Besides, the subject-matter of the complaint under sections 417 and 420, Indian Penal Code, is already covered by the issue in the Civil Suit No. 56 of 1920 pending in the Court of the Subordinate Judge of Gaya between the parties. That issue is—"Did the plaintiff pay the entire consideration, or was half of it paid by Ram Charitar?"

The matter in dispute being of civil nature, the Criminal Court has no jurisdiction over the case and the order of the Magistrate dated the 4th October is accordingly set aside and the proceeding pending in consequence thereof against the petitioner is set aside.

W. C. A.

Order set aside.

MADRAS HIGH COURT.
CRIMINAL REVISION CASE No. 326 OF 1921.
CRIMINAL REVISION PETITION No. 260 OF 1921.
December 22, 1921.
Present:—Mr. Justice Odgers.
MUTHUKUMARASWAMI NADAR AND OTHERS—PETITIONERS
versus
MUHAMMAD ROWTHER AND OTHERS—RESPONDENTS.

Criminal Procedure Code (Act V of 1898), ss. 144 (4), (5), 435, 439—Revision after expiry of two months—Order prohibiting doing of certain act till decision by Civil Court—Injunction—Jurisdiction—"Alter," meaning of.

A High Court will not decline to revise an order, passed under section 144, Criminal Procedure Code, after the expiry of two months from the date of the order. It will examine the order to see whether it was passed with or without jurisdiction, and, if in its opinion it is a wrong order, it will express its views about it. [p. 501, col. 2.]

Govinda Chetti v. *Perumal Chetti*, 30 Ind. Cas. 453; 38 M. 489; 16 Cr. L. J. 629, *Emperor* v. *Vinayak Narayan Arte*, 28 Ind. Cas. 321; 16 Cr. L. J. 273, 38 B. 719: 16 Bom. L. R. 598, *Ramanadhan Chetti* v. *Murugappa Chetti*, 24 M. 45; 2 Weir 92 and *Bhairo Gope* v. *Emperor*, 57 Ind. Cas. 662; 1 P. L. T. 377; 21 Cr. L. J. 646, referred to.

An order under section 144, Criminal Procedure Code, which is indefinite as to time and which prohibits a party from doing a certain act until the question in dispute is settled by a Civil Court, is in effect a perpetual injunction, and is, therefore, without jurisdiction. [p. 501, col. 2.]

Ramanadhan Chetty v. *Murugappa Chetti*, 24 M. 45; 2 Weir 92 and *Meyyaru Ammal, In re*, 22 Ind. Cas. 721; (1914) M. W. N. 169; 28 M. L. J. 132; 15 Cr. L. J. 145, referred to.

The word "alter" in sub-section (4) of section 144, Criminal Procedure Code, does not mean substituting the name of one party for that of the other. [p. 502, col. 1.]

Ganpat Singh v. *Emperor*, 47 Ind. Cas. 76; 3 P. L. J. 257; 4 P. L. W. 357; 19 Cr. L. J. 880, referred to.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the District Magistrate, Ramnad, dated 10th April 1921 setting aside the order of the Sub-Divisional Magistrate, Ramnad, dated 19th March 1921.

FACTS appear from the judgment.

Mr. *T. Rangachariar* (with him Mr. *K. S. Ramabhadra Iyer*), for the Petitioners.—The order under revision was passed without jurisdiction. There is no time limit fixed for the order. The order virtually amounts to a perpetual injunction on the Nadar community who are restrained from taking the car in procession till the dispute between the parties is settled by the Civil Court.

Besides, the order of the District Magistrate which was passed on appeal from the Sub Divisional Magistrate's order clearly enlarges and amplifies on the latter. The word "alter" in section 144 (4) cannot mean substitution of the names of one party for those of another.

Though two months have elapsed since the order was passed, the High Court can interfere. *Ramanadhan Chetti* v. *Murugappa Chetti* (1) and *Bhairo Gope* v. *Emperor* (2).

Mr *F. S. Vaz*, for the Respondents.—The order is not in force now as two months have expired. It is unnecessary now for the High Court to examine the propriety or correctness of the order. *Govinda Chetti* v. *Perumal Chetti* (3) and *Emperor* v. *Vinayak Narayan Arte* (4).

The District Magistrate's order does not enlarge the order of the Divisional Magistrate. It is virtually a new order by the District Magistrate which he had jurisdiction to pass to prevent a breach of the peace.

Mr. *M. H. Hakim*, for the Public Prosecutor, on behalf of the Crown.

ORDER.—This is a petition to revise the order of the District Magistrate, Ramnad, dated the 10th April 1921. It appears that, in the village of Aruppukottai there is a Nadar temple, Mariamman Koil, round which the Nadars claim the right of dragging their temple car in procession once a year. There is a rival faction in the village composed of Muhammadans who apparently resent the dragging of the car round the western and northern sides of the temple on the ground that the land on those sides belongs to them.

The first proceeding in connection with the present petition occurred on the 19th March 1921 when the Sub Divisional Magistrate made an order under section 144 of the Criminal Procedure Code by which he directed that the car be peacefully taken round the temple through the western and northern streets of the temple without infringing the rights of the Musalmans on the street to the north, and prohibited certain Musalmans from interfering with it during

(1) 24 M. 45; 2 Weir 92.
(2) 57 Ind. Cas. 662; 1 P. L. T. 377; 21 Cr. L. J. 646.
(3) 30 Ind. Cas. 453; 38 M. 489; 16 Cr. L. J. 629.
(4) 28 Ind. Cas. 321; 16 Cr. L. J. 273; 38 B. 719; 16 Bom. L. R. 598.

the festival. On appeal to the District Magistrate, he passed an interim order on the 23rd March 1921, on representation from the leading Nadars, to postpone the dragging of the car but rescinded the order of the Sub-Divisional Magistrate and prohibited the Nadar community from taking the car in procession round the west and (north) front of the temple. On the 10th April 1921 the final order to which this revision petition is directed was passed. In it the learned District Magistrate holds that the Nadars have not established their right to drag the car over the disputed land and that, until the question is settled by the Civil Court, their claim to exercise that right should not be upheld. He, however, proceeds and prohibited under section 144 the counter-petitioners, or any of the Nadar community or any one on their behalf from taking the car in procession round the west and front of the temple. Mr. Rangachariar for the petitioners, the Nadars, has urged several objections to this order on the ground that it is made without jurisdiction, and the first objection is that, although under section 144 (5) no order can remain in force for longer than two months, the learned District Magistrate has not only failed to insert such a provision in his order but had virtually issued the injunction restraining the Nadars till their claim is settled by a Civil Court The preliminary objection for me to decide is whether I ought to go into this and other objections to jurisdiction on the ground urged by Mr. Vaz, the learned Counsel for the respondent, namely, that the order being only enforcible under the Act for two months and those two months having long ago expired there is no reason why this Court should investigate the legality or otherwise of the order in question. I confess I have been strongly impressed with this argument, in support of which several cases have been quoted. *Gobinda Chetti* v. *Perumal Chetti* (3), *Emperor* v. *Vinayak Narayan Arte* (4). There is no doubt that there have been cases where a criminal revision petition has been entertained although the period of two months had long since expired. As for instance in *Ramanadhan Chetti* v. *Murugappa Chetti* (1), where the order was given on the 22nd September 1899 and the judgment in revision delivered on the 10th April 1900. Nothing seems to have been said in that case as to expiry of the time for which the order could remain in force. So also in *Bhairo Gopa* v. *Emperor* (2), though in *Govinda Chetti* v. *Perumal Chetti* (3), as the two months had expired, the learned Judge declined to revise the order. If I am of opinion that the order is wrong although it may have expired, it seems to me I should not be deterred from expressing my views about it, in case it is sought to use it in any way in the litigation which is already pending on behalf of one side or the other, in so far as it purports to settle, even only for the time being, the respective claims or rights of the parties, I, therefore, though with some hesitation, decide that the order must be examined to see whether it was passed with or without jurisdiction in spite of the fact that it has expired.

As already stated, several points were taken against the validity of the order by Mr. Rangachariar. I think it may be only necessary to deal with two or three of them. I have already quoted the terms of the order and from the words quoted it is clear that the order is indefinite as to time. There was a similar order in *Ramanadhan Chetti* v. *Murugappa Chetti* (1), where the order was, firstly, not to interfere with the management of the Koil and, secondly, not to take any part until a certain person was duly evicted from the Koil management by due course of law. This latter direction was held to contravene the provisions of sub-section 5 of section 144 and it was held that to that extent the order was made without jurisdiction. In *Meyyaru Ammal, In re* (5), Mr. Justice Sadasiva Aiyar observed: "of course, if the Magistracy tries to use section 144 as a means of granting a perpetual injunction the High Court has the power to interfere." That seems to me what the learned District Magistrate has tried to do here. There is also, in my opinion, another and equally obvious defect in the learned Magistrate's order. Section 144 (4) permits any Magistrate to rescind or alter any order made under this section by himself or any

(5) 22 Ind. Cas. 721; (1914) M. W. N. 169; 28 M. L. J. 132; 15 Cr. L. J. 145.

Magistrate subordinate to him. Here, as pointed out above, the learned District Magistrate has not confined himself to rescinding the order of the Sub-Divisional Magistrate but has prohibited the counter-petitioners or any of the Nadar community from taking the car in procession. Mr. Rangachariar, relying on a case of the Patna High Court reported as *Ganpat Singh* v. *Emperor* (6), contends that the word 'alter' cannot mean substituting the names of one party for those of the other. Mr. Vaz, for the respondent, has ingeniously contended that the order passed by the learned District Magistrate, in so far as it restrains the Nadars, is not an order in appeal at all under section 144 (4) but it is a totally new order which the District Magistrate took upon himself to pass as he feared a breach of the peace. It will be observed that the final order of the District Magistrate refers to the preliminary order dated the 23rd March and the preliminary order is clearly one passed on an appeal from the Sub-Divisional Magistrate's order—see the heading on the top of the paper. It, therefore, seems to me that I cannot, on the state of the record, say that the final order of the District Magistrate was not passed on appeal from the Sub-Divisional Magistrate and I, therefore, hold that it is not a new order, but, under the circumstances I have detailed, one which the learned District Magistrate had no jurisdiction to pass.

Mr. Rangachariar also relied on the fact that there was an existing order under section 147 passed on the 20th April 1915 by the Sub-Divisional Magistrate at that time directing the Mussulmans not to spread their looms on one of the pieces of land in dispute and holding that the land in question was a public road. Mr. Rangachariar's contention is that this order under section 147 is illegal because it deprives him of any benefit he may have under the order passed under section 147 which is in force until it is displaced by something else. I do not think it necessary to decide as to this contention in view of the opinion I entertain on the two other points detailed above.

Under the circumstances I must hold that the order of the learned District Magistrate was passed without jurisdiction and I must allow the criminal revision petition. Under the circumstances I do so without costs.

M. C. P.
S. D. *Petition allowed.*

(6) 47 Ind. Cas. 76; 3 P. L. J. 287; 4 P. L. W. 357; 19 Cr. L. J. 880.

PATNA HIGH COURT.
CRIMINAL APPEAL No. 43 OF 1922.
May 9, 1922
Present:—Mr. Justice Coutts and Mr. Justice Das.
DASRATH SINGH AND OTHERS —APPELLANTS
versus
EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 154, 298—Trial by Jury—Misdirection—First information—Value of statement made to Police in ordinary course.

It is a misdirection on the part of a Judge to lay before the Jury the purport of a statement which is neither on the record nor proved. [p. 503, col. 2.]

A statement made in the ordinary course to a Police Officer is not evidence at all and cannot be considered or proved as first information. [p. 503, col. 2.]

Criminal appeal against the order of the Assistant Sessions Judge, Gaya.

Messrs. *K. N. Choudhry* and *G. C. Pal*, for the Appellants.

The Assistant Government Advocate, for the Crown.

JUDGMENT.

COUTTS, J.—The appellants, Dasrath Singh, Suraj Singh (son of Santokhi Singh), Suraj Singh (son of Dular Singh) and Iswer Singh have been convicted under section 379 of the Indian Penal Code and have been sentenced to seven years' rigorous imprisonment each; the other appellant, Sant Prokash Singh, has been sentenced to the same term of imprisonment under section 379-114, Indian Penal Code. The trial was by Jury and the contention of the learned Counsel for the appellants is that there has been misdirection in the charge to the Jury.

DASRATH SINGH v. EMPEROR.

The facts of the case as alleged by the prosecution are, shortly, that for some time there has been a dispute between Kishun Lal and his nephew Gajadher Prasad regarding possession of two villages which adjoin each other. The tenants are chiefly Goalas and they have taken the side of Gajadhar Prasad and have been paying rent to him and his brothers. Kishun Lal attempted to get rent without success and eventually he took the aid of Bachhu Singh, one of the proprietors of an adjoining village Pipra. Village Pipra is inhabited by Babhans and tenants of Bachhu Singh. In order to coerce the tenants of Barka and Chotki Kunhri, Bachhu Singh's *gomashta* the appellant Sant Prakash Singh with about 20 men went on the morning of the 5th of July last to Barka Kunhri. Sant Prakash rode with a sword in his hand and the rest of the mob followed him armed with swords or *lathis*. When they got to Barka Kunhri they looted the houses of Bhuan Goala, Tanak Goala and Bansi Goala and beat them. They then went to Chhotki Kunhri and did the same thing at the houses of Gangoo Goala, Abhiram Goala and Dila Goala.

Two men Sital Singh and Narayan Singh Kurmi went to Fatehpore Thana and gave information to the Sub-Inspector of Police of an occurrence which had taken place at Barka Kunhri. This was not the occurrence with which we are at present concerned, but the Sub Inspector went to the village and when he got there he found Bhuan Goala and others injured; so he took their statements and sent them to hospital. He then enquired into the case. On the 13th July he went to the hospital and took the statement of Bhuan Goala and treated it as the first information in the case. He then continued the investigation which eventually led to the sending up and conviction of the present appellants.

The case was tried by the Assistant Sessions Judge of Gaya and it has been tried by him with great care. The charge to the Jury is also an exceedingly fair one; but it is contended by the learned Counsel for the appellants that the learned Assistant Sessions Judge has committed an error in law with regard to the first information and that in connection with this first information he has misdirected the Jury. Now what happened is this. The Sub-Inspector on the 5th of July took the statement of Bhuan Goala. He did not, however, treat this as the first information, but on the 13th of July he recorded Bhuan's statement again and this statement he did treat as the first information. This was a mistake on the part of the Sub Inspector but if the mistake had stopped there it would have been of little consequence. Unfortunately, however, possibly because he did not know of the statement of the 5th of July the learned Sessions Judge allowed the statement of the 13th of July to be proved as the first information and he did not have the statement recorded by the Sub-Inspector on the 5th of July (which was really the first information) proved at all. In argument, however, this statement was evidently referred to and apparently it was contended that the statement of the 13th of July was not the first information. The learned Assistant Sessions Judge realized the correctness of this contention and he told the Jury that the statement of the 5th of July was the first information and that the statement of the 13th of July was not. Unfortunately, however, he told the Jury what the purport of the statement made on the 5th of July was, although the statement had not been proved and was not on the record; and, furthermore, he told the Jury that the statement of the 13th of July merely amplified the statement of the 5th of July and that its importance was not more than a statement made in the ordinary course to a Police Officer. The contention of the learned Counsel for the appellants is that the learned Assistant Sessions Judge had no right to place the statement of the 5th of July before the Jury and that he should have informed the Jury that the statement of the 13th of July was not evidence at all and that, except in so far as its contents may have been brought out in evidence for purposes of corroboration or contradiction, they should discard it entirely from their minds. These contentions are, in my opinion, uncontrovertable, and, under the circumstances, the only course is to set aside the convictions and sentences and to remand the case for re-trial. I may say that I do this with considerable reluctance because the learned Assistant Sessions Judge's charge is a good one and very fair to the accused persons; but the facts remain that he has placed before the Jury a statement which is not on the record and he has not told them that they

FAKHAR-UD-DIN, PLEADER, *In the matter of.*

should exclude from consideration a statement which is not evidence in the case. I would, therefore set aside the convictions and sentences and direct that the case be re tried. There will be no order as to bail.

DAS, J.—I agree.

N. K.

Case sent back.

LAHORE HIGH COURT.
CASE REFERRED No. 439 OF 1921.
December 19, 1921.
Present:—Mr. Justice Broadway and Mr. Justice Martineau.
In the matter of THE LEGAL PARCTITIONERS ACT, 1879 AND OF *Khwaja* FAKHAR-UD-DIN, PLEADER.

Legal Practitioners Act (XVIII of 1879), s. 13 (b) (f) –Letter written by Legal Practitioner charging Judicial Officer with racial antipathy—Misconduct—Other reasonable cause.

A Legal Practitioner wrote a letter to a Judicial Officer imputing feelings of racial antipathy to the latter and charging him with allowing such feelings to influence him in passing contrary orders against the Legal Practitioner in cases in which he appeared:

Held, that the letter did not fall within the purview of clause (*b*) of section 13 of the Legal Practitioners Act, inasmuch as it was not written by the Legal Practitioner in the discharge of his professional duty, but that it certainly fell within the purview of clause (*f*), of that section. [p. 504, col. 2.]

Advocate, In the matter of An, 5 P. R. 1902 Cr. (F. B.), *Chanda Singh, In the matter of*, 28 Ind Cas. 722; 18 P. R 1915; Cr. 12 P. W. R. 1915 Cr; 16 Cr. L. J. 338; *District Judge of Kistna* v. *Hanumanulu*, 32 Ind. Cas 326; 18 M. L. T. 549; (1915) M. W. N. 1050; 17 Cr. L. J. 38; 39 M. 1045, *Amrita Lal, In the matter of*, 52 Ind. Cas. 798; 42 A. 86; 20 Cr. L. J. 718; 17 A. L. J. 1050, 1 U. P. L. R. (A.) 134, referred to.

Case referred by the District Judge, Jhang at Sargodha with his letter No. 1007 G, dated the 26th October 1921.

Lala *Jai Lal*, R. B., Assistant Legal Remembrancer, for the Crown.

Maulvi *Ghulam Mohy-ud Din*, for Khwaja Fakhar-ud-Din, Pleader.

ORDER.—On the 8th January 1921 Khwaja Fakhr-ud-Din, a Pleader of Chiniot, handed a letter, Exhibit *A*, which he had written, to Sardar Gian Singh, Munsif of Chiniot, who, in consequence of the objectionable nature of the contents, forwarded the letter to the District Judge with a view to action being taken against the Pleader under section 14 of the Legal Practitioners Act. The District Judge, after framing a charge and taking evidence in accordance with the provisions of that section, has found that Khwaja Fakhr-ud-Din has been guilty of unprofessional conduct or has afforded reasonable cause for disciplinary action to be taken against him. He has accordingly reported the matter to this Court and has suspended the Pleader from practise pending this Court's orders.

The letter is clearly a most improper one and its tenor is correctly described in the charge drawn up by the District Judge, which is as follows:—

"That you on or about the 8th January 1921 addressed and delivered to the Munsif at Chiniot a letter of which the whole tone and style are in general improper, and more particularly that in the said letter you impute feelings of racial antipathy against you on the part of the Munsif as a Judicial Officer and charge him with allowing such feelings to influence him in passing contrary orders against you in cases in which you appear; and that this act of yours and the expressions used by you thereby amount to professional misconduct or afford any other reasonable cause as specified in clauses (*b*) and (*f*) of section 14 of the Legal Practitioners Act."

Section 14 has been mentioned in the charge by mistake for section 13. We do not think that clause (*b*) of section 13 applies as the letter cannot be said to have been written by Khwaja Fakhr-ud-Din in the discharge of his professional duty. But the case certainly falls within the purview of clause (*f*) of that section; and Mr. Jai Lal, who has appeared on behalf of the Crown, has referred us in this connection to *Chanda Singh, In the matter of* (1), *District Judge of Kistna* v.

(1) 28 Ind. Cas. 722; 18 P. R. 1915 Cr.; 12 P. W. R. 1915 Cr.; 16 C. L. J. 338.

Hanumanulu (2), *Amrita Lal, In the matter of* (3) and *Advocate, In the matter of An* (4).

Mr. Ghulam Moby-ud-Din, who has appeared on behalf of Khwaja Fakhr ud-Din, does not justify the writing of the letter but admits that it was an improper one, and he states that his client expresses unreserved regret for having written it and throws himself on the mercy of the Court. It is to be observed, however, that in the proceedings before the District Judge no such unqualified expression of regret was made, and in fact Khwaja Fakhr ud-Din attempted to justify the remarks which he had made in his letter to the Munsif. In a letter which he wrote to the District Judge on the 5th April he said only that if in the opinion of the District Judge his letter to the Munsif had affected the latter in his official capacity he was sorry and asked for pardon. The District Judge replied that, if Khwaja Fakhr-ud-Din apologised to the Munsif in Court and withdrew a complaint (of defamation) which he had brought against the Munsif, the incident would be regarded as closed. Khwaja Fakhr-ud Din, however, did not apologise to the Munsif, and the District Judge accordingly took proceedings under section 14 of the Act.

In these circumstances although the case is not one in which a severe punishment is called for, we do not consider that the apology now offered justifies us in overlooking the matter. We suspend Khwaja Fakhr-ud-Din from practice for a period of three months commencing from the date of the District Judge's order of suspension, namely, the 25th October 1921.

Z. K. *Order accordingly.*

(2) 32 Ind. Cas. 326; 18 M. L. T. 549; (1915) M. W. N. 1060; 17 Cr. L. J. 38; 39 M. 1045.

(3) 52 Ind. Cas 798; 42 A. 86, 20 Cr. L. J. 718; 17 A. L. J. 1050; 1 U. P. L. R. (A.) 134.

(4) 5 P. R. 1902 Cr. (F. B.).

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 255 OF 1921.

June 23, 1921.

Present:—Mr. Justice Lindsay.

JIWAN—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 233, 537, application of—Property, stolen, recovered from accused separately—Joint trial—Illegality.

Where stolen property is recovered from the possession of several persons at different times, there should be a separate trial under section 411 of the Penal Code, of each of such persons. The joint trial of such persons is illegal, and the illegality is not curable by the application of section 537 of the Criminal Procedure Code.

Criminal revision from an order of the Sessions Judge, Agra, dated the 11th March 1921.

FACTS of the case will appear from the following excerpt from the judgment of the Sessions Judge:

Jiwan, Chattar and Badle have been convicted of dishonestly retaining stolen property, and appeal against their convictions and sentences.

The first objection taken is that the joint trial of the accused was illegal.

I find that the case was sent up as one of burglary, but that after hearing the prosecution evidence the Magistrate framed a charge under section 411 only. The facts as found by the Magistrate are that a burglary was committed at the house of Sitla Charan, and that articles of property stolen on that occasion were recovered from the possession of the accused separately about two months later. Undoubtedly, as there was not joint possession of the property, there ought, under the law, to be separate trials of the accused. I find, however, that the only proceeding of the Magistrate after framing the charge was to give judgment, as the accused did not want to examine any witnesses, either prosecution or defence.

It appears to me that there was no legal obligation upon the Magistrate to hear the prosecution evidence afresh as against each accused separately, after he had decided that the evidence was insufficient to prove that they had actually committed the burglary, but from the point of framing the charge it was necessary that the proceeding should

be divided, and that the remaining proceeding, if any, should be conducted separately as against the three accused persons. I am unable to say whether the Magistrate would have conducted separate proceedings if there had been any to conduct but it certainly is not possible to say that he would not have done so. There is no legal objection to his writing a single judgment to cover the case of three persons who have been tried. I, therefore, find that there is no valid legal objection to the procedure of the Magistrate.

Mr. *S. C. Mukerji*, for the Applicant.

Mr. *R. Malcomson*, the Assistant Government Advocate, for the Crown.

JUDGMENT.—This is an application in revision on behalf of one Jiwan who has been convicted in the Court of the Magistrate on a charge under section 411. It appears that two other persons were tried along with Jiwan, one of whom was acquitted, the other being convicted. The latter has not made any application to this Court.

Jiwan's conviction was upheld by the learned Sessions Judge in spite of the plea taken before him that the trial was illegal. There can be no doubt as to the illegality of the trial and I cannot agree with the Judge who seems to have taken the view that an illagality of this kind can be cured by the application of section 537 of the Criminal Procedure Code. I must give effect, therefore, to this application and set aside all the proceedings in the Court below.

The result is that the accused will be released.

W. C. A. *Application allowed.*

PATNA HIGH COURT.

GOVERNMENT APPEAL No. 3 OF 1921.

November 24, 1921.

Present :—Mr. Justice Jwala Prasad and Mr. Justice Ross.

EMPEROR—APPELLANT

versus

KUNJA DUSADH AND OTHERS—RESPONDENTS.

Criminal Procedure Code (Act V of 1898), s. 417—Appeal against acquittal—Principles governing interference by High Court.

The High Court will not interfere in a judgment of acquittal unless the lower Court has been perverse in its judgment or taken such unreasonable and distorted conclusions of the facts as to cause a miscarriage of justice. [p. 509, col. 2.]

Remarks of Straight, J., in *Empress of India* v. *Gayadin*, 4 A. 148; A. W. N. (1881) 159; 2 Ind Dec. (N. S) 745 and *Deputy Superintendent* [*Deputy Legal Remembrancer of Bengal*] v. *Amulya Charan*, 22 Ind. Cas. 786; 18 C. W. N. 666; 15 Cr. L. J. 160, referred to and followed.

Per *Ross, J.*—The mere fact that an inadmissible piece of corroborative evidence was brought on the record, through a technical error, cannot stand in the way of conviction by the High Court. [p. 507, col. 1.]

Per *Jwala Prasad, J.*—The reason that another Tribunal or other Judge might have arrived at a view other than that formed by the Trial Court is not a reason for disturbing a verdict of acquittal arrived upon a full consideration of the circumstances and evidence in the case. [p. 510, col. 1.]

Government appeal against an order of acquittal by the Sessions Judge, Durbhanga.

The Government Advocate, for the Appellant.

Mr. *S. N. Sahay*, for the Respondents.

JUDGMENT.

ROSS, J.—This is an appeal under section 417, Criminal Procedure Code, against the acquittal of ten persons who were tried by the learned Sessions Judge of Darbhanga with the aid of two Assessors on charges under sections 326, 147, 148 and 326-149, Indian Penal Code, in respect of certain grievous injuries inflicted on one Nawab Khan on the evening of 29th March last. The learned Government Advocate asks for a re trial of the case on the ground that two statements made by Nawab Khan, (1) to Mr. Guise (P. W. No. 1) two hours after the occurrence, and (2) to B. Indermani Singh, Deputy Magistrate, (P. W. No. 32), two days later, were wrongly admitted in evidence. These statements in themselves were inadmissible. Their contents ought to have been stated by the witnesses, and the failure to get this done was a technical error on the part of the Public Prosecutor. The documents were exhibited by the prosecution, and the prosecution is not entitled to take advantage of this technical error in order to have a re-trial; nor is this what the learned Government Advocate seeks to do.

He contends that on the evidence in this case there ought to have been a conviction

but he considers that he cannot ask for a conviction in this Court because the first of the statements, on which he relies, is not legal evidence as the record stands. To deal with this contention it is necessary to consider the whole case. The first statement of Nawab Khan is merely corroborative evidence, and if it seemed that the evidence in Court was a true account of the circumstances in which Nawab Khan was wounded, I do not think that the mere fact that an inadmissible piece of corroborative evidence was on the record through a technical error: should stand in the way of conviction here. There is, therefore, no necessity for a re-trial in any event. But in dealing with the evidence we must give the accused any benefit they may derive from the statements of Nawab Khan as if they had been properly admitted as they are an important element in the case.

The case for the prosecution is that on the evening of 29th March Nawab Khan, a Tokedar of Benipur Factory, was returning from Benipur Hat to his village Antore along with Phulwa Chowkidar and other persons. Near a Gachhi and Banswari of Jagannath Hajari he was attacked by a number of men some of whom were armed with axes and one with a sickle and the others with *lathies*. He was struck on the leg with an axe and was then assaulted generally, and finally one Somna cut off his nose and right ear. Twenty-four injuries were found on his person of which five were severe. Phulwa Chowkidar names eleven persons as having been in the party with Nawab Khan of whom six have been examined in Court. Nawab Khan names thirteen, adding four, namely, Baldeo Chowdhury, Gopi Jha, Asarafi Chowdhury and Ramkishun Jha, to those named by Phulwari and omitting two, namely, Chuni and Mithu Tati. In his dying declaration, however, he had said that he did not know the names of the persons who were with him except Phulwari. Of these persons six have not been examined at all, namely, Gopalji Jha, Baikunt Jha, Baldeo Missir, Bagru Jha, Rupan Dusadh, Mithu Tati, and Asarafi Chowdhury on this point. Of these persons not examined in Court the Sub-Inspector of Police examined on the 30th March, three Gopalji Jha, Baldeo Missir and Bagru Jha, and none of them named any of the assailants. The Sub-Inspector says that he sent for the other witnesses but they did not come. Of the witnesses examined in Court Phulwa gave what has been called the first information on the 29th, seven were examined on the 3rd April and one on the 1st April. These witnesses are all tenants and labourers of the Benipur Factory and their residence is Aratur. The explanation of their delay in coming forward that is now offered is that they were afraid of Ganowra Dusadh, one of the accused who is a bad character; but only two of the witnesses give this reason. One is Buchan Jha who says in his evidence that he stated before the Police that he was afraid of Ganowra as people said that he was a desperate character but he adds that this he heard three or four days after the assault. The other is Baldeo Chowdhury who says that he was hiding through fear of Ganowra, but he admits that he had only heard of the bad livelihood case against Ganowra and that Ganowra had never beaten him. The delay in the production of this evidence seems to me a grave reason for doubting the truthfulness of the witnesses. Further, it appears from Mr. Guise's evidence that several persons who came to the factory that night with Nawab Khan said that they had been with him and of these Mr. Guise picked out Phulwa. It does not appear who the others were, and if the witnesses are believed they were not among them because they say they did not go to the factory. As to the details of the occurrence, Phulwa says that Nawab Khan was struck on the leg from behind, but the Assistant Surgeon says that the injury on the leg could not have been caused from the back. Nawab Khan's own account of the affair is not consistent as the learned Sessions Judge has shown. Moreover there are serious discrepancies between his earlier and later statements. In the statement made to Mr. Guise he named only the Dusadhs as his assailants. In his dying declaration he omitted two of the names that he had previously given and substituted the names of two Babhans. Moreover in the earlier statement he said that Somna cut off his nose and ears while Kunjwa and Kail hit him with an axe while in the later statement it was Somna who struck him

with the axe, and Kunjwa who cut off his nose and ear.

The learned Government Advocate felt the importance of these discrepancies and admitted that there could not be a conviction under section 326. The occasion alleged for this attack is said to have been that some cattle of Ganowra's had been impounded by the orders of Nawab Khan on the previous day. This seems to me an altogether inadequate reasons for a savage attack of this peculiar nature.

A further unexplained element in the case is the presence of blood of a ruminant animal along with human blood on the alleged place of occurrence. No explanation of this is offered. The learned Government Advocate lays stress on the fact that a portion of the nose of Nawab Khan was found on the place of occurrence but this circumstance does not appear to me to be conclusive.

The Sessions Judge and the Assessors heard the witnesses and did not believe them. In view of the state of the evidence I am not prepared to say that in doing so they acted perversely or that it is established beyond reasonable doubt that the occurrence took place in the manner alleged by the prosecution. I would, therefore, dismiss this appeal.

JWALA PRASAD, J.—I have carefully gone through the evidence in the case and considered the able argument of the learned Government Advocate. His chief argument was that the learned Sessions Judge ought not to have brushed aside the earliest statement of Nawab Khan made before Mr. Guise soon after the occurrence by reason of its having been somewhat contradictory as compared with the statement made by Nawab Khan two days later to Mr. Inderdani, Deputy Magistrate, as dying declaration. If this were the only defect in the case of the prosecution, namely, the two contradictory statements as regards some of the details of the occurrence made by Nawab Khan, perhaps it would have been a plausible argument. I, however, think that the prosecution case, as disclosed in the evidence of Nawab Khan and the witnesses in Court, is beset with unsurmountable probabilities and does not seem to disclose the entire occurrence. Take for instance the statement of Nawab Khan himself in Court. He says: "I started from the Hat as the sun was about to set. Soon after sunset I reached Belha near Jagannath Hazari's Gachi and Banswari. About 12 or 13 men came out of the Gachi. I was going to my lodging at Antere. Of the 12 or 13 men Kunja and Koila had axes and Somna had a *ragari* sickle and the others had *lathis*. I also recognised Fouzdar, Lalji Gharbharia, Nathunia and Bilwa amongst them. The mob came to the road and chased me from the east. I fled towards the west. I was proceeding to the east; after I had fled three or four Luggas Kunja struck me with an axe on my left leg, I fell down. Then 15 or 18 men came from the south, I did not recognise any of them. This was because I fell down. I saw the men but did not recognise them. Both the mobs jointly assaulted me. As I was assaulted with *lathis* and *Tangis* I began to struggle and did not notice who beat me or on which part of the body. I did not recognise any of the men who assaulted me as I became senseless. Some of the mob said that I was dead. Then Somna got on my chest, cut off my nose and right ear."

In his statement before the Committing Magistrate he says: "Seeing the rioters I turned towards west and took to flight. I was first proceeding towards east. These people chased me Kunjwa overtaking me struck me with the axe he had with him, at the left leg. I fell down unconscious. After I fell down Koila and Kunjwa struck me with axes at the head."

It is thus clear from his statement that after receiving the first blow on the body from Kunjwa or some one else among the rioters on his left leg he fell down unconscious and thereafter the assailants struck him. After he fell down receiving the first blow on the left leg, the Doctor's evidence shows that he received no less than 23 injuries on different parts of his body both in front and behind. Some of those injuries must have been caused while the man was in a standing posture. A bold attempt was then made at one stage of the case to show that after he fell down he raised himself up again, and this is obviously with a view to explain the injurise on the different parts of his body most of which could not have

been caused while he was lying on the ground.

The evidence of the other witnesses leaves no manner of doubt that the man fell down unconscious and never raised himself again. In the earlier statement of Nawab Khan the occurrence is described in a similar fashion, but there is no mention of his having got up after receiving the first blow and having fallen down. To Babu Indermani Singh he stated: "whilst running Somna struck me with an axe on my leg and I fell down." He also said "Kunja got on my chest and cut off my nose and ear with a *haswa*." For the present I do not attach any importance to the contradiction in this statement with that made before Mr. Guise as regards the part played by Somna and Kunjwa, but the statement shows that the man after receiving the first blow fell down and never got up to receive the other belows. No detail of the incident connected with the occurrence has been given in his first statement to Mr. Guise. The second statement two days after to Indermani Singh also did not disclose the entire occurrence. Babu Indermani Singh in his evidence in Court states: "He could give answers to my questions very clearly. After I recorded the statements I read it out to Nawab Khan and he admitted that it was correctly written." The absence of a detailed account of the occurrence in the statement of Mr. Guise is said to be due to Nawab Khan being under the weight of injuries and possibly much confused and in a semi-conscious state: but the statement to Babu Indermani Singh was made two days later when he was fully conscious and was able to give his statement clearly. There is, therefore, no reason why all the details of the occurrence should not have been disclosed at that stage. I, therefore, think that the prosecution has not given the true account of the occurrence. Again the occurrence is said to have taken place just near the inhabited portion of Antore, only 10 *bighas* west of it. It was also close to village Bala, on the south being only 9 or 10 *bighas* apart from it; the Benipur Factory itself was 18 or 19 *bighas* west of the place of occurrence and the time of the occurrence was one such as the people would generally pass by the way from the Hat to their respective villages. Yet we do not see the neighbouring villagers having come out hearing the noise and shout. The witnesses in the case were not examined by the Police Officer soon after the occurrence, but were examined several days after. The delay in recording the statement is inexplicable. Some of the witnesses say that no Police Officer asked them to give an account of the occurrence. It is impossible to rely upon the statement of the witnesses in the present case, particularly when those examined at the earliest stage were not examined in Court and their statement before the Police Officer was to the effect that they did not recognise any of the assailants. It is admitted by the prosecution that the deceased had led a somewhat reckless and loose character, and the Doctor in his evidence suspects that he had venereal disease, taints of which were found upon his person. This lends support to the suggestion of the defence that the assailants were persons who had grievance against him on account of his immoral character and that the names of the assailants and the place of occurrence had been changed.

The case of the prosecution is, therefore, not without suspicion. It is not a case in which it can be said that the opinion of the Assessors was perverse or that of the learned Judge who accepting that opinion acquitted the accused, and this Court will not interfere in a judgment of acquittal unless the lower Court has been perverse in its judgment or taken such unreasonable and distorted conclusions of the facts as to cause a miscarriage of justice. This has been established by a long course of decisions in this country; *vide Empress of India* v. *Gayadin* (1) and *Deputy Superintendent* [*Deputy Legal Remembrancer of Bengal*] v. *Amulya Charan* (2). The observation of Straight, J. in the first mentioned case fits in so well with the present case that I would conclude this judgment in the words of that learned Judge:—"It is not because a Judge or a Magistrate has taken a view of a case in which Government does not coincide, and has acquitted accused persons, that an appeal from his decision must necessarily prevail, or that this Court should be called upon to disturb the ordinary course of justice by putting in force the arbitrary powers conferred on it

(1) 4 A. 148; A. W. N. (1881) 159; 2 Ind. Dec. (N. S.) 745.

(2) 22 Ind. Cas. 736; 18 C. W. N. 666; 15 Cr. L. J. 100.

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by section 272 (corresponding to section 417, Criminal Procedure Code). The doing so should be limited to those instances in which the lower Court has so obstinately blundered and gone wrong as to produce a result mischievous at once to the administration of justice and the interests of the public. We cannot say in the present case that the Sessions Judge so egregiously and foolishly erred in his conclusions," as to the accused that we feel ourselves bound either to convict them, or to order a new trial. The Assessors and the Sessions Judge had the witnesses before them and consequently the best opportunity of judging the truth. It is not said that they did not conduct the enquiry with carefulness and weighed the facts to the best of their ability. The reason that another Tribunal or other Judge might have arrived at a view other than that formed by the Assessors and the learned Judge in the present case is not the reason for disturbing the verdict of acquittal which appears to us to have been arrived upon the full consideration of the circumstances and evidence in the present case.

Agreeing, therefore, with the view expressed by my learned brother I dismiss this appeal.

S. D.

Appeal dismissed.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 657 OF 1921.

December 22, 1921.

Present:—Mr. Justice Stuart.

ANWAR—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 233, 239—Joint trial of thieves and persons in possession of stolen property—Legality.

The theft of certain articles by one person and the dishonest possession of them by another knowing them to be stolen form one transaction even though the receipt is not simultaneous with the theft. The joint trial of such persons, therefore, is not bad in law under the provisions of section 239, Criminal Procedure Code.

Criminal revision from an order of the Sessions Judge, Allahabad, dated the 5th September 1921.

Mr. *L. M. Roy*, for the Applicant.

Mr. *R. Malcomson*, the Assistant Government Advocate, for the Crown.

JUDGMENT.—The facts are as follows: A bicycle was stolen from the precincts of the Allahabad Post Office. Another bicycle was stolen from the precincts of the Allahabad Bank. Parts of both stolen bicycles were found in the house of a man called Narbada Prasad. Parts of both stolen bicycles were found in the shop of a bicycle dealer called Ram Saran. Evidence was given to the effect that Anwar, an employee of Ram Saran in his bicycle shop, had been seen loitering both at the Post Office and at the Allahabad Bank just before the bicycles disappeared. All three men were charged before a Magistrate of the First Class under section 411 of the Indian Penal Code, Anwar being charged in the alternative under section 379 of the Indian Penal Code. The Magistrate convicted Narbada Prasad and Ram Saran under section 411 of the Indian Penal Code and Anwar under section 379 of the Indian Penal Code. Narbada did not appeal. Ram Saran appealed and was acquitted on the merits. Anwar appealed but his appeal was dismissed. He comes here in revision. The first point taken by his learned Counsel is that the joint trial of Narbada, Ram Saran and Anwar was bad in law under the provisions of sections 234 and 239, Criminal Procedure Code. How does the case stand against the three? The case for the prosecution was that Anwar had stolen both bicycles and that Ram Saran was in dishonest possession of parts of both bicycles and that Narbada Prasad was also in dishonest possession of parts of both bicycles, each knowing that these parts were stolen property. According to the view taken in the case of *Emperor* v. *Balabhai Hargovind* (1) the theft of the two bicycles and dishonest possession of them knowing them to be stolen, that possession being by different persons, formed one transaction, even though the receipt was not simultaneous with the theft. I agree with the

(1) 6 Bom. L. R. 517; 1 Cr. L. J. 584.

view taken in that decision. I do not find that there is anything in my view contrary to the view expressed by Lindsay, J., in the case of *Jiwan* v. *Emperor* (2), for there the actual thief not being charged in the case, there was nothing to connect the three persons. Here it is the fact that Anwar, the actual thief, was charged with the receivers, which justifies the several acts being considered parts of one transaction. On the merits Anwar was clearly proved to have been loitering just before the theft of the bicycles. When the owners returned the bicycles had disappeared, and Anwar had disappeared. Portions of the stolen bicycles were found in the shop in which he is employed. This being the case I do not see my way to interfere on the merits. I, therefore, dismiss this application.

N. H. *Application dismissed.*

(2) 67 Ind. Cas. 505; 19 A. L. J. 515.

PATNA HIGH COURT.
CRIMINAL REVISION No. 113 OF 1922
WITH
CIVIL REVISION No. 86 OF 1922.
May 22, 1922.
Present:—Mr. Justice Adami.
HARI BUX RAM—PETITIONER
versus
CHHEDI PANDE—OPPOSITE PARTY.

Registration Act (XVI of 1908), ss. 73, 82 (a), 83—District Registrar, refusal by, to sanction prosecution—High Court, power of, to interfere—Remedy, proper.

A deed of mortgage and a sale-deed were presented to a Sub-Registrar for registration, the alleged executant of the deeds denied that he had executed them, and registration was refused: an application was then made to the District Registrar under section 73 of the Registration Act who ordered an inquiry to be made by the Special Sub-Registrar, and this officer found that the documents had been duly executed by the alleged executant and directed registration thereof; he also found that the executant had made false statements and applied to the District Registrar for sanction to prosecute him under section 82 *a* of the Registration Act; the District Registrar, after a full inquiry, reversed the order of the Special Sub-Registrar directing registration, and refused to sanction the prosecution of the executant. On revision to the High Court:

Held, that the High Court had no jurisdiction to interfere as the District Registrar had acted as a Revenue Court, and that the proper remedy was to obtain a reversal of the order of the District Registrar by the Board of Revenue, or by a decree of a Civil Court. [p. 512, col. 1.]

Application to revise an order passed by the District Registrar, Motihari, dated 6th February 1922, in a proceeding under section 73 of the Indian Registration Act, wherein he refused to act on the report of the Special Sub-Registrar recommending the prosecution of the opposite party for an offence under section 82 (*a*) of the Registration Act.

Messrs *Asghar* and *H. P. Sinha*, for the Petitioner.

Government Advocate, for the Opposite Party.

JUDGMENT.—The facts which are necessary for a decision of this case are as follows:—

On the 6th of December 1920 the petitioner applied to the Sub-Registrar of Bettiah for compulsory registration of a mortgage and a sale-deed which he alleged had been executed by one Chhedi Pande. Chhedi Pande before the Sub-Registrar on the 16th December denied execution of those documents and, therefore, the Sub-Registrar refused to register them. The petitioner then filed an application under section 73 of the Registration Act before the District Registrar of Motihari. The District Registrar made over the matter for enquiry to the Special Sub-Registrar who had amalgamated powers under sub-section (2) of section 7 of the Registration Act and had, therefore, power to make the inquiry just as if he were the District Registrar. The Special Sub-Registrar examined witnesses on both sides and found on the 15th of July 1921 that the documents in question had been duly executed by Chhedi Pande and, therefore, ordered those documents to be registered. The deeds were actually registered on the 22nd July 1921. The Special

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Sub-Registrar found that Chhedi Pande had made false statements and had thus committed an offence under section 82, clause (a) of the Registration Act and, therefore, submitted the papers and a report, dated the 20th July 1921, for the sanction of the District Registrar under section 83 of the Act. The District Registrar called on Chhedi Pande to show cause against the prosecution under section 82 (a) for falsely denying execution of the sale-deed and the mortgage-deed. When cause was shown the District Registrar examined witnesses and made a full inquiry and then proceeded to enquire into the whole case; and he came to a finding that the documents in question ought to be cancelled and that they could not be registered. He, therefore, upset the order of the Special Sub-Registrar directing registration and at the same time refused to sanction the prosecution of Chhedi Pande under section 82 of the Registration Act. It is against this order of the District Registrar that this application has been made.

The grounds taken are that as the Special Sub Registrar had co-ordinate powers with the District Registrar the District Registrar had no jurisdiction to upset the order of the Special Sub-Registrar, directing registration, or to refuse to confirm the sanction granted by the Special Sub-Registrar for the prosecution of Chhedi Pande.

Now, it is quite clear that the District Registrar was acting as a Revenue Court and there can be no doubt that this Court has no jurisdiction to interfere with orders passed by the Revenue Authorities in their revenue administration or by the Revenue Courts. The order passed by the District Registrar may have been without jurisdiction but the remedy for the petitioner was either to approach the Board of Revenue to get the order set aside as being without jurisdiction, or, if necessary, to file a suit in the Civil Court. With that part of the application this Court has nothing to do.

It is next contended that the District Registrar in refusing to accord sanction for the prosecution of Chhedi Pande under section 82 (a) was acting as a Court in a criminal matter and, therefore, this Court has jurisdiction to interfere. I do not think that it is really necessary to enter into the question of the power of this Court to interfere with this order as to sanction. The facts are that the District Registrar has, as District Registrar, given judgment after full inquiry and has found that the sanction should not be accorded. He has given good reasons in that judgment and until that judgment is upset by a proper authority, either by the Board of Revenue or by a decree of a Civil Court, that judgment is a good judgment. That being so, and this Court being unable to go into the reasons for which that finding was come to, I cannot see that I can now interfere with that part of the order which refused to accord sanction. The matter might be looked at also in another way. If this order were upset by this Court at the present juncture while the judgment of the District Registrar still holds good so far as the revenue side of the matter is concerned, there must necessarily be some confusion. The result of upsetting the District Registrar's order as to sanction would be to restore the order of the Special Sub-Registrar granting sanction to prosecute Chhedi Pande, and, therefore, we would at the same time have an order of the Sub-Registrar directing the prosecution and a revenue order of the District Registrar to the effect that the case is not one in which registration should be allowed owing to faith being put in the statements made by Chhedi Pande. Under the circumstances, even if this Court had jurisdiction to interfere with the order as to sanction, I think that this is a case in which this Court would refuse to interfere. The application is, therefore, rejected.

The order passed in the above case will also govern Civil Revision No. 86 of 1922.

W. C. A.

Application rejected.

SRI RAM v. SOBHA RAM-GOPAL RAI.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 339 OF 1921.

March 17, 1922.

Present :—Mr. Justice Lindsay and Mr. Justice Stuart.

SRI RAM AND OTHERS—DEFENDANTS—APPELLANTS

versus

FIRM SOBHA RAM-GOPALRAI—PLAINTIFF—RESPONDENT.

Evidence Act (I of 1872), s. 92— Pro-note purporting to be executed after settlement of accounts—Evidence to prove that accounts were not taken.

Where it is stated in the body of a pro-note that the sum mentioned in it has been arrived at after taking accounts between the parties and that it is payable on demand, the executant of the note cannot give evidence to prove that, as a matter of fact, the document was not executed after the settlement of accounts.

Second appeal from a decree of the District Judge, Meerut, dated the 27th November 1920.

Mr. *L. M. Banerji*, for the Appellants.

Dr. *S. N. Sen* and Mr. *Kanoda Prasad*, for the Respondent.

JUDGMENT.—In our opinion there is no merit in this appeal. The suit was brought by a firm of commission agents doing business at Hapur against another firm carrying on business in grain in the Meerut city. This firm is said to consist of three persons, Narain Das, Sri Ram and Ram Nath, who were impleaded as defendants. It is stated that the defendant firm is carried on in the name of Narain Das and Sri Ram.

The case for the plaintiff firm was that, on the 4th of August 1917, a promissory-note was passed in their favour by the defendant firm for a sum of Rs. 4,071-4-0. It was alleged that this amount, which carried interest at the rate of 6 per cent. per annum was to be payable on demand. The plaintiff alleged the demand made and the refusal of the defendant firm to pay. Hence the suit.

The main defence which was set up by the defendant firm is contained in paragraph 8 of the written statement. While it was not denied that the promissory-note, upon which the suit was based, was executed, it was alleged, that, as a matter of fact, the note had not been executed after a settlement of account had been arrived at between the parties. It was said that certain dealings were going on between the parties relating to grain and that in view of certain circumstances some loss was apprehended at the time. The allegation was that this note for Rs. 4,071-4 was passed to the plaintiff as a sort of security to him and it was further alleged that the agreement between the parties was that the account between them was to be settled at a later date and that money is to be paid or received in accordance with that later settlement. Various other pleas were set out with which we are really not concerned here.

The main complaint which is made here in second appeal is that both the Courts below refused the application of the defendant firm to have an inspection of the accounts; in other words, that the Courts below refused to allow the accounts between the parties to be re-opened. So far as this plea is concerned, it appears to us to have no force whatever. The suit is based upon a promissory-note and the language of this document is of importance in deciding the matter which is now before us. It is stated in the body of this document that accounts had been taken between the parties and that a sum of Rs. 4,071-4 was found owing to the plaintiff firm. It was distinctly stated in the promissory-note that this sum together with interest at the rate of 6 per cent. per annum would be payable to the plaintiff firm on demand.

The defence which was set out in the written statement was, in our opinion, a defence which could not be allowed to be raised. The defendants were in substance trying to put forward a case at variance with the terms of the written contract between the parties. As we have pointed out, the promissory-note contains an unconditional promise to pay; there is nothing in the note to indicate that this undertaking to pay was subject to the further condition that accounts were at some subsequent period to be re-opened between the parties and that payment was not to be demanded or could not be enforced until this further settlement of accounts had taken place. To allow the defendants to give evidence of this kind would be to violate the provisions of section 92 of the Evidence Act. It is quite true that in certain cases which are specified in the provisos to this section evidence may be given against the terms of the written docu-

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ment. Proviso 1, for example, lays down, that any fact may be proved which would invalidate a document, facts such as fraud, intimidation, illegality, etc. There is, however, in the written statement of the defendant firm no allegation whatever of fraud. The only case which is disclosed in the written statement is the case that the written document of contract does not contain the real contract between the parties. In this view of the case all the argument about reopening of accounts seems to us to be out of place, and so far as the cases to which we have been referred are concerned, and which are set out in the judgment of the Court of first instance, they do not appear to us to have any material bearing on the question with which we are dealing. In our opinion the defendants in this case were not entitled to put forward the plea that they had a right to call for a re examination of the accounts and to demand a fresh settlement.

The only other point with which we have to deal is the liability of the firm in respect of this note which admittedly was written by the first defendant Narain Das. There can be no doubt that the three defendants are brothers; that they are members of a joint family; that they carry on business at Meerut in one shop, and it was admitted that Narain Das, who signed this promissory-note, was the managing member of the family. These being the facts, we have no doubt whatever that the defendant firm was liable on the note.

The result is that the appeal fails and is dismissed with costs including in this Court fees on the higher scale.

S. D.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL APPEAL No. 158 OF 1920.

February 3, 1922.

Present:—Mr. Justice Oldfield and Mr. Justice Venkatasubba Rao.

P. SANKUNNI—DEFENDANT—APPELLANT

versus

C. S. VENKATARAMANI, MINOR BY NEXT FRIEND C. S. SWAMINATHA PATTAR—PLAINTIFF—RESPONDENT.

School Master and pupil—Corporal punishment on pupil, right of, extent of—School discipline, breach of—Two smacks, infliction of, not causing injury, whether actionable—Madras Educational Rules, r. 9 A

A School Master is the delegate of the parent and may for the purpose of correction inflict moderate and reasonable corporal punishment on a pupil. [p. 516, col. 1.]

Reg. v *Hopley*, (1860) 2 F. & F 202, *Fitzgerald* v. *Northcote*, (1865) 4 F. & F. 656; 142 R. R. 704, *Hutt* v. *Governors of Haileybury College*, (1887) 4 T. L R. 623, followed.

The courts, however, should not fail to insist on a close scrutiny of the severity of the chastisement inflicted and its justification. [p. 516, col 2]

Rule 59 A of the Madras Educational Rules, 1908, or the similar rule in the Rules of 1901, which refer to cases of moral delinquency and flagrant insubordination should not be construed to prohibit or regulate the petty corrections without which the ordinary discipline of a School cannot be maintained and which, if they are to be effective, must be given immediately. [p. 516, col. .]

Where a School Master smacks a pupil on the cheek for making a noise and the smacks cause no injury requiring medical aid or disable the pupil from going home at once, the punishment is such as a parent might expect his child to receive, and is not in excess of the master's legitimate powers of chastisement. [p. 516, col. 2.]

Per *Venkatasubba Rao, J.*—If the punishment be administered for the gratification of passion or of rage, or if it be immoderate and excessive in its nature or degree or if it be protracted beyond the child's powers of endurance or with an instrument unfitted for the purpose and calculated to produce danger to life or limb, in all such cases the punishment is excessive, the violence is unlawful. [p. 518, col. 2.]

Reg v. *Hopley*, (1860) 2 F. & F. 202, followed.

A School Master cannot escape liability merely on the ground that chastisement administered to a pupil has not left any marks of violence or injury on the pupil's body. The question whether the punishment inflicted is moderate and reasonable is one of fact and Courts in this country will certainly discountenance resort by a School Master to barbarous and inhuman forms of correction. [p. 520, col 1.]

Appeal against a decree of the Court of the Subordinate Judge, South Malabar, at Palghat, in Original Suit No. 18 of 1918.

SANKUNNI v. VENKATARAMANI.

Messrs. *C. Madhavan Nair* and *D. A. Krishna Variar*, for the Appellants

Mr. *C. P. Ramaswami Aiyar* (Advocate-General) and Mr. *N. Rama Aiyar*, for the Respondent.

JUDGMENT.

OLDFIELD, J.—Personal matters and allegations of ulterior motive have entered unduly into the pleadings in, and conduct of, this case in the lower Court. But the facts and the considerations, with which we are concerned for the purpose of this appeal, can be stated with very little reference to them. The defendant, Principal of what at the date in question was the Victoria College, but is now a Government College, at Palghat, appeals against a decree awarding to plaintiff, a pupil in the High School attached thereto, Rs. 150 as damages for an assault. At the trial two questions were raised on which very little has been said here. For it is not seriously disputed that defendant had on the occasion in question the powers ordinarily exercised by the Headmaster of the School, to inflict corporal punishment or that he is not proved to have done more than he himself admits, given plaintiff "two smacks" with his hand on his cheek. We are asked to hold either that in the circumstances of the case the infliction of this chastisement was within defendant's powers and he is not liable for damages at all or that, if he is so liable, the damages awarded are excessive and also that the award to the plaintiff of half the costs of the suit is unsustainable. The memo. so far as it has been pressed by plaintiff is against the award of damages as inadequate and will be dealt with the appeal.

The circumstances as alleged by plaintiff are that on 15th March 1918, the last day of the current term at the end of the last working period, the students including plaintiff in Form IV demonstrated their satisfaction by clapping their hands in a manner, which we believe to be usual in Indian Schools and which, according to the evidence, was usual at Palghat. The demonstration, however, in the opinion of defendant, who was in the corridor went beyond what was permissible and on going to the class-room he found plaintiff in his place near the door with two other boys shaking a reversible desk, which already, according to the evidence, was in rickety condition. The other two boys ran away, but plaintiff went on shaking the desk, and defendant then inflicted the "two smacks", already referred to, saying "what do you mean? clear out." The account, which we are asked on plaintiff's behalf to accept, is that this violence was used unreasonably to check a mere display of school-boy high spirits, which was sanctioned by custom; and that, if defendant, as he says, before taking action, called to the class "stop that", plaintiff could not and did not hear him. On the last point as on others of detail, clear evidence, on which a distinct conclusion can be reached, is not and is not likely to be forthcoming, since events followed each other quickly and some at least of the witnesses were excited. But there is, on the other hand, clear support for what defendant's account generally entails, that the line between mere exuberance and rowdyism was transgressed and that a substantial breach of discipline was in question.

Defendant, a teacher of twenty-three years' experience, who has reached the head of his profession and to whom nothing resembling malice is now imputed, deposed that there was a tremendous noise due not only to clapping of hands, but also to drumming on the desks, hooting whistling and shrieking; and the addition of these gave the whole thing the appearance of rowdyism. He was so impressed by this as the climax of other similar incidents that he issued a circular, Exhibit B, to his staff on the subject that afternoon. He is clear that plaintiff was deliberately attempting to damage the desk he was sitting at by shaking it, and the necessity for his at once stopping an act of thoughtless mischief to school property is easily intelligible. For his evidence corroborated by that of the Headmaster, I. C. W., who saw the desk shortly after, is that one screw belonging to it at least was wanting and one was without a nut; and such shaking would presumably loosen its parts still further. Two to five defendant's witnesses, other masters in classes adjacent to plaintiff's speak to an exceptional uproar there, the former referring to shouting, shrieking and whistling. Plaintiff is, as his statements regarding other occurrences show, an untrustworthy witness. The evidence of six and seven plaintiff's witnesses, his

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classmates is not of value, if only because one of them is closely connected with the prime mover against defendant in the disputes, which have recently occurred over the management of the College, and the other is plaintiff's relative. The other persons referred to in the plaint as having been present, were not named or called. Third witness for plaintiff is the Master, who was taking the class at the time. He says that the noise, consisting in clapping was not exceptional. But he left the room, apparently while it was in progress, and was, he admits, reprimanded by defendant for allowing it; he was on probation and his service was terminated by defendant; in the circumstances no weight can be given to his statements. The evidence standing thus, the conclusion must be that defendant's case is substantially correct and that there was a breach of discipline, which deserved and which it was his duty to repress by punishment. If any answer is needed to the contention which found favour with the lower Court, that plaintiff should not have been made to suffer for a disturbance, to which he is not proved to have actually contributed, there is the fact spoken to by defendant alone, but which there is no good reason for doubting, that he was shaking the desk and was, therefore, joining in the rowdy demonstration which was going on.

There is, so far as we have been shown, no Indian authority as to the amount or nature of physical force which a School Master in inflicting punishment is entitled to use. But there is, subject to one reservation to be referred to later, no dispute that the general rule laid down by the English Courts *Reg.* v. *Hopley* (1), *Fitzgerald* v. *Northcote* (2) and other more recent cases including *Hutt* v. *Governors of Haileybury College* (3) must be applied, that the Master as the delegate of the parent may for the purpose of correction inflict moderate and reasonable corporal punishment. Care may, no doubt, be necessary in the application of this general principle in this country, in which this delegated authority must be exercised by persons so dissimilar in status as a pial School Master and the defendant; and Courts will, no doubt, not fail to insist on a close scrutiny of the severity of the chastisement inflicted and its justification. But in the present case there is no difficulty. For the "two smacks" which alone have been established were probably the minimum, which a boy, like plaintiff, aged fourteen would have felt. They caused no injury requiring medical attention or even which made plaintiff cry out or disabled him from going home at once. The references by his father, 5th witness for plaintiff, to his illness for three days after the occurrence and his subsequent attack of fever and small-pox are grotesque. The real reason why importance was attached to what happened is no doubt that given by 9th witness for plaintiff, that "it was a case of Brahmin being beaten by a Thiyya and it would have been different, if the man who beat was a Brahmin." It is impossible to find, with reference to general principle, and we understand that, if general principle alone had been in question, the lower Court would not have found that defendant exceeded his powers.

Reliance, however, has been placed by plaintiff and the lower Court has based its decision mainly on Rule 59 of the Madras Educational Rules, 1918, or the similar rule in the Rules of 1901, which was actually in force at the date in question. These rules embody notifications approved by Government and are, it is not disputed, binding on institutions, such as the Palghat College which receives Government aid. Rule 59A provides that corporal punishment shall not be inflicted except in a case of a moral delinquency or flagrant insubordination and shall be limited to six cuts on the hand, to be administered only in accordance with a specified procedure, with the details of which we are not concerned. This rule resembled closely the Regulation considered in *Mansell* v. *Griffin* (4) although the question there was not only of the character of the punishment authorized but also and principally of the right of an Assistant Mistress to inflict it instead of the Head-Master in the Regulation. On that point, in the words of Phillimore, J.,

(1) (1860) 2 F. & F. 202.
(2) (1865) 4 F. & F. 656; 142 R. R. 703.
(3) (1887) 4 T. L. R. 628.

(4) (1903) 1 K. B. 160. 88 L. T. 51; 72 J. P. 6; 24 T. L. R. 67 affirmed on appeal (1908) 1 K. B. 947; 77 L. J. K. B. 676; 99 L. T. 132; 72 J. P. 179; 6 L. G. R. 548; 24 T. L. R. 431; 52 S. J. 376.

if the Regulations were "known to the parents, this would, no doubt, give rise to a strong argument to show that the parent had only delegated to the under-teacher that authority which the rules of the School give." A similar argument was in fact relied on in this case at the trial, but not here; and it was rejected by the lower Court for the sufficient reasons that the Rule was never pleaded, that plaintiff's guardian was not proved to have known of or acted on it and that as it could not at any time have been altered or cancelled by Government, it cannot create between parent or student and the master any direct obligation. The rule was, however, also relied on by the lower Court and is relied on here as evidence of the kind and quantity of corporal punishment, which is sanctioned in such a School by custom and professional opinion and which, therefore, the Court should regard as reasonable.

It may at once be observed that acceptance of this argument will be of no material assistance to plaintiff. For if his complaint is only that he received "two smacks" on his cheek instead of the minimum permitted by the rule, a cut with a cane on his hand, there can, with all respect for the opinion of his learned Vakil to the contrary, be no difficulty in comparing the relative severity of these punishments; and, his sole grievance consisting of the informality of the procedure employed, although the pain inflicted was less, an award of only nominal damages will be entailed. But in fact Rule 59A is not applicable at all, as either prohibiting or regulating the petty corrections, such as that now in question without which the ordinary discipline of a School cannot be maintained and which must be given immediately, if they are to be effective, this appearing from the references in it to moral delinquency and flagrant insubordination and the specific instances given of the former. In *Mansell* v. *Griffin* (4) although (as already stated) the question was primarily of the person who had authority to punish, the similar Regulation then in question was read as not exhaustive of the occasions on which corporal punishment could be employed or the methods of its employment, other methods consisting in interference with the liberty of the subject being specified as legitimate in less serious cases and the principle applicable to infliction of blows being referred to as the same. There the findings with reference to the Regulation were, as they would have to be here, if only the rule were in question, that the method of chastisement was improper although the chastisement actually inflicted was moderate and not so hurtful as that authorized, and that the defendant exceeded her authority. Yet it was held that those findings were not inconsistent with a refusal of damages and that notwithstanding the Regulation it was enough for the teacher to be able to say: 'The punishment inflicted was moderate and it was such as is usual in the School and such as the parent might expect that the child would receive if it did wrong."

That, and not anything included in the rule, being the test to be applied to the Master's action, it is sufficient for the present purpose that, although actual instances of these petty chastisements must from the nature of the case be few and evidence regarding them difficult to obtain, since neither students nor Masters will be willing to admit that recourse to them was ever necessary, there is clear evidence that such recourse has on occasions taken place at Palghat and is not regarded as improper by persons in plaintiff's social position. Thus it is important that 8th and 9th witnesses for plaintiff, his castemen, admitted having been beaten for petty faults by their teachers without suffering in reputation, the latter, as already stated, distinguishing plaintiff's case with reference to the caste of defendant: and defendant speaks to having given blows on boys' cheeks himself on other occasions and he and I. C. W. to a former Principal of the College having done so. There is accordingly enough to show, what common knowledge would support, that the punishment plaintiff complains of was such as a parent might expect his child to receive. The conclusion must be that defendant was entitled to inflict it and is not liable because he did so.

It is only necessary to add that in any event it would have been impossible to sustain the lower Court's use of its discretion to award to plaintiff half the costs of the suit. For, whilst it recognised that the allegations of fact were greatly exaggerated and that a decree could be given for only Rs. 150 out of Rs 5,250 claimed, it lost sight of the fact that the claim at the latter figure was inflated to an extent, which

neither the desire to obtain a right of appeal on the facts to this Court nor the caste prejudice already referred to could excuse. The reason given for imposing liability for half the costs on defendant, that he failed in one line of defence on Issue IV, although he succeeded on another, is unconvincing; and we cannot subscribe generally or without reference to the conduct of the parties to the principle which the lower Court professes that an award of costs on the amount disallowed should not be given, if the result is "to sweep away" the whole damages decreed.

The appeal is allowed, the suit being dismissed with costs throughout; the memorandum of objections is dismissed with costs.

VENKATASUBBA RAO, J.—This appeal raises three questions:—

(1) What is the extent of the right possessed by a School Master to inflict punishment on his pupil?

(2) Is the punishment actually inflicted by the defendant upon the plaintiff justified?

(3) If the punishment is not justified or has been exercised unreasonably, to what damages is the plaintiff entitled?

According to the law of England the authority of the School Master is, while it exists, the same as that of the parent. It is stated that the parental authority is delegated to the School Master and that the School Master represents the parent for purposes of correction. This proposition is borne out by ample authority. See *Reg.* v. *Hopley* (1) *Fitzgerald* v. *Northcote* (2), Halsbury's Laws of England, Vol. XXVII, page 876, Vol. XII, page 124 and Vol. XVII, page 107.

The power of the English father over his children was never so wide as that of the Roman father. Under the ancient Roman Law the father had the power of life and death over his children. But this doctrine of parental authority was gradually relaxed though it was never under the Roman Law wholly abandoned. The Common Law, however, gives the parent only a moderate degree of authority over his child's person and the parental chastisement must be moderate and must be exercised in a reasonable manner, and if the parent exceeds the bounds of moderation and inflicts cruel and merciless punishment he is liable to be punished. See Schouler's Domestic Relations, 5th Edition, section 244, and Eversley, the Law of Domestic Relations, 3rd Edition, pages 509 and 510.

It follows, therefore, that for the purposes of correction the School Master may inflict a moderate and reasonable corporal punishment. Cockburn, C. J., says in *Reg.* v. *Hopley* (1) above referred to, "if it be administered for the gratification of passion or of rage, or if it be immoderate and excessive in its nature or degree or if it be protracted beyond the child's powers of endurance or with an instrument unfitted for the purpose and calculated to produce danger to life or limb, in all such cases the punishment is excessive, the violence is unlawful."

With reference to these principles I shall proceed to examine whether in this case the defendant exceeded the bounds of moderation in inflicting punishment upon the plaintiff. The Subordinate Judge has found that the plaintiff's version of the injury inflicted upon him is grossly exaggerated and that the defendant gave the plaintiff two smacks on his cheek. The defendant's justification is founded upon a breach of the discipline of the School and I am prepared to accept the defendant's account of the incident. According to him on the day in question he heard a loud noise coming from the long Hall of the School and on turning to go over to the long Hall he found the teacher of the Fourth Form A coming towards him. The defendant asked him whether that noise came from his class and rebuked the teacher for having come away without checking the boys. Then he went over to the Fourth Form A class, asked the boys who had gone out into the verandah to go back into their class and the defendant told them that what they did was rowdyism and that they ought not to repeat it. Then he found that there was a light clapping of hands in Form (V) B. He did not mind it. He objected to rowdyism but not to merry-making. Then immediately after there was a tremendous sound from Form IV (B) due to clapping of hands "drumming on the desk", hooting, whistling, shrieking. He paused for about a minute and then went over to the room of IV (B). Plaintiff and two other boys were seen shaking a reversible desk. But the other two boys ran away and the plaintiff looking at him continued the shaking of the desk. This is in effect the evidence of the defendant and he deposes that the plaintiff behaved like a rowdy by shaking the desk and that the

defendant apprehended damage to the desk which by the way was already in a damaged condition. The Head-Master was examined as a Court witness and he states that about an hour after this incident the defendant told him that in IV (B) class there was a good deal of rowdyism characterised by shrieking, hooting, whistling and a shaking of the desk and that the plaintiff was seen by the defendant in the act of shaking the desk and raising it up and down and thus creating a great deal of noise, and that the defendant thereupon gave him two smacks on the cheek.

Though the plaintiff did not admit that he shook the desk and stated that he merely clapped his hands, the 7th witness examined on the plaintiff's side, a classmate of the plaintiff, admitted that the boys clapped their hands and "drummed on the desk" and that the plaintiff also along with the rest of the class did both these acts; and the 6th witness for the plaintiff, another classmate of his, also admitted that on that date there was extra noise The version of the defendant is also borne out by the probabilities of the case. He says that on the 14th March 1918, *i.e.*, the day previous to the occurrence in question, he asked the Head-Master to check the beginnings of the disorder of the kind mentioned above, that the Head-Master in obedience to his order went on the 14th to the classes concerned and spoke to the boys and that on the 15th after the incident he issued a Circular which is filed and marked as Exhibit B in the case. The Circular states that the defendant had been noticing during the two days, the 14th and 15th, "the most perfect rowdyism prevailing in class rooms at the end of certain lessons.....clapping of hands, whistling, shrieking, etc., which no Master who has any idea of discipline would tolerate."

In these circumstances was the defendant justified in giving two smacks on the cheek of the plaintiff? I have carefully examined the evidence and I find that it is nowhere stated that the plaintiff suffered undue pain or any injury on account of this beating. No doubt the plaintiff stated that in addition to the smacking on the cheek the defendant assaulted him brutally and that as a result of the merciless and cruel assault the plaintiff suffered bodily pain. When the defendant filed his written statement, the plaintiff knew that the defendant admitted that he had given only two smacks on the cheek but that he had denied the rest of the assault. It is significant that no attempt was made to elicit from the plaintiff the extent of the suffering he underwent on account of the punishment which the defendant admitted he had inflicted upon the plaintiff. It is also noticeable that the defendant himself was not cross examined as regards the nature of the smacking with a view to establish that it was excessive or violent. The defendant says that he considered it quite a trifling matter and that in the circumstances he felt he was justified in inflicting these two smacks.

I find it, therefore, difficult to hold that the defendant exceeded the bounds of moderation or that the punishment inflicted by him was unreasonable. Mr. Krishnaswamy Iyer, who appeared for the plaintiff, stated that he would not contend that rule 59A of the Madras Educational Rules is binding upon the defendant. Rule 59A runs as follows:—"Corporal punishment shall not be inflicted in Schools except in a case of moral delinquency such as deliberate lying, obscenity of word or act or flagrant insubordination and then it shall be limited to six cuts on hand and be administered only by or under the supervision of the Head-Master. The Head-Master shall record in a register every case in which corporal punishment has been inflicted specifying the name, class and age of the pupil, the date, nature of the offence and the amount of punishment." The learned Vakil admitted that the relations of the plaintiff and the defendant would be governed by the rules of the Common Law and that the defendant as Principal, had power to inflict corporal punishment, and that the only question was whether the punishment inflicted was reasonable and moderate. It is, therefore, not necessary to discuss the binding nature of Madras Educational Rules or the reasonableness of the punishment with reference to the said rules. He, however, argued that the rule 59A is indicative of what is reasonable punishment. I am clearly of the opinion that this contention is untenable. As a matter of fact, the rules are silent as regards the punishment to be inflicted in cases of offences other than the offences dealt with under the rule. Does it follow then that in cases not covered by this rule corporal punishment cannot be inflicted at all? Or if it can be, the Master

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is always bound to strike the pupil on the hand? If this argument is sound the School Master would not be justified in inflicting any corporal punishment whatsoever, however light it may be, unless the corporal punishment consists of strokes on the hand. It may well be that in the School Master's opinion the caning of the pupil in the hand is too severe a punishment for the offence of which the pupil is guilty; but if the doctrine contended for is correct, the School Master will be bound never to depart from this form of punishment. Cases also may be conceived where caning a pupil by striking him on the hand would not be proper or desirable as where the pupil may be suffering from some disease or infirmity in the hand or for some other similar reason the pupil is unable to stand such punishment. In *Mansell* v. *Griffin* (4) Phillimore, J., makes the following observations: "It is, I suppose, false imprisonment to keep a child locked up in a class room or even to order it to stop under penalties in a room for a longer period than the ordinary School time without lawful authority. Could it be said that a teacher who kept a child back during play hours to learn over and say his lesson again or who directed a child to stand up and kept him standing perhaps for an hour, subjecting him thus to fatigue and to the derision of all his classmates or who put upon him a dunce's cap as was frequently done in earlier days in the case of stupid or backward children—could it be that such a teacher would be liable in an action for trespass to the person? The cases I have instanced are not cases of the infliction of blows, but they are cases of interference with the liberty of the subject, and it seems to me that the principle must be the same for all these cases."

I may observe that the School Master cannot escape liability merely on the ground that the chastisement administered to the pupil has not left on the pupil's body any marks of violence or injury. Cases are not uncommon in this country of punishments of extremely grotesque character being inflicted involving danger to life or limb of the pupil or resulting in a state of prostration on the part of the pupil and the Courts will certainly discountenance resort by the School Master to such barbarous and inhuman forms of corrections. The question whether the punishment inflicted is moderate and reasonable is a question of fact but the Courts will consider, in the words of Cockburn, C. J., already referred to, whether the punishment administered was immoderate and excessive in its nature or degree and I may add that if it was immoderate and excessive either in its nature or degree the punishment ceases to be reasonable. Mr. Eversley in "Law of Domestic Relations" says that the right of the parent of chastisement is jealously watched by the Courts and if the parent exceeds the bounds of moderation and inflicts cruel punishment upon the child he may be severely punished. I may observe that if this is true in the case of a parent it is much more necessary that in the case of a School Master this right should be closely watched by the Courts.

In *Fitzgerald* v. *Northcote* (2) cited above, Cockburn, C. J., while stating that, on the one hand, it is for the general benefit of the society and of its youth that the authority of those charged with the care of scholastic establishment should be maintained, observed: "on the other hand, it is of equal importance that it should not be exercised arbitrarily."

I have considered the circumstances that led to the administering of the correction in this case and the evidence relating to the nature and degree of the punishment inflicted and I am of opinion that the punishment was neither immoderate nor unreasonable. The plaintiff had admitted that the Principal bore no ill-will or malice towards him but, on the other hand, had given the plaintiff good advice on previous occasions. To use the words of Cockburn, C. J., again, the punishment was not administered for the gratification of passion or of rage. In these circumstances, I hold that the plaintiff is not entitled to any damages and I agree with the judgment that has been delivered by my learned brother.

M. C. P.

N. H.

Appeal allowed.

JODHI RAM v. KAUNSILLA.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 836 OF 1920.

March 3, 1922.

Present:—Mr. Justice Ryves and Mr. Justice Gokul Prasad.

JODHI RAM—DEFENDANT—APPELLANT

versus

Musammat KAUNSILLA AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Agra Tenancy Act (II of 1901), s. 164 (2)—Profits, suit for—Negligence of Lambardar *neither alleged nor proved—Decree, whether to be based on gross rental or actual collection—Mixed question of law and fact—Negligence—Presumption—Proof.*

In a suit for profits brought by a co-sharer against a *lambardar*, if no negligence is alleged or proved against the *lambardar* within the meaning of section 164 (2) of the Agra Tenancy Act, a decree can be given on the actual collection and not on the gross rental. [p. 521, col. 2.]

Chhabraji Kuar v. *Ganga Singh*, 60 Ind. Cas 643; 43 A. 29; 18 A. L. J. 863; 2 U. P. L R. (A.) 272, referred to.

The question whether the lower Court was right in giving a decree on the basis of gross rental is a mixed question of law and fact [p. 521, col. 2]

Chhabraji Kuar v. *Ganga Singh*, 60 Ind. Cas. 643; 43 A. 29; 18 A. L. J. 863; 2 U. P. L. R. (A.) 272, referred to

The fact that a large portion of the demand for a certain year remained uncollected does not necessarily lead to the inference that the balance would not be recovered in subsequent years and that the deficit in that particular year was due to the negligence of the *Lambardar*. Evidence must be given before such an inference can be drawn [p. 522, col. 1.]

Second appeal from a decree of the Officiating District Judge, Badaun, dated the 6th April 1920.

Mr. *M. L. Agarwala* (with him Mr. *Harnandan Prasad*), for the Appellant.

Mr. *S. A. Haidar*, for the Respondents.

JUDGMENT.

RYVES, J.—This appeal arises out of a suit brought by co-sharers against a *Lambardar* for profits of 1323 *Fasli plus* arrears of 1321 and 1322 collected in the year 1323. In the plaint there is no allegation whatsoever of negligence against the *Lambardar* but in the claim at the foot of the plaint the decree sought for is based on the gross rental for 1323 *Fasli plus* the arrears of 1321 and 1322 collected in the year 1323. The only defence with which we are now concerned is raised in the second paragraph of the written statement and that appears to have been made to meet the claim on the gross rental It is there stated; "The claim for profits on the basis of gross rental is not correct. It ought to be on the basis of realisation". The Trial Court on these pleadings fixed an issue "should profits be allowed on *jamabandi* or collections?". It held that no negligence had been proved against the *Lambardar* within the meaning of section 164 (2) of the Tenancy Act. It, therefore, decided to give a decree on the actual collection and it found that the plaintiffs' share out of the collection amounted to Rs. 458-12-8 and gave a decree accordingly with interest.

The plaintiffs appealed and there for the first time in the grounds of appeal it was stated that negligence on the part of the defendant-respondent was fully proved from the facts on the record, and that plaintiffs' claim ought to have been decreed with reference to gross rental. We have not been able to understand fully the judgment of the learned District Judge, but we find that he has given the plaintiffs a decree based on gross rental for 1323 and included in it arrears collected in 1323 for the years 1321 and 1322. This he was not entitled to do. The point is completely covered by a ruling of this Bench in *Chhabraji Kuar* v. *Ganga Singh* (1). The plaintiffs can only get a decree for their share on the actual collection unless they can come within section 164 (2), in which case they are entitled to a decree on the gross rental. They are not entitled to a decree on the gross rental of 1323 *plus* collections made for arrears of previous years. On the question as to whether the learned Judge was correct in giving a decree based on gross rental, as we have said in the case of *Chhabraji Kuar* v. *Ganga Singh* (1), to which we have already referred, it is a mixed question of law and fact. Assuming that the Court below was entitled to go into the question of negligence, seeing that it had not been raised in the plaint, we have very great doubts as to whether it should have allowed that question to be opened in appeal for the first time. It is true that the issue was fixed in the Trial Court as to whether profits should be allowed on *jamabandi* or collections, but that was on the pleadings

(1) 60 Ind. Cas. 643; 43 A. 29; 18 A. L. J. 863; 2 U. P. L. R. (A.) 272.

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of the parties and the plaintiffs had not even alleged negligence. Having raised the plea, a decree could only be passed on gross rental if the plaintiffs proved negligence. This the Trial Court held had not been done. The main ground, it seems to us, on which the learned District Judge found that the *Lambardar* had been guilty of negligence was that whereas the demand for 13.3 was Rs. 2,464 odd, the realisations for that year were only Rs. 664-5-3. The learned Judge has omitted to notice that in fact the total collection for that year was much more, namely, Rs. 1,6 4-10-8. The fact that even a large proportion of the profits of the years of 1323 remained unpaid does not necessarily lead to the inference that the balance would not be recovered in subsequent years, and that the deficit in that particular year was due to the negligence of the *Lambardar*. Evidence must be given before such an inference can be drawn. In our opinion, therefore, it has not been shown that the *Lambardar* failed to collect any amount in 13.3 owing to his negligence.

The result is that we allow the appeal, set aside the decree of the Court below and restore that of the First Court with costs including in this Court fees on the higher scale.

S. D. *Appeal allowed.*

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 1205 OF 1919.

December 9, 1921.

Present:—Mr. Justice Abdul Raoof and Mr. Justice Martineau.

JHANDHA AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

Musammat JIWAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Alienation by female—Heirs, right of, to challenge alienation—Compromise by female—Declaratory suit by heir and reversioner, maintainability of.

As a general rule no female in possession of immoveable property acquired from her husband, father, grandfather, son or grandson otherwise than as a free and absolute gift can permanently alienate such property, and her sons and heirs have a right to control her dealings with the property. [p. 525, col. 1.]

Nur-ul-nissa v. *Gauhar-ul-nissa*, 61 P. R. 1906; 110 P. W. R. 1910; *Partapi* v. *Hazara Singh*, 31 Ind. Cas. 794; 33 P. R. 1916, distinguished.

A suit is maintainable by an heir and reversioner to have it declared that a compromise made by a female will not affect his right to succeed as heir and reversioner. [p. 525, col. 2.]

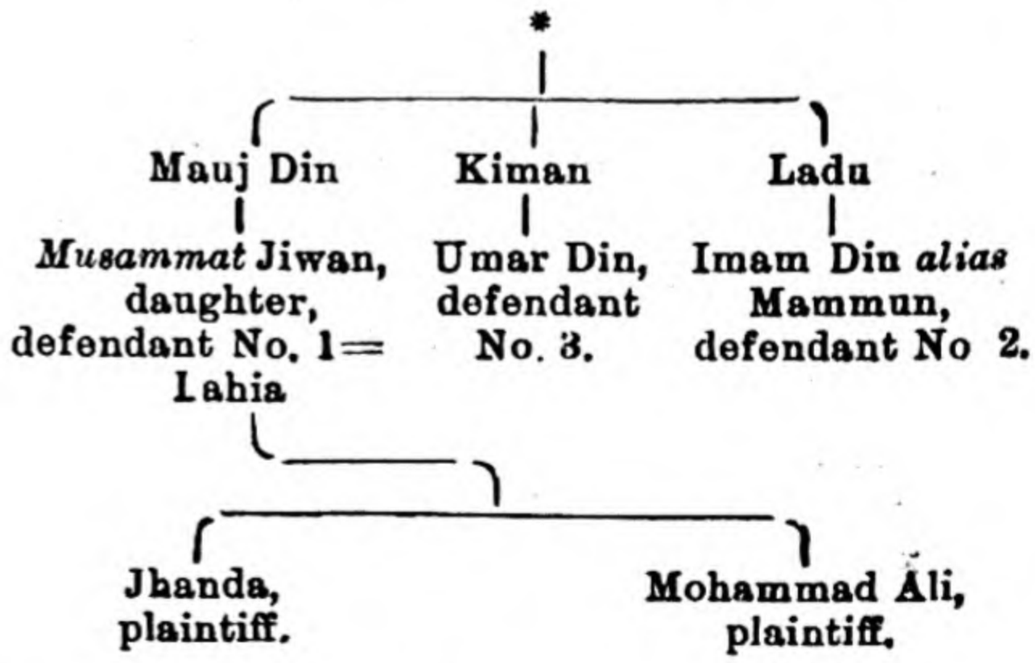
First appeal from a decree of the Senior Subordinate Judge, First Class, Lyallpur, dated the 6th March 1919.

Messrs. *Badr-ul-Din Qureshi*, and *B. A. Cooper*, for the Appellants.

Syed *Mohsin Shah*, for the Respondents.

JUDGMENT.—This was a suit for a declaration to the effect that the deed of compromise executed by defendant No. 1 in case *Umar Din* v. *Mammun* on the 5th December 1918 was not binding on the plaintiffs. It has been dismissed on a preliminary ground that the plaintiffs have no *locus standi* to maintain the suit. One of the issues also raised the question whether the plaintiffs had any cause of action on which they could base their claim. In the judgment of the Court below there is an indication that it was inclined to hold against the plaintiffs on that issue also, but as the final decision is not based on that point we need not take into consideration the issue raised as to the want of cause of action.

The following pedigree table will make the facts on which the suit is based clear:—



Mauj Din has 2½ squares of land as a tenant of Government. In 1913 he acquired a proprietary right in the land. Out of this he gave ½ square to Umar Din and ½ square to Lahia, his son-in law. It is stated that Mauj Din adopted Imam Din by a deed of adoption dated the 20th September 1901.

On the 24th July 1916 Mauj Din died. His land was mutated in the name of Imam

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Din on the 28th September 1916. Umar Din brought a suit against Imam Din objecting to the mutation and claimed possession of the land. *Musammat* Jiwan was also impleaded as a defendant at a later stage. Imam Din, defendant, resisted that suit on the ground that he was entitled to retain possession as the adopted son of Manj Din. On the 5th December 1916 the parties entered into a compromise under which *Musammat* Jiwan's sons, the present plaintiffs, were given four *kilas* of land and in lieu of this Umar Din withdrew from the prosecution of the case. Now, the plaintiffs have brought the present suit claiming a declaration that the compromise shall have no effect on their rights to succeed as heirs and reversioners. The suit was resisted by the defendant, Imam Din *alias* Mamun, and one of the pleas raised was that the plaintiffs had no *locus standi* to maintain this suit. The Court below has given effect to this plea and has dismissed the suit. Hence this appeal.

The first question to be determined in the case was whether *Musammat* Jiwan was an heir and was entitled to succeed on the death of Manj Din. That question, however, has been left undetermined. The learned Judge of the Court below has apparently taken it for granted that *Musammat* Jiwan had a right to succeed, but has held that in order to maintain the suit the plaintiffs were bound to establish that they had the right to control the action of their mother in respect of property inherited by her from her father. It is stated in paragraph 64 of Rattigan's Digest of Customary Law that "except as provided in paragraph 39 or paragraph 62, no female in possession of immoveable property acquired from her husband, father, grandfather, son or grandson otherwise than as a free and absolute gift can permanently alienate such property."

If Jiwan was an heir to her father her right in the property left by him was a restricted one, and it is clear that the plaintiffs, who are her sons and heirs, are competent to contest an alienation of the property by her. Cases in which it has been held that the right to control the limited owner's dealings with the property does not follow from the right to succeed as heir are mostly cases in which the person contesting the alienation is a woman, [*e.g.*, *Nur-ul-nissa* v. *Gauhar-ul-nissa* (1), *Partapi* v. *Hazara Singh* (2)] and are quite inapplicable to the case of a son suing to contest an alienation by his mother. The plaintiffs are, therefore, entitled to maintain the suit.

It is contended on behalf of the respondent that *Musammat* Jiwan, according to the custom governing the parties, was not an heir and that, therefore, the plaintiffs had no right to succeed. The question whether *Musammat* Jiwan was an heir, as already observed, has not yet been determined.

We accept the appeal and, setting aside the decision of the Court below on the preliminary point stated above, remand the case for a decision on the merits. Costs will abide the result. The Court fees on the memorandum of appeal in this Court shall be refunded.

S. D. *Appeal accepted.*

(1) 61 P. R. 1906; 110 P. W. R. 1906.

(2) 31 Ind. Cas. 794; 33 P. R. 1916.

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL NO. 12 OF 1920.

January 20, 1922.

Present:—Sir Grimwood Meare, Kt., Chief Justice and Justice Sir P. C. Banerji, Kt.

MOHAMMAD AHMAD—PLAINTIFF—APPELLANT

versus

ZAHUR AHMAD AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11—Res judicata—Compromise decree—Co-defendants—Decree in partition suit.

A compromise decree operates as *res judicata* unless it is tainted with fraud or was procured by undue influence. [p. 525, col. 1.]

Mohammad Hashmat Ali v. *Kaniz Fatma*, 27 Ind. Cas 701; 13 A L J. 110, referred to.

A decision as between co-defendants cannot be *res judicata* unless it was necessary to decide an issue between the co-defendants in order to grant relief to the plaintiff. [p 525, col 2]

In a suit for partition, where the rights of different persons have to be determined, and have been so determined, the decision might operate as *res judicata*, although the plaintiff in the subsequent suit may have been a defendant in the previous suit,

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But if the plaintiff in the subsequent suit was only one of the several defendants in the previous suit, had no defence to the claim for partition, was not at all concerned with the share which was claimed by the plaintiff in that suit, was made a defendant simply because he was a co-sharer, and the decision in the suit did not affect any question of partition of shares between him and the plaintiff in that suit, a decision between the plaintiff and other defendants in that suit would not have the effect of *res judicata* as between that defendant and his co-defendants. [p. 526, col. 1.]

Somasundara Mudali v. *Kulandaivelu Pillai*, 28 M. 457; 14 M. L. J 404, referred to.

Letters Patent Appeal against the judgment of Mr. Justice Knox, dated the 27th November 1919, in Second Appeal No. 340 of 1918.

Mr. *Peary Lal Banerji*, for the Appellant.

Mr. *G. W Dillon*, Dr. *S. M. Sulaiman*, Messrs. *Hamidullah*, *S. A. Haider* and *Iqbal Ahmad*, for the Respondents.

JUDGMENT.—The question which arises in this appeal is whether the suit of the plaintiff is barred by the rule of *res judicata*. For the purpose of determining this question it is necessary to state a few facts. One Karimullah died many years ago leaving a widow, *Musammat* Sabiunnissa, a son Nizamuddin and two daughters, Khurshed Jahan and Kaniz Fatma. Disputes arose between the heirs of Karimullah and a suit was brought by Khurshed Jahan, one of the daughters, for her share in the estate of Karimullah. That suit was compromised and a decree was passed on the basis of the compromise in 1868. According to the compromise and the decree, Khurshed Jahan relinquished her claim to the estate left by her father, and as to the property which was found by arbitrators in that case to be the property of her mother, *Musammat* Sabiunnisse, she also relinquished the rights she might acquire in that property upon the death of her mother. This relinquishment was for a consideration. As stated above, the terms of the compromise were embodied in a decree and the decree was passed as between Khurshed Jahan and her sister Kaniz Fatma as also the other heirs of her father. Khurshed Jahan is dead. Nizamuddin executed a sale-deed in favour of three persons, namely, the present plaintiff, Muhammad Ahmad, Muhammad Kasim and Mushtaq Ahmad. Muhammad Kasim having died, his son Hashmat Ali brought a suit in 1912, which was Suit No. 24 of that year, for possession of the property sold to his father by Nizamuddin as also a share of the property which he alleged had been inherited by him from *Musammat* Khurshed Jahan, who was his wife. In that suit several houses were claimed. The present plaintiff, Muhammad Ahmad, was made a defendant, because he was one of the purchasers under the sale-deed executed by Nizamuddin. The suit was for partition of the share which was claimed by Hashmat Ali and for possession. The case was tried and, in the end, the claim of Hashmat Ali was dismissed in respect of the property purchased from Nizamuddin on the ground that Nizamuddin had previously sold his interest in the property and had, therefore, no rights to convey it to the persons who obtained a sale-deed from him. As regards the property which was claimed by right of inheritance to Khurshed Jahan, the claim was dismissed on the ground that Khurshed Jahan had abandoned her rights in the property and, therefore, none passed to her heirs. Subsequently to the passing of this decree the present suit was instituted by Muhammad Ahmad, and he claimed the share Nizamuddin had sold to him under the sale deed to which we have referred above, and also a share in the property in dispute which he claimed to have inherited from his mother, Khurshed Jahan. The present suit relates to only one of the houses claimed in the previous suit.

The Court of first instance dismissed the suit on the ground of *res judicata*. It held that the matter was *res judicata* by reason of the decision in the suit brought by Hashmat Ali in 1912 and also by reason of the decree which was passed in 1868.

The lower Appellate Court affirmed the decree of the Court of first instance holding that the matter was *res judicata* in consequence of the decision in the previous suit brought by Hashmat Ali.

This decree of the lower Appellate Court was affirmed by a learned Judge of this Court.

In the appeal before us it is contended that the view of the lower Appellate Court and of the learned Single Judge of this Court that the claim is barred by the rule of *res judicata* by reason of the decision in the suit of Hashmat Ali, was erroneous and

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that section 11 of the Code of Civil Procedure cannot be held to apply to the present case. For the decision of the question of *res judicata* we deem it desirable to consider the case from two different aspects. The claim relates to different shares in the house which is the subject-matter of the suit. As regards one share, which is about 1/6th, the claim is based on the sale-deed executed by Nizamuddin As regards the remainder of the share claimed, the suit of the plaintiff is founded on his right of inheritance as the son of *Musammat* Khurshed Jahan. As regards the latter claim, that is, the claim based on the right of inheritance to Khurshed Jahan, the Court of first instance, as we have said above, held that by reason of the decision in 1868 the plaintiff had no right and also that the matter was *res judicata*. We think that this view of the Court of first instance is correct. In the suit which was decided in 1868 a decree was passed against Khurshed Jahan, the effect of which was that Khurshed Jahan was not entitled to any part of the property claimed, whether as heir to her father or as the future heir of her mother. That decree was passed between Khurshed Jahan and Kaniz Fatma and the predecessors-in-title of the other defendants to the present suit. Therefore, unless the decree was tainted with fraud or was procured by undue influence, that decree will be binding on Khurshed Jahan and every person claiming title through her. It was not asserted, nor is it now claimed, that the decree was obtained by fraud or by undue influence. Therefore, the decree is a valid decree which is binding between the parties to the present suit. Furthermore, we have to consider the effect of that decree, and it is urged that the effect of it is that Khurshed Jahan did not lose the right which she might acquire in her mother's property after her death. This question of the right of Khurshed Jahan is concluded by the decision of this Court in the case of *Mohammad Hashmat Ali* v. *Kaniz Fatma* (1). In accordance with that ruling Khurshed Jahan had lost all right in the property including the property now in suit, and the plaintiff cannot claim any share in that property as one of the heirs of Khurshed Jahan. This part of the plaintiff's claim has, therefore, been rightly dismissed, though, as we shall show hereafter, the view that the decision in *Hashmat Ali's case* (1) operates as *res judicata* is, in our judgment, not correct.

We have now to deal with the remainder of the plaintiff's claim, that is, with that part of the claim which is based on the purchase from Nizamuddin. As to this part of the claim the Courts below have held that inasmuch as Mohammad Ahmad, the present plaintiff, was a party to the suit brought by Hashmat Ali and that suit was dismissed on the ground that Nizamuddin had no title to the property which he sold, the matter has become *res judicata*. We are unable to agree with this view. The rule of *res judicata* is laid down in section 11 of the Code of Civil Procedure. Under the provisions of that section an issue which arises in a subsequent suit should not be tried by the Court if the same issue has been tried in a previous suit between the same parties or persons through whom they claim, and this trial has been by a Court competent to try both the suits. Now, in the present suit the matter in issue is whether the plaintiff, Mohammad Ahmad, has acquired by reason of his purchase from Nizamuddin the share which he claims in the house in dispute. In the previous suit this was not the issue before the Court. The issue in that suit was whether Hashmat Ali had acquired the share which he claimed by virtue of the sale-deed executed in his favour by Nizamuddin. The issue, therefore, in the present suit was not identical with the issue which arose in the previous suit and the question of the title of Mohammad Ahmad, the present plaintiff, was never decided in that suit. It is true that he was a defendant to that suit but a decision as between co-defendants cannot be *res judicata* under the provisions of section 11 unless it was necessary to decide an issue between the co-defendants in order to grant relief to the plaintiff. This has been held in numerous cases to which it is not necessary to refer. As between the present plaintiff and the defendants to this suit, no issue was tried in the previous suit and no issue could be tried for the purpose of determining the question of the title of Hashmat Ali. The present plaintiff does not derive title from Hashmat Ali, and any decision, which was

(1) 27 Ind. Cas. 701; 13 A. L. J. 110.

arrived at between the present defendants and Hashmat Ali cannot, therefore, be binding upon the present plaintiff.

Explanation 4 of section 11 was relied upon in the argument before us but that Explanation does not, in our opinion, afford any help to the respondents. Under that Explanation, a party to a suit, who could and ought to have put forward a claim, or a defence, but does not do so, cannot be allowed to set up the claim or the defence in a subsequent suit. In the suit of Hashmat Ali Muhammad Ahmad was a defendant and he could not put forward his present claim as a defence to the suit of Hashmat Ali. Therefore, in our opinion, Explanation 4 has no application to the present case. It was urged that as the suit of Hashmat Ali was a suit for partition, all parties having an interest in the property were necessary parties to the suit and the title of the defendants, who were co-sharers of the plaintiff, could be determined in that suit. No doubt, in a suit for partition where the rights of different persons interested in the property as co-sharers have to be determined, and have been so determined, the decision might operate as *res judicata* although the plaintiff in the subsequent suit may have been a defendant in the previous suit. But that was not the case here. In Hashmat Ali's suit no question had to be determined as to the respective rights of Hashmat Ali and Muhammad Ahmad. Muhammad Ahmad had no defense to the claim of Hashmat Ali and he was not at all concerned with the share which was claimed in that suit by Hashmat Ali. The decision in the previous suit did not affect any question of partition of the respective shares of Hashmat Ali and Muhammad Ahmad. In a suit of this nature, in which a co-sharer was made a defendant simply because he had an interest in the property which was claimed, a decision between the plaintiff and other defendants could not be held from any point of view to have the effect of *res judicata* as between the defendant whose title was not in issue and was never determined in the previous suit. This case very much resembles the case of *Somasundara Mudali* v. *Kulandaivelu Pillai* (2) which has been cited to us. The ruling in that case fully supports the view which we have expressed above.

The result is that the appeal must be dismissed as regards the share claimed as heir to *Musammat* Khurshed Jahan. As regards the share claimed by virtue of the purchase from Nizamuddin, the decree of this Court and of the Courts below must be set aside and the case remanded to the Court of first instance with directions to re-admit it under its original number in the register and to dispose of it according to law. In so far as the costs of the litigation relate to the share in regard to which the claim has been dismissed, the plaintiff must bear the costs of the defendants in all Courts proportionately to the portion of the claim dismissed. As regards the remainder of the claim, costs here and hitherto will be costs in the cause.

S. D.

Appeal dismissed.

(2) 28 M. 457; 14 M. L. J. 404.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 252 OF 1919.

December 22, 1921.

Present:—Mr. Justice Broadway and Mr. Justice Martineau.

Musammat JIND KAUR AND OTHERS—DEFENDANTS—APPELLANTS

versus

INDAR SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Custom—Succession—Murderer's son, whether can succeed to estate of person murdered—Public policy.

Not only is a murderer himself debarred from succeeding to the property of his victim but the disability extends to all those who claim *through* and not merely *from* him. [p. 529, col 1]

Muhammad Khan v. *Sis Bano*, 41 P. R. 1906; 95 P. L. R 1906: 82 P. W. R 1906, followed.

Sadhu Singh v. *Secretary of State for India*, 18 P. R. 1908; 19 P. W. R. 1908, 156 P. L. R. 1908, distinguished.

Roda v. *Harnam*, 18 P. R. 1895 (F. B.), *Shah Khanam* v *Kalandhar Khan*, 74 P. R 1900; P. L. R. 1900, p 455, *Vedanayaga Mudaliar* v *Vedammal*, 27 M. 591 at p 6 , *Sundar* v *Salig Ram*, 4 Ind. Cas. 800; 26 P. R. 1911; 34 P. L. R. 1911; 33 P W R. 1911, referred to.

This principle is based upon public policy and has nothing to do with custom or the personal law of the parties. [p, 530, col. 1.]

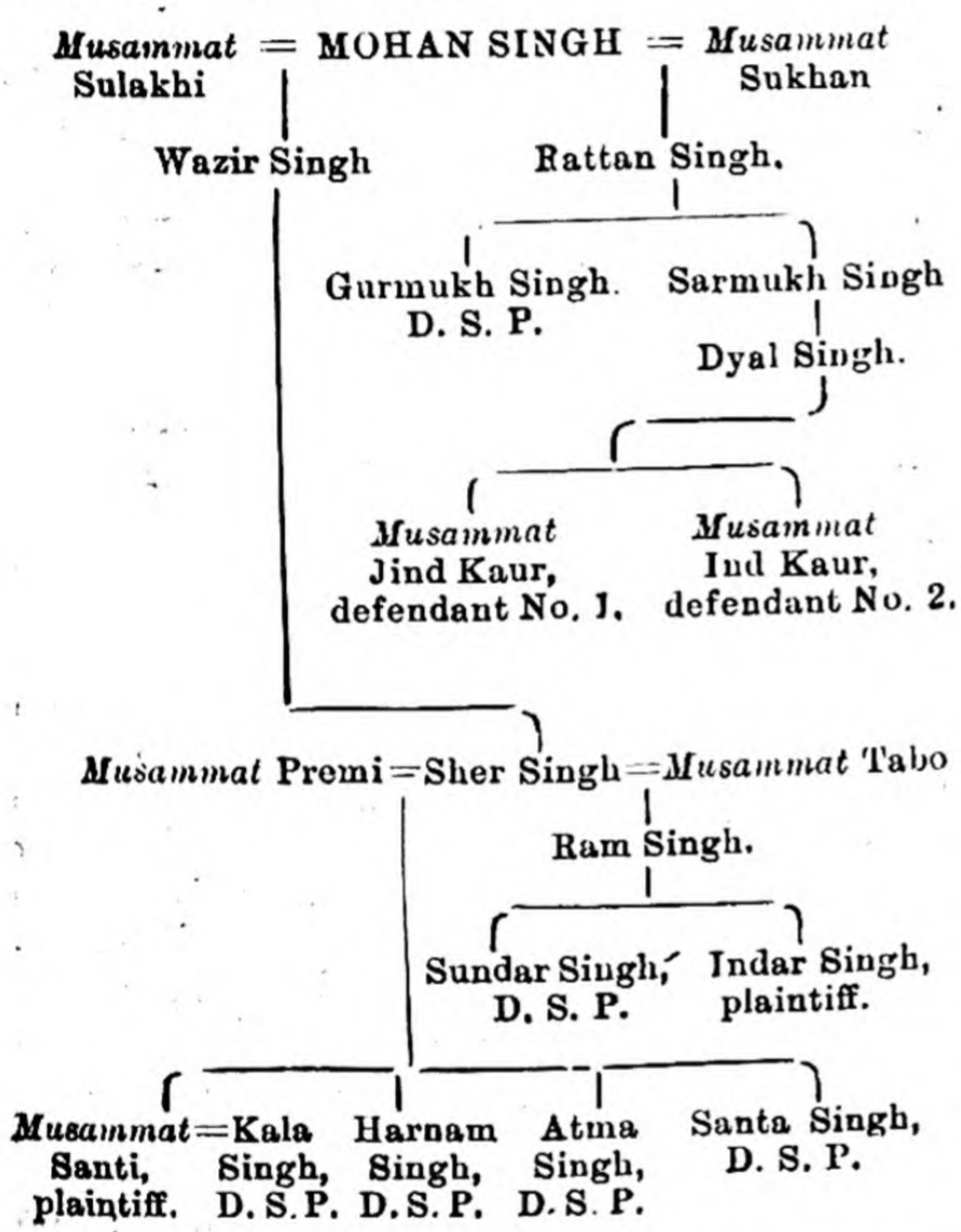
JIND KAUR v. INDAR SINGH.

Second appeal from a decree of the District Judge, Lahore, dated the 22nd January 1919, reversing that of the Subordinate Judge, First Class, Lahore, dated the 29th October 1918

—Messrs. *J. G. Sethi* and *Dev Raj Sawhney*, for the Appellants.

Lala *Moti Sagar*, R. S., and Sardar *Khark Singh*, for the Respondents.

JUDGMENT.—The following pedigree table will help to explain the case:—



On the night of the 6th March 1906 Dyal Singh, his wife and only son were murdered, and for their murder Ram Singh was sentenced to death and Harnam Singh to transportation for life (he is dead), while Sundar Singh was sentenced to seven years' rigorous imprisonment for the offence of concealing evidence of the murder, (he is also dead). Dyal Singh was murdered with the object of securing his property, and after the criminal case had been disposed of by the Chief Court, on the 20th September 1906, mutation of Dyal Singh's lands was entered in the revenue papers on the 17th November 1906 and sanctioned on the 26th June 1907. The Revenue Records show that Kala Singh and Santa Singh were both present during the mutation proceedings, and that Dyal Singh's lands were mutated as under:—

To Kala Singh	...	$\frac{1}{4}$th
To Santa Singh	...	$\frac{1}{4}$th
To *Musammat* Jind Kaur	...	$\frac{1}{4}$th; and
To *Musammat* Ind Kaur	...	$\frac{1}{4}$th

Atma Singh had died before Dyal Singh's murder. Indar Singh was expressly excluded on the ground that he was the son of Ram Singh, the murderer of Dyal Singh. *Musammat* Jind Kaur and *Musammat* Ind Kaur have ever since been in possession of the lands allotted to them. Santa Singh died without issue and his property was taken by Kala Singh on whose death his widow *Musammat* Santi succeeded to her husband's estate. On the 3rd January 1918 Indar Singh and *Musammat* Santi instituted a suit against *Musammat* Jind Kaur and Ind Kaur claiming possession of the lands held by them belonging to Dyal Singh. It was alleged that the two defendants were not the daughters of Dyal Singh, and that even if they were they had no right to succeed to Dyal Singh's estate in the presence of the plaintiffs, Dyal Singh's collaterals, as the land was ancestral and the parties are governed by custom.

The defendants contested the suit on the ground that it was bad for misjoinder of parties and causes of action, and that as Ram Singh, father of Indar Singh, and Kala Singh, husband of *Musammat* Santi, had murdered Dyal Singh with the sole object of securing his property, the plaintiffs were debarred from making any claim, and that *Musammat* Santi had no *locus standi*. The Trial Court held that the property was ancestral and that the defendants were the daughters of Dyal Singh, who had been murdered by Ram Singh and others with the sole object of securing his property but that Kala Singh was not implicated in the crime. The suit was dismissed as it was held that Indar Singh was debarred from claiming the property, he being the son of the murderer of Dyal Singh, and that *Musammat* Santi could not sue, firstly, because her husband, Kala Singh, had made no claim to succeed, and secondly, that if *Musammat* Santi were allowed to sue it would be Indar Singh who would ultimately benefit by her success which would result in the stultification of the law

JIND KAUR v. INDAR SINGH.

which excludes the murderer and his descendants from benefiting by the murder. Their suit having thus been dismissed the plaintiffs appealed to the District Judge attacking the findings as to the relationship of the defendants with Dyal Singh and the correctness of the view taken by the Trial Court of the law. The learned District Judge came to no definite finding on the question whether the defendants were the daughters of Dyal Singh but this fact appears to have been accepted as correct. The plaintiffs' suit was decreed, it being held that as Indar Singh had a right to succeed as a reversioner, which right he derived from the common ancestor, Mohan Singh, and not from his father, Ram Singh, he was not excluded by the daughters of Dyal Singh in spite of the fact that he was the son of Dyal Singh's murderer. *Qua* the case of *Musammat* Santi it was held that it stood or fell according to the decision regarding Indar Singh's claim. The learned District Judge appears to have thought that as Kala Singh had made no claim against the daughters of Dyal Singh *Musammat* Santi *ought* not to succeed, but that, as Indar Singh was the only person entitled to dispute her claim, and instead of doing so admitted it, she should be granted a decree. Against this decree *Musammat* Jind Kaur and *Musammat* Ind Kaur have preferred this second appeal to this Court through Mr Jai Gopal Sethi and we have heard Mr. Kharak Singh for the respondents.

It has been contended that Indar Singh as a son of the murderer of Dyal Singh cannot be allowed to benefit by the murder committed by his father and is, therefore, debarred from succeeding to the estate of Dyal Singh. This general principle that a son of a murderer cannot be allowed to benefit by the felony committed by his father has been conceded by the learned District Judge, but it has not been given effect to in the present case on the ground that Indar Singh did not derive his title to succeed to the estate of the murdered man from his father but by virtue of his community of descent from Mohan Singh, the common ancestor of himself and the last male owner, namely, Dyal Singh.

In coming to this decision the learned District Judge has apparently departed from the rule laid by a Division Bench of this Court in the case reported as *Muhammad Khan* v. *Sis Bano* (1). This decision has not been ignored by the lower Appellate Court which has, however, preferred the principles enunciated in *Sadhu Singh* v. *Secretary of State for India* (2). The latter ruling, however, does not appear to have any bearing on the present case. It has to be borne in mind that the succession in this case is to the estate of Dyal Singh, *i.e.*, the murdered man. The decision in *Sadhu Singh* v. *Secretary of State for India* (2) related to an entirely different matter. There a certain man had been accused of an attempt to murder and had absconded; proceedings had been taken against him under sections 87 and 88 of the Criminal Procedure Code and his property had been sold by auction, his son sued for a declaration that the sale would not affect his reversionary rights as heir after his father, and the question that was decided by the Full Bench was that all that was sold was the right, title, and interest of the absconder, and that by this sale his son's right of reversion was not taken away. Now, the principle on which *Muhammad Khan* v. *Sis Bano* (1), proceeded was that it was against public policy to allow the descendants of a murderer to succeed, not to the *murderer's* estate but to the estate of the murderer's *victim* when the said victim had been murdered with the sole object of securing his property. The facts of that case were somewhat similar to those of the present one: a man had been murdered by his paternal uncle with the object of securing his property; the land of the murdered man had been mutated in favour of his sister and the son of the murderer sued for possession on the ground that he was the reversioner; the murderer was still alive and it was conceded at the bar that during his lifetime his son, who was a minor, could not be allowed to take possession, but it was asked that a declaratory decree should be passed to the effect that the said son would be entitled to the property after his father's,

(1) 41 P. R. 1903; 95 P. L. R. 1903; 83 P. W. R. 1906.
(2) 18 P. R. 1908; 19 P. W. R. 1908; 153 P. L. R. 1908.

the murderer's death. In *Shah Khanan* v. *Kalandhar Khan* (3), it was held by a Division Bench of the Chief Court that the murderer himself could not succeed to the estate of his victim. There the murderer, who was the plaintiff, had been convicted of the abetment of the murder of his half brother and sentenced to seven years' rigorous imprisonment; the mother of the victim had succeeded to the property; when the convict had served out his sentence he instituted a suit for possession basing his claim on the ground that he was a customary heir. It was held that the plaintiff was disentitled to succeed upon that principle of public policy and justice which demands that no criminal should benefit by the result of his crime, and that it was unnecessary to consider either the Muhammadan or Customary Law on the point. Following this ruling the learned Judges responsible for *Muhammad Khan* v. *Sis Bano* (1), held that not only was the murderer excluded from inheritance, but that on the same grounds his descendants were also barred from the succession. It was said that the principle of exclusion applied to all who derived their claim from the criminal and as the plaintiff claimed his inheritence *through* his father it would be opposed to public policy to allow him to succeed. Reference was made to *Kola* v. *Harnam* (4), with approval where it is laid down that in regard to collaterals such heirs take the estate from the sonless owner as his heirs and derive their title to possession of the ancestral estate from him and through him from the common ancestor. It was sought to support the decision of the lower Appellate Court by the contention that the right of a son to succeed collaterally is wholly independent of his father and derived, not from the father but from the common ancestor, and that in the present case Ram Singh being excluded by reason of his being the murderer, the right to succession became vested in Indar Singh. This proposition, however, is entirely opposed to what was held in *Muhammad Khan* v. *Sis Bano* (1), for there it was specifically laid down that the fact that the father had committed the crime did not serve to vest the right of succession in the plaintiff. Now, after Dyal Singh's death Ram Singh would have succeeded to his share (whatever that share might have been) but for the fact that as Ram Singh was the murderer he was excluded from the succession. This exclusion, however, did not serve to vest the right of succession in Indar Singh. So long as Ram Singh was alive Indar Singh could not advance any claim and as Ram Singh's exclusion did not vest the right to succession in Indar Singh, Ram Singh's subsequent death (by hanging) did not give Indar Singh any right to succeed. Doubtless Indar Singh does not claim to succeed to his father as his heir, but bases his claim on his relationship to the common ancestor, Mohan Singh. He does, however, claim *through* Ram Singh inasmuch as it is *through* Ram Singh that he is related to Mohan Singh and Dyal Singh. This appears to have been the *ratio decidendi* in *Muhammad Khan* v. *Sis Bano* (1) and there seems to be no reason to take a different view. The principle of exclusion merely amounts to this that on the grounds of public policy a person guilty of felony is debarred from inheritance. As was held in *Vadamayaga Mudaliar* v. *Velammal* (5), the vesting of the inheritance itself is not intercepted, *i.e.*, the vesting of the succession is not prevented but what was vested in accordance with the law is wrested away on the ground of justice and equity. The murderer's right in such a case is swept away and with it is carried away the right of every one who claims through (and not merely from) him. As Indar Singh derives his right to succeed *through*, though not *from*, his father, his right to succeed is taken away by the criminal act of Ram Singh.

If this were not so the object of this principle of exclusion would be, in many cases, rendered nugatory: an aged father who had a right of reversion to a large estate could murder the holder of that estate and suffer the extreme penalty cheerfully knowing that by his action he had benefited his sons very materially.

(3) 74 P. R. 1900; P. L. R. 1900, p. 455.
(4) 118 P. R. 1895 (F. B.).

(5) 27 M. 591 at p. 600.

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Ram Singh was not the source of Indar Singh's right of succession but he was the channel through which this right went to Indar Singh, and when the channel becomes tainted, or blocked, the right to succeed ceases to flow on to the son.

In these circumstances it is not necessary to consider the authorities cited by Mr. Kharak Singh which deal in the main with Hindu Law. As remarked in *Shah Khanam* v. *Kalandhar Khan* (3) the principle is based on public policy and justice, and the Hindu or Customary Law on the point need not be considered. The authorities cited by Mr. Kharak Singh were:

Soni Ram v. *Kanhaiya Lal* (6), *Freemutty Manokarani Debi* v. *Hirapada Mitter* (7), *Gangu* v. *Chandrobhagabai* (8), *Nilmadhab Mitra* v. *Jotindra Nath Mitra* (9). Gour's Hindu Code, page 921, and Trevelyan's Hindu Law, pages 357 and 412.

It was also contended that in *Sundar* v. *Salig Ram* (10), the view as to collateral succession laid down in *Roda* v. *Harnam* (4) had been abrogated. A reference to the authority, however, shows that this is not the case. As has been pointed out above the principles enunciated in *Roda* v. *Harnam* (4) were cited with approval in *Muhammad Khan* v. *Sis Bano* (1). In *Sundar* v. *Salig Ram* (10), the 1895 decision [*Roda* v. *Harnam* (4)] is referred to apparently with approval at pages 72 and 73, although at page 74 Rattigan, J., makes certain remarks which would appear to throw some doubt on the subject. It was not held or even explicitly opined that the view taken by the Court in the decision of 1895 case [*Roda* v. *Harnam* (4)] was wrong. *Muhammad Khan* v. *Sis Bano* (1), appears to be conclusive on the point and should have been followed by the lower Appellate Court. The claim so far as Inder Singh is concerned was, therefore, bad and his suit should have been dismissed. The claim advanced by *Musammat* Santi is not on the same footing as that advanced by Indar Singh. She derives her claim *from* and *through* her husband who was not guilty of participation in the murder. Her husband, Kala Singh, could have succeeded to all the estate along with Santa Singh. He did not, however, do so but instead stood by and allowed the daughters of Dyal Singh to oust him, and to take possession of the property. Up to the time of his death he never advanced any claim to oust the daughters of Dyal Singh. The Revenue Records show that both Kala Singh and Santa Singh were present during the mutation proceedings. Just as Kala Singh advanced no claim against the daughters of Dyal Singh so did Santa Singh refrain from doing so. Their silence up to their respective deaths appears to indicate that they had acquiesced in the succession of the two daughters, and therefore, *Musammat* Santi had no right to advance the claim she has made.

The appeal is accepted and the plaintiff's suit dismissed with costs throughout.

Z. K. *Appeal accepted.*

(6) 19 Ind. Cas. 291; 35 A. 227; 13 M. L. T. 437; 17 C. W. N. 605; 11 A. L. J. 389; (1913) M. W. N. 470; 17 C. L. J. 488; 15 Bom. L. R. 489; 25 M. L. J. 131; 40 I. A. 74 (P. C.).

(7) 24 Ind. Cas. 311; 18 C. W. N. 718 (P. C.).

(8) 32 B. 275 at pp 294, 295; 10 Bom. L. R. 149.

(9) 18 Ind. Cas 764 17 C. W. N. 341.

(10) 9 Ind Cas. 300; 26 P. R. 1911; 34 P. L. R 1911; 38 P. W. R. 1911.

PATNA HIGH COURT.

LETTERS PATENT APPEALS NOS. 101 AND 102 OF 1921.

April 27, 1922.

Present:—Sir Dawson Miller, Kt., Chief Justice, and Mr. Justice Adami.

IN L. P. A. No. 101 OF 1921

QYAMUDDIN KHAN AND ANOTHER —APPELLANTS

versus

RAMYAD SINGH AND OTHERS—RESPONDENTS.

IN L. P. A. No. 102 OF 1921

Babu BANSDHARI SINGH AND OTHERS —APPELLANTS

versus

RAMYAD SINGH AND OTHERS—RESPONDENTS.

Batwara *partition*—Bakasht *lands*—*Co-sharer in possession before partition*—*In partition lands allotted to another co-sharer*—*Co-sharer in possession, whether entitled to remain in possession.*

QYAMUDDIN KHAN v. RAMYAD SINGH.

In all cases of a *batwara* partition between co-proprietors, if the lands are merely the *bakasht* lands of the landlords before the partition, then, in the absence of any special arrangement come to between the landlords themselves at the time of the *batwara*, none of them has the right to dispute the possession of those into whose *takhta* the particular lands in question fall. The only exceptions are those which are created by law either under the Bengal Tenancy Act or under some other provision of law whereby a tenancy interest or possibly some other interest in land is acquired. [p. 533, col. 1.]

Basudeo Narain v. *Radha Kishun*, 65 Ind. Cas. 281, 3 P. L. T. 22; (1922) Pat. 55 and *Nandkishore Singh* v. *Mathura Sahu*, 65 Ind. Cas. 586; 3 P. L. T. 13, distinguished.

There is no law which provides that merely because a co-sharer has been in possession of *bakasht* lands, belonging to himself and his co-sharers, he is, therefore, entitled after a Collectorate partition to remain in possession of those lands when they are allotted to the *takhta* of one of his co-sharers. [p. 533, col. 1.]

Letters Patent Appeals against the judgment of Mr. Justice Ross, dated the 27th October 1921.

Messrs. *S. M. Mullick* and *H. P. Sinha*, for the Appellants.

Messrs. *Kulwant Sahai* and *S. N. Rai*, for the Respondents.

JUDGMENT.

MILLER, C. J.—These are two appeals under the Letters Patent from a decision of Mr. Justice Ross, dated the 27th of October last. There were two cases instituted by two co-sharer landlords claiming in the one case 8 *bighas* of land and in the other case 12 *bighas* 5 *kathas* against the same defendant, who previously had been a co-sharer with the plaintiffs. Both the suits raised exactly the same question for determination; they have been heard together and determined by one judgment.

The plaintiffs and the defendants were co-sharer landlords in Mouzah Silarhi and in April 1918 effected a *batwara* partition whereby different parcels of the lands in suit fell into the *takhtas* of the plaintiffs respectively. It appears that before the *batwara* partition the defendants had been in actual possession of the lands and had been cultivating them and giving a portion of the produce to their co-sharer landlords. After the partition when the plaintiffs sought to get possession they were resisted by the defendants and after certain proceedings under section 144 of the Criminal Procedure Code the present suits were instituted in October 1918 by the plaintiffs claiming possession of the lands after eviction of the defendants. The case set up by the defendants in their written statement was that the lands in suit were their ancestral *kaimi raiyati* lands which they acquired before their acquisition of the proprietary interest and, of course, if that case could have been made out, no doubt the defendants would have been entitled to remain in possession as *raiyats* notwithstanding the subsequent partition.

The case made by the plaintiffs was that the lands in question were not the defendants' *raiyati* *jote* at all but were the *maliks'* *bakasht* lands and that the defendants were in fact in possession before the *batwara* but were in possession as *maliks*, and it was not disputed that the distribution of the produce was as stated and as set out in the Record of Rights. A further defence was raised by the defendants to the effect that even if the disputed lands were the *maliks'* *bakasht* lands, which they denied, then in that case also they were entitled to remain in possession notwithstanding the partition as there was no law or custom by which the defendants' *kasht* right in the disputed lands could after the *batwara* and demarcation of boundaries be extinguished. The Record of Rights described the lands as *bakasht* of the *maliks* and in a note in the Survey *khatian* the manner in which the rent or the produce was distributed was thus stated: "after deducting the *raiyati* half share, from the remainder of the produce is again deducted landlords' share due to the co-sharer in possession and the residue is divided amongst the other *maliks* according to their shares with an addition of $1\frac{1}{4}$ seers in the maund for cess."

When the case came before the Trial Court the defendants contended that this entry in the Record of Rights was consistent, and consistent only, with a *raiyati* interest in the defendants and they strongly relied upon that entry as supporting their claim which was also evidenced by some oral testimony, and that they had many years ago and before they became proprietors acquired a *raiyati* interest in the land. That contention, however, failed. The learned Munsif came to the conclusion that the defendants had never acquired a *raiyati* interest by purchase or otherwise from any tenant or

from any one, and he found that the entry in the Record of Rights was not inconsistent with that which in another part of the record was distinctly stated, namely, that the lands were the *bakasht* lands of the *maliks*, and upon the whole of the evidence he arrived at the conclusion of fact upon that issue adverse to the defendants. He further came to the conclusion that as the defendants were neither *maliks* nor tenants of the *pattis* in which the disputed lands were situated, they were not entitled to remain in possession. That finding disposed of the point raised as an alternative point by the defendants that having been in possession of *bakasht* lands they were still after the *batwara* entitled to remain in possession upon payment of rent to their co-sharers. The case then went on appeal to the Subordinate Judge and he arrived at exactly the same conclusion of fact as that which the Munsif had come to and found that there was absolutely no documentary evidence to prove that the defendants had ever acquired any tenancy right prior to their acquisition of proprietary right in the village and that the oral evidence on their behalf was quite unreliable. Those findings of fact cannot be questioned in second appeal, but when the case came on second appeal to this Court it was contended before the learned Judge that notwithstanding the finding of fact the defendants had, upon the facts found, acquired an interest in the land which was not extinguished by reason of the *batwara* proceedings. This view of the case appears to have commended itself to the learned Judge because he allowed the appeal and dismissed the suits with costs. He was apparently influenced by the entry in the Record of Rights as to the manner in which the produce had been distributed between the defendants actually occupying the land and their co-sharers. He thought that this fact in itself negatived the suggestion that the lands were part of the *zerait* lands of all the proprietors held for the purpose of convenience by those particular proprietors, the defendants. If the learned Judge meant by that passage that the plaintiffs were contending that these were *zerait* lands and, therefore, that no rights of occupancy could be acquired in them, the learned Judge had not appreciated what the real issues in the case were. I think, however, it is only fair to the learned Judge to say that in using the words *zerait* lands there, he was not using the term in the technical sense in which it is used in the Bengal Tenancy Act. He probably meant to use the expression merely to indicate lands in the direct possession of the *maliks* such as *bakasht* lands. However that may be, the conclusion he arrived at was that the plaintiffs even after the *batwara* could only become entitled to cultivating possession of the disputed lands as a result of partition if the right to cultivate itself was in hotchpot when the partition was made. It seems to me, with great respect to the learned Judge, that in expressing the matter as I have just stated he was somewhat misplacing the onus. Unless the plaintiffs had acquired some right in the lands known to the law, some tenancy right or some right recognised by the law as creating an interest therein other than the proprietary interest, the result of the partition would inevitably be that the co-sharers to whose *takhta* the land was allotted would get possession of the land, and direct possession, unless there was some tenant already on the land. It was not necessary to prove affirmatively that it was the intention in the *batwara* proceedings that this land should be given into the direct cultivating possession of the landlords. It must be presumed that the right to cultivate was considered by the landlords at the time of the partition to have been as the learned Judge described it, itself in hotchpot. Apart altogether from any intention, it seems to me that it was in hotchpot and that the onus was upon the defendant to prove by some arrangement or by some agreement between the proprietors when the *batwara* partition was effected that the right actually to cultivate was not in hotchpot. Two cases, however, have been relied upon by the learned Government Pleader on behalf of the respondents which he says support his contention. The first of those was Second Appeal No. 82 of 1921, [*Basudeo Narain* v. *Radha Kishun* (1)], to the judgment in which my learned brother was a party, in which it was decided that a co sharer who acquires an occupancy holding during the continuance of the joint estate of himself and his co-sharers does not lose his *raiyati* right by reason of a *batwara* partition. That decision, however, may be

(1) 65 Ind. Cas. 281; 3 P. L. T. 22; (1922) Pat. 55.

justified under section 22, sub section (2) of the Bengal Tenancy Act. The case set up in the present appeal is admittedly not a case coming under section 22, sub-section (2) of that Act. It is not contended that the defendants acquired any occupancy right during the period that they were co-sharers with the plaintiffs. The other case is a decision of similar import. It is Letters Patent Appeal No. 117 of 1920. [*Nandkishore Singh* v. *Mathura Sahu* (2)]. That was a decision of Jawala Prasad, Acting Chief Justice and Mr. Justice Das, and that again was a case where the right of the defendant was acquired in the circumstances contemplated in section 22, sub-section (2) of the Bengal Tenancy Act, and it is important to observe that in the course of the judgment after pointing out that one of the contentions was that the lands were the *bakasht* of the proprietors and as such the plaintiffs had no right to the same if they fell into the *patti* of the defendants in the partition proceedings, it is stated: "This would be so if the land was the *bakasht* of the proprietors prior to the partition," so that so far from this decision being an authority in favour of the respondents it seems to me an authority to the contrary.

The result of my opinion is that in all cases where you have a *batwara* partition between co-proprietors if the lands are merely the *bakasht* lands of the landlords before the partition, then, in the absence of any special arrangement come to between the landlords themselves at the time of the *batwara*, none of them has the right to dispute the possession of those into whose *takhta* the particular lands in question fall. The only exceptions seem to me to be those which are created by law either under the Bengal Tenancy Act or under some other provision of law whereby a tenancy interest or possibly some other interest in land is acquired. But in the present case there is no law that I am aware of which provides that merely because a co-sharer has been in possession of *bakasht* lands belonging to himself and his co-sharers, he is, therefore, entitled after a Collectorate partition to remain in possession of those lands when they are allotted to the *takhta* of one his co-sharers.

In my opinion these appeals should be allowed with costs, the decision of the learned Judge set aside and the decree of the Subordinate Judge restored.

ADAMI, J.—I agree.

S. D.

Appeals allowed.

(2) 165 Ind. Cas. 566; 3 P. L. T. 13.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 385 OF 1920.

February 27, 1922.

Present:—Mr. Justice Ryves and Mr. Justice Gokul Prasad.

Babu PARASRAM SINGH—DEFENDANT—APPELLANT

versus

PANDOHI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Mortgage—Prior mortgagee obtaining foreclosure decree and acquiring equity of redemption without making puisne mortgagee party to suit—Redemption—Puisne and prior mortgagees, right of—Redemption suit filed by puisne mortgagee—Prior mortgagee prepared to redeem puisne mortgagee—Litigation to be regarded as two cross-suits—Prior mortgagee to be allowed redemption—Justice—Equity—Balance of convenience.

Where a prior mortgagee by conditional sale obtains a foreclosure decree and becomes the owner of the equity of redemption, without making the puisne usufructuary mortgagee a party to the suit, either of the mortgagees has a right to redeem the other; but if the puisne mortgagee sues to redeem the prior mortgagee and the latter is prepared to redeem the former, the litigation must be regarded as two cross-suits, and, having regard to the justice of the case, the equities of the parties and the balance of convenience, the prior mortgagee should be given a decree to redeem the puisne mortgagee. The puisne mortgagee should not be allowed to redeem the prior mortgagee, who, having become owner of the equity of redemption, might file a redemption suit the next day and redeem the puisne mortgagee. [p. 835, col. 2.]

Hassanbhai v *Umaji*, 28 B. 153; 5 Bom. L. R. 892, *Kedar Nath* v. *Saiyad Hafiz Ali*, 10 O. C. 356, *Charni* v. *Raj Bahadur*, 2 Ind. Cas 495, *Ram Piari* v. *Raghunath Singh*, 29 Ind Cas 794, referred to.

Kedar Prosanna Lahiri v. *Girindra Prosad Sukul*, 8 C. L. J. 173, distinguished.

Second appeal from the decree of the District Judge, Ghazipur, dated the 10th of February 1920.

Dr. *S. M. Sulaiman*, and Dr. *K. N. Katju*, for the Appellant.

Mr. *Kamala Kant Verma*, for the Respondents.

PARASRAM SINGH v. PANDORI.

JUDGMENT.

RYVES, J.—The essential facts so far as they are necessary for the purposes of this appeal can be stated very shortly. The mortgagor, who is no longer interested, by a mortgage by conditional sale dated the 20th of September 1900 mortgaged his *zemindari* share in four villages to the defendants. Subsequently on the 15th of July 1903 he executed a usufructuary mortgage in favour of the plaintiffs of three small plots of *sir* land for Rs. 99 15-6, and on the 8th of July 1904 he executed two other usufructuary mortgages in favour of the plaintiffs of some other small plots of *sir* and *khud kasht* land for Rs. 71 and Rs. 75 respectively. The aggregate area of these plots was a little over 3 *bighas*, that is something more than an acre. All these plots of land were situated within the boundary of the village of Ukraewan, one of the four villages mortgaged to the defendants. These three usufructuary mortgages were all unregistered. The terms of all of them were similar. The mortgagees undertook to pay the Government revenue, and the profits were set off against the interest. It was agreed that the mortgages could be redeemed at the end of the month of Jeth in any year on payment of the principal money.

In 1907 the defendants brought a suit for foreclosure of the mortgage of 1900 against the mortgagor and obtained a decree which was made absolute in 1908, and thus they obtained eventually possession of the mortgaged property. The plaintiffs, the puisne mortgagees, were not made parties to that suit. Thereafter the defendants ought to eject the plaintiffs, in the Revenue Court, describing them as their tenants. They pleaded that they were usufructuary mortgagees and, on being referred to the Civil Court obtained a decree from the Civil Court declaring them to be usufructuary mortgagees. This was on the 21st of May 1917. On the 6th of August 1918 the plaintiffs served a notice on the defendants of their intention to sue for redemption of the prior mortgage of 1900. On the 30th of August 1918 the defendants deposited in Court under the provisions of section 83 of the Transfer of Property Act the entire amount due to the plaintiffs on the three subsequent usufructuary mortgages, offering to redeem them. The plaintiffs refused to accept the money and on the 10th of September 1918 filed this suit praying to be allowed to redeem the prior mortgage of 1900 on payment of "the amount which the Court considers genuine and valid" and that "they may be put in possession of the property comprised in the prior mortgage together with the *sir* land appertaining thereto." The defendants contested the suit on three grounds. The first two need not be considered. The third ground taken was: "to avoid future dispute and to put a stop to the litigation, they (the defendants) had deposited the whole amount due to the puisne mortgagees on their mortgages and asked them to give up possession and that although they had refused this offer, they were still willing to pay them everything due under their mortgages." On these pleadings the Trial Court framed, among other issues, Issue No. 6: "Have defendants got a right to redeem the mortgages in favour of the plaintiffs? Have defendants been ready to pay the mortgage money due to plaintiffs? If so, how does it affect the claim?" On this issue, the only one with which we are concerned, it held: "defendants appear to have deposited the mortgage-money due to the plaintiffs in Court under section 83 of Act IV of 1882, and they claim that they have got a preferential right of redemption. This view though countenanced by the Bombay High Court is opposed to the views of the other High Courts (*vide* Gour's Transfer of Property Act, page 1130—IV Edition of 1915 and the rulings cited on that page). The learned author observes: 'If the Bombay view be correct, the prior mortgagee would steal a march over the subsequent mortgagee by keeping him ignorant of the suit in which he acquires the mortgagor's interest.'" It went on to find that inasmuch as the plaintiffs had not been made parties in the foreclosure suit, the plaintiffs had a preferential right to redeem; and it gave them a decree for redemption on payment, not of the amount claimed by the plaintiffs, namely Rs. 3,282-12 0, but of Rs. 4,929-6 0 which included a sum of Rs. 1,400 which the defendants had to pay in their suit to redeem a still earlier mortgage. The defendants appealed and in paragraphs 4 of their memorandum of appeal put their case in the following words:—"Legally the appel-

lants as representatives of the mortgagor and also as prior mortgagees have a right to redeem the mortgages in favour of the plaintiffs. The appellants with a view to do away with future disputes, have already deposited, under section 83 of Act IV of 1882, the mortgage consideration due to the plaintiffs in a competent Court, but they, as a precautionary measure, instituted this suit. Having regard to the entire circumstances the defendants' prayer as to the redemption of the plaintiffs' mortgages was fit to be allowed and in this case a decree for redemption in favour of the defendants should have been prepared. Such a decree is not prejudicial to the plaintiffs, and the one for redemption, passed by the Court is materially injurious to the defendants' right." The learned Judge of the Court below sets out as one of the two points for his decision, as follows, "that the defendants appellants who were once prior mortgagees were now the owners of the equity of redemption and were, therefore, entitled to redeem the plaintiffs' mortgages." Unfortunately, as it seems to me, when he comes to discuss this proposition in his judgment he changes the phraseology of the issue as he had originally expressed it and asked himself, "the second point for decision is whether the subsequent mortgagees have a preferential right of redemption over a prior mortgagee who has obtained a decree for foreclosure," and he then goes on to hold that the plaintiffs, not having been made parties in the former foreclosure suit, cannot in any way be affected by what happened in that suit, and finally, after discussing some rulings, to which I shall refer later, accepted the *dictum* of Dr. Gour already quoted and dismissed the appeal. The defendants come here in second appeal and their first ground is that the learned District Judge has overlooked the fact that although the subsequent mortgagees are entitled to redeem the prior mortgage, the prior mortgagees who have already acquired the mortgagor's right by foreclosure, can after such redemption claim redemption of the subsequent mortgage.

It seems to me most unfortunate that the Courts below should have asked themselves which of the parties had "the preferential" right to redeem. It seems to me clear beyond any controversy that both had a right of redemption. I prefer to regard this litigation as being substantially two cross-suits which might well have been consolidated, as indeed they were for all practical purposes, having regard to the pleadings and Issue No. 6 framed by the Trial Court and reiterated in the Appellate Court and tried out in both Courts. I think paragraph 21 of the written statement already quoted may be regarded as substantially a plaint in such a cross suit. I think this litigation really involves two suits, (1) by a puisne mortgagee to redeem a prior mortgagee who had not made him a party in his suit on his own mortgage, and (2) by a person who had become the owner of the mortgaged property, and who had acquired the equity of redemption and, therefore, stands in the shoes of the mortgagor, to redeem an encumbrance. It seems to me that both are, *prima facie*, entitled to what they claim and the question for the Court under such circumstances when all the parties were before it and all the necessary evidence was on the record was to decide once and for all, having regard to the equities of the parties and to prevent further litigation, what the justice of the case demanded. In this view what I think we have to look at in this appeal, is not whether the decisions of the Courts below were legally correct but whether we should now do what I think the Courts below should have done. Look at the consequences. If we uphold this decree the plaintiffs pay the decretal amount to the defendants, and the next day the defendants will inevitably file their suit to redeem the plaintiffs and so recover the property. All that the plaintiffs are entitled to is to get back their mortgage money. After all they are merely mortgagees and as such are liable to be redeemed by the owner of the property, that is the mortgagor or whoever represents him. In this case the prior mortgagees, the defendants, having acquired the equity of redemption, stand in the shoes of the mortgagor and are the owners of the property. I should be content to stop here and base my decision on what seems to me to be required by the equities of the case. But, as it has been very ably argued, on behalf of the respondents, that the decisions of the various Courts except the Bombay decision are opposed to my view, I think I should consider those authorities. The Bombay case, namely, *Hasanbhai*

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v. *Umaji* (1), it is conceded, is an authority in favour of the appellants, but it is argued that the facts there were different; that the decision itself is unreasonable and that it has not been followed by other Courts. In the Bombay case the mortgagor brought a suit to redeem the prior mortgage and got a decree but failed to pay the decretal amount within the time ordered and consequently the mortgage was foreclosed. Then the subsequent mortgagee brought a suit for sale on his mortgage, thereby it is said offering the prior mortgagee the option of redeeming him. Although the facts are different, I do not think the principle of law involved is substantially different. Next, it is said that the decision of the Bombay Court is unreasonable, because if the puisne mortgagees had been made parties in the former suit, as they should have been made, they would have had an undoubted right to redeem the prior mortgage, and it is said the prior mortgagee must not be allowed to take advantage of his own fault by depriving the subsequent mortgagees of their right to redeem the prior mortgage. This, I think puts, Dr. Gour's *dictum*, already quoted, in other words. Although it has been held that a subsequent mortgagee who should have been made a party to a suit on a prior mortgage but had not been made a party, cannot in any way be affected by the decree in that suit, and cannot be put in a worse position than he would have been in if he had been made a party, on the other hand, it seems to me, he cannot be put in a better position than he would have been in if represented then. If he had been made a party to the former suit, no doubt he could have redeemed the prior mortgage, but he would not thereby have obtained possession of the property. What he now claims is, that, not having been made a party to the former suit, that decree must be considered a nullity, and that he is now entitled on redeeming the prior mortgage to become the owner of the whole property originally mortgaged. This manifestly he cannot do. The result of the former suit undoubtedly was to vest the ownership of the property in the defendants and as such they must have a right to redeem the plaintiffs. The last argument is that the other High Courts have not followed the Bombay decision. It seems to me that this argument is based on the headnote to the Bombay case which is very misleading. According to that it was "Held, reversing the decree, that, *H*, the prior mortgagee, had a right to redeem superior to that of *L*, the subsequent mortgagee." Put baldly like that, it is most misleading. The High Court never held anything of the kind What they did hold was as reported on page 160: "Looking to the substance and not to the form of the suit the plaintiff was clearly seeking relief on the basis of the right of a mortgagee. When the pleadings were complete it appeared that his mortgage was subsequent in date to that which Hasan had taken of the same lands and had foreclosed. The contest thus became one between on the one hand, a prior mortgagee in possession, who had obtained a decree absolute for foreclosure, and, on the other hand, a subsequent mortgagee who had not been made a party to the redemption suit in which that final decree for foreclosure was made." Later on it is said: "The next and main point for decision is whether, looking to the equities on both sides, Hasan, the prior mortgagee, who had already obtained a final decree for foreclosure against the mortgagors and was in possession, ought to have been given an opportunity to redeem Umaji, the subsequent mortgagee," and they held that under the circumstances of the case he should be allowed to redeem the subsequent mortgagee. It seems to me, therefore, that the note in Dr Gour's commentary on page 1130 in my opinion is not quite accurate, where he says: "the right of the prior mortgagee to redeem the subsequent mortgagee on his acquiring the mortgagor's equity of redemption whether by foreclosure or sale in a suit to which the subsequent mortgagee was not a party has been categorically affirmed in Bombay while it has been as categorically denied by the Calcutta and other Courts." The learned Vakil for the respondents has not been able to refer us to a single case in which the Bombay case has been dissented from. That case was published as long ago as 1904, and the cases that have been referred to really have held nothing more than what is quite clear, namely, that a subsequent mortgagee

(1) 28 B. 153; 5 Bom. L. R. 892.

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who has not been made a party to a foreclosure decree is not affected by it. The Bombay case, however, has been unreservedly approved of and followed in the case of *Kedar Nath* v. *Saiyad Hafiz Ali* (2), decided by a Bench consisting of Messrs. Chamier and Griffin, both of whom were subsequently Judges of this Court. It was followed in the case of *Charni* v. *Raj Bahadar* (3) by Mr. Justice Karamat Hussain, and it was referred to by Mr. Justice Piggott in the case of *Ram Piari* v. *Raghunath Singh* (4). That was a similar case to this one and Mr. Justice Piggott far from dissenting from the Bombay case decided not to follow it, not apparently because he did not approve of it but because there were no materials on the record on which he could give the prior mortgagee a decree and he, therefore, left the parties to obtain such remedies as they might have in a further suit. I do not think it necessary to refer more specifically to any other of the many decisions which have been brought to our notice, except perhaps the case of *Kedar Prosanna Lahiri* v. *Girindra Prosad Sukul* (5). There the contest was between the first mortgagee and the second mortgagee who had both brought suits on their mortgages without making the other a party, and on getting a decree had purchased the mortgaged property, and it was there held that each party was entitled to redeem the other, but the preferable right to redeem was with the plaintiff who in that case was the subsequent mortgagee. The point now before us was not argued or decided and no cases were referred to. As I have already said, the decision of the Courts below in this case was legally right, but I do not think it was the proper decision to give, having regard to all the circumstances of the case and the pleadings of the parties. I would, therefore, allow the appeal, and allow the defendants to redeem the plaintiffs' mortgages, on payment to them the sum due on their mortgages in the next month of Jeth. If they fail to do so I would dismiss the appeal.

GOKUL PROSAD, J.—I agree in the order proposed and in the judgment of my learned brother. I have only to state that the result of our dismissing this appeal and suit would be to prolong this litigation. If the plaintiffs are allowed to redeem the prior mortgage in favour of the defendant who has now acquired the equity of redemption the result would be that the defendant prior mortgagee purchaser will bring a suit to redeem the puisne mortgage in favour of the plaintiffs and would get back the property on payment of the amount due under the plaintiffs' mortgages as also the amount which he has received from the plaintiffs in satisfaction of his prior mortgage or, in other words, the defendant would be placed back in the same position in which he would have been if he had been allowed to redeem the plaintiffs. Besides this, the plaintiffs would be in no better position by redeeming the mortgage in favour of the defendant. They would have after redemption their 3 *bighas* odd free from the mortgage and would only have a charge on the balance of the mortgaged property for the proportionate amount which they would have had to pay over and above the proportionate share due from their 3 *bighas*. From this aspect, too, the result of conceding to the plaintiffs' argument would be a suit for contribution by the plaintiffs against the owners of the remaining portion of the mortgaged property. So that in any case the plaintiffs would not benefit from the suit. The decree proposed by my learned brother fully meets the justice of the case and gives effect to the equities between the parties and at the same time prevents useless multiplicity of proceedings. I agree in the order proposed.

BY THE COURT.—The order of the Court is that this appeal is allowed, the defendant being given time to the 9th of June 1922 to redeem the plaintiffs' mortgages on payment of the sum due on their mortgages on that date. In case of their failure to do so, this appeal will stand dismissed. Under the circumstances of this particular case we direct that the parties do bear their own costs of this litigation.

S. D. *Appeal allowed conditionally.*

(2) 10 O. C. 356.
(3) 2 Ind. Cas. 495.
(4) 29 Ind. Cas. 794.
(5) 8 C. L. J. 173.

AMRIT LAL v. MURLIDHAR.

PATNA HIGH COURT.

APPEAL FROM APPELLATE ORDER No. 221 OF 1921.

May 9, 1922.

Present:—Mr. Justice Jwala Prasad and Justice Sir John Bucknill, Kt.

Babu AMRIT LAL AND ANOTHER—APPELLANTS

versus

MURLIDHAR AND OTHERS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art 182—Execution - Application for transfer of decree to incompetent Court, whether according to law—Step-in-aid of execution—"Applying in accordance with law," meaning of—Practice—Patna High Court, whether bound to follow Calcutta rulings.

An application for the transfer of a decree for execution to another Court is a step-in-aid of execution, but in order to save limitation such an application must also be in accordance with law within the meaning of clause *(v)* of Article 182. [p 538, col. 2.]

An application asking the transfer of a decree to a Court not having pecuniary jurisdiction to try the original suit is not an application in accordance with law and, therefore, cannot save limitation. [p. 540, col. 1.]

Shri Sidheshwar Pandit v. *Shri Harihar Pandit*, 12 B. 155; 6 Ind. Dec. (N. S) 588, *Gokul Kristo Chunder* v. *Aukhil Chunder Chatterjee*, 16 C. 457; 13 Ind. Jur. 418; 8 Ind. Dec. (N. S) 301, *Ghulam Ghouse* v *Sunni Lal*, 5 Ind. Cas. 155; 7 M. L T. 132, *Shamsunder Saha* v *Anath Bandhu Saha*, 6 Ind. Cas 97; 37 C. 574; 14 C. W. N. 662, followed.

Narasayya v. *Venkatakrishnayya*, 7 M. 397; 2 Ind. Dec (N. S) 860, *Shanmuga Pillai* v. *Ramanathan Chetti*, 17 M, 309; 4 M. L. J. 91; 6 Ind. Dec. (N S.) 214, *Abdulla Sahib* v *Ahmed Hussain Sahib*, 22 Ind. Cas. 275; (1914) M. W. N. 97; 15 M. L. T. 148; dissented from.

Per *Jwala Prasad, J.*—The term "applying in accordance with law" means applying to the Court to do something in execution which by law that Court is competent to do. It does not mean applying to the Court to do something which either to the decree-holder's direct knowledge in fact or from his presumed knowledge of the law, he must have known the Court was incompetent to do. [p. 541, col. 1.]

Chattar v. *Newal Singh*, 12 A. 64; A. W. N. (1889) 202; 6 Ind Dec (N S.) 792, referred to.

The Patna High Court ought to follow a Calcutta ruling unless it is satisfied that the ruling is wrong. [p. 540, col 2.]

Abdul Gani v. *Raja Ram*, 35 Ind. Cas. 463; 1 P. L. J. 232; 20 C. W. N. 829; 3 P L. W. 62 F. B, *Khoda Bukhsh* v. *Bahadur Ali*, 45 Ind. Cas. 203; (1918) Pat 120; 3 P. L. J. 285; 4 P. L W. 324, *Kaniz Zohra* v. *Syam Kisen* [*Boondi Sahu*], 39 Ind. Cas. 89; 2 P. L. J. 115; 1 P. L. W. 73; (1917) Pat. 138, *Sheobaran Mahto* v. *Bhogea*, 46 Ind. Cas. 884; 3 P. L J. 639, referred to.

Per *Bucknill, J.*—An application for transfer is primarily a step which saves limitation. But the transfer in order to be effective must be one which can be properly made by the transferring Court If that Court is not competent to make the transfer then there is no step in fact taken recognised by law which can save the commencement of the running of the limitation period [p. 542, col. 2]

The Patna High Court is not bound to follow slavishly the decisions of the Calcutta High Court or of any other High Court. [p. 542, col. 2]

Appeal from an order of the Subordinate Judge, Gaya.

Messrs. *A. K. Ray*, and *N. P. Sinha*, for the Appellants.

Messrs. *S. N. Sinha* and *N. C. Ghosh*, for the Respondents.

JUDGMENT.

JWALA PRASAD, J.—The only question for determination in this appeal is whether the application of the appellants for execution of their decree filed on the 29th May 1920 is barred by limitation or not.

The solution of the question depends upon whether the application of the decree-holders dated the 24th August 1917 whereby the decree in question was transferred to the Court of the First Munsif for execution was a step-in-aid of execution under Article 182, clause (*v*) of the Limitation Act.

The decree in question was passed by the Subordinate Judge of the Second Court, Gaya, in a suit the value of which was stated to be Rs. 5,000. The suit was, therefore, beyond the jurisdiction of the Munsif to whom the decree was transferred for execution in pursuance of the application of the decree-holder of the 24th August 1917.

Now, it has been concluded by authorities that an application for the transfer of a decree for execution to another Court is a step in-aid of execution* but in order to save limitation such an application must also be an application in accordance with law within the meaning of clause (*v*) of Article 182. If the Munsif to whom the decree was sent for execution was competent to execute it then undoubtedly the application of the decree-holder, dated the 24th August 1917, was in accordance with law and can be taken advantage of by the decree-holder in order to save the present application for execution from being barred by limitation. If, on the other hand, the Munsif had no jurisdiction to execute the decree the Subordinate Judge had no power to transfer the decree to him for execution and, therefore, the application of the 24th August 1917 asked for a relief which the Subordinate Judge was not competent to grant. In that view the application

*See *Ramchandra Marwari* v. *Krishna Lal Marwari*, 65 Ind. Cas. 332; 3 P. L. T. 298.—[*Ed*].

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of the 24th August 1917 would not be an application in accordance with law and, therefore, would be of no avail to him.

There has been a sharp division of opinion in the several High Courts in India as to whether a Court not having jurisdiction over an original suit can execute a decree obtained in that suit or not. The Madras High Court as early as in the year 1884 held that it is not necessary that the Executing Court should also have been competent to try the original suit, see *Narasayya* v. *Venkatakrishnayya* (1). A note of dissent was struck in the Bombay High Court in the year 1887 in the case of *Shri Sidheshwar Pandit* v. *Shri Harihar Pandit* (2). The matter then came to be dealt with by the Calcutta High Court in 1889 in the case of *Gokul Kristo Chunder* v. *Aukhil Chunder Chatterjee*(3) where a Division Bench of that Court presided over by Piggot and Beverley, JJ. agreed with the view taken by the Bombay High Court and held that the Court executing the decree should also be a Court competent to try the original suit so far as the pecuniary jurisdiction was concerned. Mr. Justice Muttusami Ayyar who was a party to the decision in *Narasayya* v. *Venkatakrishnayya* (1), above quoted, adhered to his view in the case of *Shanmugam Pillai* v. *Ramanathan Chetti* (4). In the judgment delivered by him he tried to meet all the objections raised by the Bombay and the Calcutta High Courts to the view expressed by him in the case in *Narasayya* v. *Venkatakrishnayya* (1).

The aforesaid decisions relate to a period prior to the present Code of Civil Procedure of 1908, but the law on the subject does not appear to have been materially altered by the present Code. The only alteration is in the power of the Court which passes a decree to transfer *suo motu* a decree for execution to any Court subordinate to it. In the Code of 1882, section 223, the clause on the point empowered the Court which passed the decree to send it of its own motion for execution to any subordinate Court. The corresponding provision in the Code of 1908, section 39, clause (*ii*) has added the words "of competent jurisdiction" to the words "Subordinate Court" occurring in the former Code; in other words, under the present law it has been expressly made clear that a Court which passes a decree can send it of its own motion for execution to any Subordinate Court "of competent jurisdiction."

Mr. Atul Krishna Ray submits that the present case is governed by clause (1) of section 39, under which on the application of the decree-holder the Court which passed the decree may send it for execution to another Court in the circumstances and for the reasons set forth in clauses (*a*) to (*d*) of the section. He contends that those clauses (*a*) to (*d*) do not in any way restrict the transfer of a decree for execution to a Court only of competent jurisdiction. He says that on the application of the decree-holder in this case the Court which passed the decree could send it for execution to any Court whether that Court be of competent jurisdiction or not. Plainly speaking his contention is that there is nothing in section 39 to prevent the Subordinate Judge who passed the decree from sending it for execution to the Court of the Munsif not having the pecuniary jurisdiction to try the suit in which the decree was passed. He also refers to section 6 of the Code of Civil Procedure which runs as follows:—

"Save in so far as is otherwise expressly provided, nothing herein contained shall operate to give any Court jurisdiction over suits, the amount or value of the subject-matter of which exceeds the pecuniary limits (if any) of its ordinary jurisdiction."

The words in this section are virtually the same as in the corresponding section of the old Code. Mr. Ray contends that this section applies only to suits and not to execution proceedings. He has also referred to provisions in the Code relating to the transfer of suits from one Court to another set forth in sections 22 to 24 of the Code and says that the Legislature has expressly made it clear that a suit can only be transferred for trial to a Court of competent jurisdiction. He contends that there is no such provision in section 39 of the Code which relates to the transfer of a decree for execution. He, therefore, says that the Legislature evidently meant that a decree should be sent for execution to any Court where it can with facility be executed by reason either of the property of the judg-

(1) 7 M. 397; 2 Ind. Dec. (N. S.) 860.
(2) 12 B. 155; 6 Ind. Dec. (N. S.) 588.
(3) 16 C. 457; 13 Ind. Jur. 418; 8 Ind. Dec. (N. S.) 301.
(4) 17 M. 309; 4 M. L. J. 91; 6 Ind. Dec. (N. S.) 214.

ment-debtor being situate within the jurisdiction of a particular Court or of the judgment-debtor residing therein, regardless of whether that Court had jurisdiction to try the original suit or not and irrespective of whatever pecuniary or territorial jurisdiction of that Court may have been. Mr. Ray says that there can be no doubt that a decree may be sent for execution to a Court which may not be competent to try the original suit; for instance, a decree for money obtained in a Court in Patna on a hand-note or a bond against a defendant residing in Patna may be transferred for execution to a Court in the United Provinces by reason of the property of the judgment-debtor being within the jurisdiction of that Court even though that Court was not competent to try the original suit, inasmuch as neither the cause of action arose in the jurisdiction of that Court nor the defendant resided therein. Mr. Purnendu Narain Sinha, on the other hand, contends that though in the circumstances set forth in the illustration given above, the decree may be executed by a Court not being competent to try the suit, yet a Court in the United Provinces executing the decree should have the pecuniary jurisdiction to try the original suit: in other words, he makes a distinction between a pecuniary and territorial jurisdiction. He says that although for the purpose of execution a Court executing a decree may not have the territorial jurisdiction to try the suit, yet it must have the pecuniary jurisdiction to try it in order to be competent to execute the decree. He has also referred to section 47 of the Code of Civil Procedure and has contended generally that the Executing Court may have to decide many questions relating to the execution, discharge or satisfaction of the decree, and those questions might involve disputes of a larger value much beyond the pecuniary limit of the Munsif to try and consequently the Court of the Munsif should not be allowed to execute a decree passed by the Court of the Subordinate Judge. He has also referred to the provisions of appeals, namely, that the decisions of the Munsif are appealable to the District Judge whereas the decisions of the Subordinate Judge may be appealable to the High Court directly and, therefore, he contends that in questions decided by the Munsif in the course of the execution of decrees, appeals might lie to the District Judge whereas they ought to be cognisable by the High Court alone. Mr. Ray has practically adopted the reasons given by the Madras Court and Mr. Purnendu Narain Singha has adopted, on the other hand, the reasons given by the Calcutta High Court. The question came before the said Courts even after the present Code of Civil Procedure came into operation and both the High Courts have stuck to their own views; *vide Ghulam Ghouse* v. *Sunni Lal* (5), *Shamsunder Saha* v. *Anath Bandhu Saha* (6) and *Abdulla Sahib* v. *Ahmad Hussain Sahib* (7).

It is obvious that the point for determination is somewhat difficult and that equally weighty reasons can be advanced in support of both views. The last ruling of the Calcutta High Court was the case in *Shamsunder Saha* v. *Anath Bandhu Saha* (6) above quoted.

In a case of this kind we think that we ought to follow the Calcutta ruling unless we are satisfied that that ruling is decidedly wrong. This principle was laid down as early as in May 1916, shortly after the establishment of the Patna High Court, *vide* the case of *Abdul Gani* v. *Raja Ram* (8) and has ever since then been repeated on various occasions; *vide Khoda Bukhsh* v. *Bahadur Ali* (9) *Kaniz Zohra* v. *Syam Kisen* [*Bondi Sahu*] (10) and *Sheobaran Mahto* v. *Bhogeta* (11). There can hardly be any question that up to 1916 before the establishment of this Court the Subordinate Courts in Gaya were governed by the decisions of the Calcutta High Court according to which the Munsif of Gaya was not competent to execute the decree passed on the 23rd March 1907 by the Subordinate Judge of Gaya; in other words, as laid down by Sir Lawrence Jenkins in the case reported as *Shamsunder Saha* v. *Anath Bandhu Saha* (6)

(5) 5 Ind. Cas. 155; 7 M. L. T. 132.
(6) 6 Ind Cas 97; 37 C. 574; 14 C. W. N. 662.
(7) 22 Ind. Cas. 275; (1914) M. W. N. 97; 15 M. L. T. 148
(8) 35 Ind. Cas. 468; 1 P. L. J. 232; 20 C. W. N. 829; 3 P. L. W. 62 (F. B.).
(9) 45 Ind. Cas. 203; (1918) at P. 130; 3 P. L. J. 285; 4 P. L. W. 324.
(10) 39 Ind. Cas. 83; 2 P. L. J. 115; 1 P. L. W. 73; (1917) Pat. 133.
(11) 46 Ind. Cas. 884; 3 P. L. J. 639.

(quoted above) at page 577*, the order of the Subordinate Judge transferring the decree for execution to the Court of the Munsif was without jurisdiction. Adopting the principle laid down by Sir Lawrence Jenkins in the aforesaid case we are inclined to agree with the view taken in the Calcutta High Court that the Munsif of Gaya had no jurisdiction to execute the decree passed by the Subordinate Judge of that District. There could not be any question of a *bona fide* mistake on the part of the decree-holder in the present case. Mr. Ray says that the view taken in the Madras High Court in *Abdulla Sahib* v. *Ahmed Hussain Sahib* (7) was believed by his client to be the correct view in preference to the view taken in the Calcutta High Court and, therefore, on the 24th August 1917 just after the constitution of this Court the appellant filed his application for transfer of the decree to the Court of the Munsif. But the appellant must be presumed to have known the Calcutta rulings, and therefore, he had no right to put in his application in direct contravention of the authorities in Calcutta. If once it is held that the Munsif had no jurisdiction to execute the decree, then the application of the decree-holder of the 24th August 1917 praying for the transfer of the decree to the Court of the Munsif for execution was not in accordance with law. It was pertinently pointed out in the case of *Ghattar* v. *Newal Singh* (12) that the necessary consequence of adopting a contrary view would be to hold that any application, however, absurd a decree-holder might make to a Court, would be sufficient to render his application one in accordance with law. I think the term "applying in accordance with law" means applying to the Court to do something in execution which by law that Court is competent to do. I do not think that it means applying to the Court to do something which either to the decree-holder's direct knowledge in fact or from his presumed knowledge of the law he must have known the Court was incompetent to do.

As observed above, the decree-holder in this case must be presumed to have had knowledge of the law as laid down by the Calcutta High Court that the Munsif had no jurisdiction to execute the decree in question, and that the Subordinate Judge was not competent to transfer the decree for execution and consequently the application in question of the 24th August 1917 was not in accordance with law. We, therefore, agree with the view taken by the Court below that the application of the 24th August 1917 is of no avail to the decree-holder and consequently the present application for execution filed on the 20th March 1920 and registered on the 14th June 1920 is barred by limitation. The view taken by the Calcutta High Court appears to be correct.

Our attention has been drawn to certain cases in which mistakes or defects either in the application for execution or in the order of the Court have been condoned in favour of a decree-holder, for instance, in the case of *Bipin Behari Mitter* v. *Bibi Zohra* (13) an application for execution of a decree made under the influence of a *bona fide* mistake against a dead person was held to be an application in aid of execution. But there the decree was passed on the 1st April 1903 and the application was made on the 1st March 1906, the judgment-debtor had died on the 25th May 1903 but the decree-holder had not come to know of the death until the 26th April 1906, that is, long after the filing of the application for execution, and soon after he came to know of it he made an application praying for the substitution of the names of the legal representatives of the deceased judgment debtor. That case was decided upon its own merits and until the decree-holder had known of the death of the judgment-debtor he had to regard the judgment-debtor on the record as the person against whom the execution could proceed. In the case of *Keshwa Surendra Sahi* v. *Mulakrani Kuer* (14) the application was made without having applied for the appointment of a guardian *ad litem* of the minor judgment-debtor. There the application was made in accordance with law inasmuch as there was no defect in the application and the application for the appointment of the guardian could be made at a later stage during the course of the execution. In the case in *Kunjbehari Singh* v. *Tarapada Mitter* (15) the decree was sent for execution

(12) 12 A. 64; A. W. N. (1889) 200; 6 Ind. Dec. (N. S.) 790.

*Page of 37 C.—[*Ed.*]

(13) 35 C. 1047.

(14) 48 Ind. Cas. 415; 4 P. L. J. 35.

(15) 58 Ind. Cas. 220; 1 P. L. T. 386.

direct to a Subordinate Court of another District instead of through the District Court of that District. The mistake was of the Court and not of the decree holder. Therefore, it was held that the decree holder could not suffer on account of the mistake of the Court inasmuch as his application for the transfer of the decree was in accordance with law without any defect whatsoever.

In conclusion, we direct that this appeal be dismissed but in the circumstances we make no order as to costs.

BUCKNILL, J.—This was an appeal from a decision of the District Judge of Gaya, dated the 18th July 1921, affirming an order of the Subordinate Judge of the same place dated the 15th of November in the previous year. The circumstances under which the appeal came before this Bench are very simple but they raise a question to which the answer is not very easy.

The plaintiffs obtained three decrees against the defendants in a suit No. 161 of 1905 which was brought before the Subordinate Judge of Gaya. One of these decrees appears to have been for possession of certain properties, a second for costs and the third for mesne profits. It is admitted that the value of the subject-matter of the suit was outside the jurisdiction of any Munsif of the District. Various attempts seem to have been made by the decree-holders, most of them apparently very half hearted, to execute their decree, but for various apparent and non apparent reasons into which it is not necessary to go here no execution appears to have been really effective and the last execution application made before the Subordinate Judge was dismissed on the 25th July 1916. On the 24th August 1917 the plaintiff applied to the Subordinate Judge and obtained a transfer of the execution of the decrees to the Court of the First Munsif of Gaya. It seems to have been registered there on the 1st September 1917 and was dismissed, I do not know why, on the 20th September of the same year. After that came the present application to the Subordinate Judge for execution filed on the 29th May 1920. Now, the respondents here contend that the last execution proceedings in the Subordinate Judge's Court having been dismissed on the 25th July 1916 and the present application having been filed on the 29th May 1920 the application is barred by the three years' rule of limitation. On the other hand the appellants maintain that the application for transfer which was made by them on the 24th August 1917 was a definite step in the execution proceedings which has kept their rights alive and which prevents the operation against them of the limitation of three years running as from the 25th July 1916. It is common ground that an application for transfer is primarily a step which saves limitation. For that proposition there is ample authority but it is urged that the transfer in order to be effective in that direction must be one which can be properly made, and that if it was not competent for the Subordinate Judge to have made such a transfer order, then there was no step in fact taken recognised by law which would in any way save the commencement of the running of the limitation period nor is this proposition in itself seriously contested. What, however, is the real point is as to whether in this case the Subordinate Judge could legally make the order such as he did, that is, transferring to the Munsif for execution a decree concerning a subject matter greater in value than the Munsif had power to deal with in a suit. The authorities are in direct conflict on this question. The Madras High Court has consistently held that a Munsif has jurisdiction to execute a decree relating to subject matter of greater value than that which he had power to deal with in a suit; the Calcutta High Court has always been of the contrary opinion. I am not prepared to subscribe altogether to the view that this Court must slavishly follow the decisions of the Calcutta High Court or of any other High Court, but after having listened to the arguments in this case very carefully and having read all the cases quoted in these proceedings, I have come to the conclusion that the Calcutta rulings are correct. I therefore agree with my learned colleague that this appeal should be dismissed.

S. D.

Appeal dismissed.

Advocate Jammu & Kashmir Srinagar.

FIRM FATEH DIN ALLAH DITTA v. QUTAB DIN.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 122 OF 1917.

November 18, 1921.

Present:—Mr. Justice Scott Smith and Mr. Justice Abdul Qadir.

THE FIRM FATEH DIN-ALLAH DITTA —PLAINTIFFS—APPELLANTS

versus

QUTAB DIN AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 57, 58, 63—Execution of decree—Attachment—Claim proceedings—Execution dismissed—Order in claim proceedings—Title suit—Limitation.

Plaintiffs who had obtained a decree against a certain firm attached certain houses in execution of the decree. Objections to the attachment of one of these houses were filed under Order XXI, rule 58, Civil Procedure Code. Some evidence was taken in support of the objection and proceedings were then adjourned to 13th February 1914 for further evidence. In the meantime the decree was partially satisfied and at the request of the decree-holders the Court dismissed the execution proceedings on 9th February 1914. On 13th February the decree-holders being absent, the Court passed an order accepting the objection and removing the attachment. In April 1915 the plaintiffs again attached the same house in execution of the same decree. The defendants again objected and their objection was allowed on 27th August 1915. On 2nd October 1915 plaintiffs brought a regular suit for a declaration that the house belonged to the judgment-debtor. The lower Courts dismissed the suit as time-barred on the ground that it had been brought more than one year from the order of 13th February 1914:

Held, (1) that the effect of the order of 9th February 1914, dismissing the execution proceedings, was, under Order XXI, rule 57 of the Civil Procedure Code, to remove the attachment: [p 544, col. 1.]

Dildar Husain v. *Sheo Narain*, 49 Ind. Cas 113; 41 A. 157; 17 A. L. J. 52, relied upon

(2) that after the order of 9th February 1914 the Court had become *functus officio* and that, therefore, the order of 13th February 1914, was a nullity and was not binding on the plaintiffs; [p 545, col 2]

Kashinath Morsheth v. *Ramchandra Gopinath*, 7 B. 408; 8 Ind. Jur 45; 4 Ind. Dec. (N s.) 274, relied upon.

Nogendra Lal Chowdhury v *Fani Bhusan Das*, 44 Ind. Cas 265; 45 C. 785; 23 C. W. N. 375, *Narasimha Chetti* v. *Vijiapala Nainar*, 27 Ind. Cas. 944; 2 L. W. 206; *Jiwani* v. *Nathu Mal*, 5 Ind Cas. 890; 28 P. R. 1910; 19 P. W. R. 1910; 63 P. L. R. 1910, distinguished.

(3) that the plaintiffs' cause of action arose on 27th August 1915 and that their suit was, therefore, within time. [p. 545, col. 2.]

Second appeal from a decree of the District Judge, Gujranwala, dated the 4th December 1916, affirming that of the Subordinate Judge, Second Class, Sialkot, dated the 17th January 1916.

Mr. *Ghulam Rasul*, for the Appellants.

Dr. *Nand Lal*, for the Respondents.

JUDGMENT.—The facts, out of which this second appeal arises, are as follows:—

On the 15th of August 1913 plaintiffs-appellants obtained a decree against the firm Muhammad Jamil and Muhammad Yakub. On the 1st of October 1913 in execution proceedings certain houses were attached and three objections were filed under the provisions of Order XXI, rule 58, Civil Procedure Code. In the present case we are only concerned with house No 242 in regard to which an objection was lodged by Qutab Din and Galab Din, defendants respondents. There was an investigation held into this objection and some evidence having been recorded, the hearing was adjourned to the 13th of February 1914 for further evidence of the decree-holders. Meanwhile certain other houses were sold at auction and the decree-holders received altogether a sum of Rs. 1,900 towards their decree and gave a receipt in part payment on the 7th February 1914. On the 9th February 1914 the Executing Court passed the following order:—"Rs. 1,900 have been paid and a receipt given. The decree having been partially executed let the proceedings be struck off." The words actually used are '*dakhal daftar howe*.' The presence of the parties on that date is not noted on the record, but it is probable that the decree holders were present and said that they did not wish to prosecute the execution further for the time being, as otherwise the Court would hardly have struck the proceedings off before the 13th of February 1914, which was the date actually fixed. On the 13th of February 1914 the decree holders did not appear, but the objector appeared and made an oral application that, as the decree-holders and the judgment-debtor had come to terms and the proceedings had been struck off, his objection should be accepted and the house released from attachment. On this the Court passed an order formally accepting the objection and removing the attachment.

On the 23rd of April 1915 the decree-holders made a fresh application for execution and got the same house again attached. The same objectors made a fresh objection and on the 27th of August 1915 this was

allowed. The plaintiffs then brought a regular suit on the 2nd of October 1915, which has been dismissed as barred by time, it being held that they should have sued within one year from the 13th of February 1914, on which date the previous objection was allowed. Before the lower Appellate Court it was argued, apparently for the first time, that the order of the 9th of February 1914 practically removed the attachment, and that, therefore, the order of the 13th of February 1914 should not have been passed, the argument being that no order was passed against the plaintiffs within the meaning of Order XXI, rule 63, Civil Procedure Code. The District Judge, however, was of opinion that if the order of the 9th February removed the attachment the suit was barred by four days more than if the order of the 13th of February 1914 were taken as the final order on the objection. He said in his judgment, page 8 of the paper book: "The expression-filing execution proceedings is perhaps an unsound and objectionable one, but it is the usual order passed when no immediate action is required and the proceedings are kept alive. It refers in no way to the objection and the fact that on the 13th of February the Court clearly and in so many words removed the attachment shows that in its opinion that attachment subsisted and existed until that date." The plaintiffs have now come up in second appeal to this Court and the same argument as was urged before the lower Appellate Court is again strongly pressed here.

Mr. Ghulam Rasul for the appellants says that what happened on the 9th of February 1914 was that the Court was unable to proceed further with the application for execution by reason of the default of the decree-holders, who did not wish for the time being to continue the execution proceedings, and that its order striking off the proceedings was really an order dismissing the application for execution within the meaning of Order XXI, rule 57, of the Civil Procedure Code, and that upon the dismissal of the application the attachment ceased. Now, we think that there can be no doubt that the Court struck off the proceedings on the 9th of February 1914, because the decree holders did not desire, having realized Rs. 1,900, to proceed further at that time against the judgment-debtor. Under these circumstances the Court could either dismiss the application or adjourn the proceedings to a future date. It certainly did not adjourn the proceedings, to a future date, and, therefore, it was bound under rule 57 to dismiss the application. The case of *Dildar Husain* v. *Sheo Narain* (1) is on all fours with the present case. There in execution of a decree the whole of a house was sold by auction instead of a share therein, which alone was saleable in execution of the decree. Various objections were raised and in the end the Court executing the decree passed the following order:—

"The sale is set aside; the application for execution is struck off. The attachment will remain."

It was held that the attachment had come to an end on the decree-holder's application being struck off. It was also said that the word "default" used in Order XXI, rule 57, of the Civil Procedure Code, is not restricted to default of appearance or matters of that description. It means a failure to do what the decree-holder was bound to do, that is, to go on with his application and have the property sold. In the course of his judgment Tudball, J. page 161* of the Report, said: "To my mind it is clear and beyond all doubt that the decree-holder in December 1914 did not wish to proceed further with his then pending application for execution, and it was in fact dismissed by reason of this default in carrying on proceedings. To my mind Order XXI, rule 57, clearly and distinctly applies to the present case. The fact that the Court in dismissing the application that the attachment should continue makes no difference. The law distinctly says that in these circumstances the attachment shall cease." Now, applying these remarks to the present case we have no doubt whatever that the decree-holders on the 9th of February 1914 did not wish to proceed further with the then pending application for execution and it was in fact dismissed by reason of their default in carrying on the proceedings, and Order XXI, rule 57, clearly applies. The result is that the order of the 9th of February 1914 had the effect

(1) 49 Ind. Cas. 113; 41 A. 157; 17 A. L. J. 53.

*Page of 41 A.—[*Ed.*]

of removing the attachment on the house in dispute.

Mr. Ghulam Rasul argues that the attachment having ceased on the 9th of February 1914, there was no necessity thereafter for any adjudication on the objection of Qutab Din and Gulab Din, and that the Court's order of the 13th of February 1914 was unnecessary and redundant. He refers to *Kashinath Morsheth* v. *Ramchandra Gopinath* (2) wherein it was held that the decision on the plaintiff's first application having no object existing on which to operate, the attachment having then been removed, it could not properly be regarded as *res judicata* since no one was seriously interested in having it decided in a different way. In the present case also the attachment having been removed on the 9th of February 1914 the application of Qutab Din and Gulab Din had no longer any object existing on which to operate. In other words Qutab Din and Gulab Din's object had been obtained by the removal of the attachment, which took place upon the dismissal of the execution proceedings.

Dr. Nand Lal, on behalf of the respondents, urges that even if the order of the 13th of February 1914 be considered as an erroneous one, still it is an order against the plaintiffs and must be held to be conclusive against them, and that the plaintiffs were bound to bring their suit within one year from that date under Order XXI, rule 63, Civil Procedure Code. He cites *Nagendra Lal Chowdhury* v. *Fani Bhusan Das* (3), *Narasimha Chetti* v. *Vijiapala Naikar* (4) and other rulings as authorities for the proposition that an order under Order XXI, rule 63, Civil Procedure Code, is binding, even if it is made after an incomplete investigation or no investigation at all. With these decisions we have no quarrel, but we do not think that they assist Dr. Nand Lal's clients. What we have to do is to consider the effect of the orders of the 9th and 13th February 1914 respectively. In regard to the effect of the latter order Dr. Nand Lal refers to *Jiwani* v. *Nathu Mal* (5). In that case *N. M.* in execution of his decree against *F. D.* attached a house. *Musammat J.* and *L.* objected to the attachment, an enquiry was made by the Executing Court, and on 14th of October 1903 in the absence of the decree-holder an *ex parte* order releasing the house was passed in the following words:—

"*Aj digridar hazir nahin hai, misl ijra ba adam pairvi dakhil daftar hui hai, lihaza jaidad mokruka waguzar howe, misil dakhil daftar ho.*"

It was held that notwithstanding the wording of this order it was an adjudication on the merits under section 280, Civil Procedure Code, 1882, inasmuch as the objector had actually produced his evidence, and the decree holder after several hearings produced none and absented himself on the last hearing. Now, that case is distinguishable from the present one, inasmuch as the enquiry there was complete and there was an adjudication upon the merits. It is possible that the Court in that case might have been justified in dismissing the application for execution for default, but it actually adjudicated upon the objection which was before it, and that adjudication was certainly binding upon the decree holder, who had only one year from the date of the order to bring the suit to establish his right. In the present case there was no adjudication upon the merits at all and the order of the 9th of February 1914 did not contain any reference to the objection then pending. It had, however, as we have already pointed out, the effect of removing the attachment and an adjudication upon the merits of the objection was no longer necessary. We have no difficulty in agreeing with Counsel for the appellants that the order of the 13th of February 1914 was quite unnecessary and, moreover, the proceedings having been dismissed for default on the 9th of February 1914 the Court was *functus officio* and had no power to pass any further order therein. Its order of the 13th of February 1914 was, therefore, altogether a nullity and time did not begin to run against the decree-holders from that date. We, therefore, hold that the plaintiffs' cause of action arose on the 27th of August 1915, on which date the objection of Gulab Din and Qutab Din was allowed, and that the present suit is within time.

We accept the appeal and setting aside the order of the lower Appellate Court remand the case to the Court of the first instance for decision on the merits. Stamps on this appeal

(2) 7 B. 403; 8 Ind. Jur. 45; 4 Ind. Dec. (N. S.) 274.

(3) 44 Ind. Cas. 265; 45 C. 785; 28 C. W. N. 375.

(4) 27 Ind. Cas. 944; 2 L. W. 206.

(5) 5 Ind. Cas 890; 23 P. R. 1910; 19 P. W. R. 1910; 63 P. L. R. 1910.

and on appeal in the lower Appellate Court will be refunded. Other costs will be costs in the cause.

Z. K. *Case remanded.*

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER No 1 OF 921.

December 9, 1921.

Present:—Justice Sir William Ayling, Kt., and Mr. Justice Venkatasubba Rao.

VARADA RAMASWAMI AND OTHERS—APPELLANTS

versus

VUMMA VENKATARATNAM—RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 47, 73, 144, 151—Attachment of moneys—Rateable distribution among decree-holders, order for—Order set aside in appeal—Restitution, application for, by the attaching decree-holder, maintainability of—Inherent power of Court to order restitution under s. 151.

Respondent obtained a decree against *M.* and in execution attached certain moneys belonging to *M.* The moneys, after realisation were rateably distributed among various decree-holders of *M.* The order for rateable distribution was, however, reversed on appeal Respondent then applied for return of the moneys rateably distributed and this was ordered:

Held, that as the contest was between rival decree-holders, the order for rateable distribution was neither a decree under section 144, Civil Procedure Code, nor an order under section 47, Civil Procedure Code, and that the order for restitution was without jurisdiction [p. 547, col. 1.]

Venkataperumal (Rajah of Karvetnagar) v. *Venkata Reddi*, 29 Ind. Cas 231; 39 M 570; 29 M. L. J. 96; (1915) M. W. N 334; 17 M L T 427, distinguished.

Balmer Lawrie & Co v. *Jadunath Banerjee*, 27 Ind. Cas. 644; 42 C. 1; 19 C W N 102, referred to.

Semble:—Whether the respondent is entitled to relief under the Court's inherent powers under section 151, Civil Procedure Code. [p. 546, col. 1.]

Appeal against an order of the Court of the Subordinate Judge, Kistna, at Ellore, dated 7th September 1920 in Appeal Suit No. 128 of 1920, preferred against an order of the Court of the District Munsif, Ellore, in Civil Miscellaneous Petition No. 3571 of 1919, in Original Suit No. 776 of 1916.

FACTS appear from the judgment.

Mr. *V. Krishna Mohan*, for the Appellants.—The order for restitution was one without jurisdiction. The lower Courts were not empowered to pass it. The order for rateable distribution was passed on contest between rival decree holders and is not a decree within section 144, Civil Procedure Code. Nor is it an order under section 47, Civil Procedure Code. The judgment-debtor did not object to the rateable distribution.

Mr. *P. Venkataramana Rao*, for the Respondent.—The order for rateable distribution may be treated as one made under section 47, Civil Procedure Code. See *Venkataperumal [Rajah of Karvetnagar]* v. *Venkata Reddi* (1).

In any event the respondent is entitled to relief alternatively under section 73 (2), Civil Procedure Code.

Section 151, Civil Procedure Code, which gives wide discretionary powers to Courts, may be invoked in respondent's favour and the order was obviously in the interests of justice.

JUDGMENT.—The respondent in this case obtained a decree against a judgment-debtor, Mothivala Usman, in Original Suit No. 776 of 1916 on the file of the Ellore District Munsif. In execution he attached certain monies belonging to the judgment-debtor. Various other decree holders, who are appellants now before us, applied for and obtained rateable distribution under section 73 of the Code of Civil Procedure. The money was distributed. On appeal the order for rateable distribution was set aside by the District Court. The respondent then applied for the return of the money which had been paid to the other decree holders and this was ordered by the District Munsif, the order being confirmed on appeal by the Subordinate Judge. The matter now comes up before us on second appeal.

The lower Courts purport to have directed the return of the money under section 144, Civil Procedure Code, though the Subordinate Judge in his judgment also refers to section 151. It is represented on behalf of the appellants that section 144 has no application to the present case on the ground that the order for rateable distribution cannot be treated as a decree within the meaning of section 144, Civil Procedure Code. Referring to the definition of *decree* in section 2 of the Code, it is clear that the order for rateable distribution can only be so treated if it is to

(1) 29 Ind. Cas. 231; 39 M. 570; 29 M. L. J. 96 (1915) M. W. N. 334; 17 M. L. T. 427.

be considered as an order under section 47. In the present case the order was passed on contest between rival decree holders. No objection to the rateable distribution was raised by the judgment debtor nor is it suggested that his interests were directly or indirectly affected.

We are referred to *Venkaraperumal [Rajah of Karvetnagar]* v. *Venkata Reddi* (1) by respondent's Vakil as showing that an order for rateable distribution may be treated as an order under section 47. But that was a case in which the order was passed on an objection raised by the judgment debtor to the effect that a particular decree-holder was not entitled to participate because he had no subsisting application for execution pending. The learned Judges are at pains to distinguish between such a case and the case where the contest was between rival decree-holders and to say that such a case as the latter was not governed by section 47, Civil Procedure Code. They refer to *Balmer Lawrie & Co.* v. *Jadu Nath Banerjee* (2) as authority to this effect. In our opinion the distinction is sound and the order for rateable distribution in this case cannot be regarded as an order under section 47 or as a decree within the purview of section 144. Viewed, therefore, as an order under section 144, the order under appeal was without jurisdiction and must be set aside.

The learned Vakil for the respondent seeks to support it with reference to the inherent powers of the Court conferred by section 151. The Subordinate Judge merely refers to these inherent powers but does not discuss them; nor does he consider whether their exercise is called for in the circumstances of this case. He further declined to consider the objection raised by the appellants to the effect that the respondent's decree was fraudulently obtained on the ground that this has nothing to do with the question of restitution (clearly meaning under section 144). It may be that the respondent is entitled to relief to be granted under the inherent powers of the Court under section 151, but whether relief should be granted under this section will have to be carefully considered. The lower Court will have to determine whether the exercise of these powers are necessary for the ends of justice, that is to say, whether this is the only legal method by which the respondent can obtain his dues; and the objection raised regarding the alleged fraudulent nature of the respondent's decree will be an objection to be legitimately considered.

In this connection, it has been suggested that section 73, clause (2) would afford respondent an alternative means of redress. This, we may remark, is not so. If the assets were not liable to be rateably distributed, clause (2) of section 73 would have no application. With these remarks we must set aside the orders of the lower Courts and direct that the petition be restored to the file of the District Munsif and disposed of according to law. Costs in this and in the lower Appellate Court will be provided in the order to be ultimately passed.

M. C. P.

Appeal allowed;
Case remanded.

(2) 27 Ind. Cas. 644; 42 C. 1; 19 C. W. N. 1202.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 132 OF 1921.
(CIVIL MISCELLANEOUS No. 303 OF 1921.)
May 20, 1922.

Present:—Mr. Justice Harrison.

ALAM DIN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

ALLAH DAD DECEASED, AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 47, O. XXXII, r. 3 (3—Execution proceedings—Minor—Guardian—Affidavit not filed—Guardian not appearing and acting for minor, effect of—Property sold in execution—Suit to set aside sale—Limitation—Limitation Act (IX of 1908), Sch. I, Arts. 12, 144.

Where in execution proceedings against the minor son of a judgment-debtor, the application for the appointment of the minor's guardian is not accompanied by an affidavit, under Order XXXII, rule 3 (3), of the Civil Procedure Code and the guardian does not appear and act at all for the minor, the latter never becomes a party to the execution proceedings; and if his property is sold in such execution proceedings and he institutes a suit to set aside the sale, the suit is governed by Article 144 and not by Article 12 of Schedule I, Limitation Act. [p. 548, col. 2; p. 549, col. 1.]

ALAM DIN v. ALLAH DAD.

Chotha Ram v. *Karmon Bai*, 44 Ind. Cas. 169; 8 P. R. 1918, *Nusrat Ali* v. *Sakina Begam*, 53 Ind. Cas. 460; 121 P. R. 1919; 78 P. L. R. 1920, *Gulzari Lal* v. *Madho Ram*, 26 A. 447; A. W. N. (1904) 61; 1 A. L. J. 65, *Munnu Lal* v. *Ghulam Abbas*, 6 Ind. Cas. 788; 32 A. 287; 12 Bom. L. R. 439; 11 C. L. J. 557; 14 C. W. N. 474; 8 M. L. T. 57; 13 O. C. 123; 20 M. L. J. 591; 37 I. A. 77 (P. C.), *Imam Din* v. *Puran Chand*, 55 Ind. Cas. 833; 1 L. 27; 84 P. L. R. 1920; 37 P. W. R. 1920, *Bhagwati* v. *Banwari Lal*, 1 Ind. Cas. 416; 31 A. 82; 6 A. L. J. 71; 5 M. L. T. 185 (F. B.), *Purno Chandra* v. *Bejoy Chand*, 18 Ind. Cas. 859; 18 C. L. J. 18; 17 C. W. N. 549 and *Hira Singh* v. *Ghulam Qadir*, 48 Ind. Cas. 399; 113 P. R. 1918, referred to.

Second appeal from a decree of the District Judge, Jhelum, dated the 23rd April 1921, reversing that of the Munsif, Second Class, Chakwal, dated the 12th July 1920.

Lala *Ram Chand Manchanda*, for the Appellant.

M. *Imam Din*, for the Respondents.

JUDGMENT.—On 29th July 1902 a decree for 24/6 and 4/2 costs was passed against one Nowab. In the course of the execution proceedings he died and his two minor sons were brought on the record as his representatives. In the 7th application for execution dated 17th December 1907, at which time the balance realisable was Rs. 16 7-0, an application was made that Allah Dad, the uncle of the minors, should be appointed their guardian and that their house should be sold. This was not accompanied by an affidavit. Notice was duly served on 31st December 1907 on Allah Dad but in spite of this he did not appear from first to last. In accordance with the application the house belonging to the minors was attached and was eventually sold. On 27th April 1908 the decree-holder was given permission to bid and he being the only bidder the house was knocked down to him on 6th August 1908 for Rs. 22 out of which, after deducting the decretal money and the costs, Rs. 1-1-9 were deposited in the Treasury and have presumably lapsed as there is nothing to show that the sum was even withdrawn by Allah Dad. This sale was confirmed on 6th October 1908 but before confirmation, the Executing Court sent notice to Allah Dad on 8th August 1908, requesting him to appear on 4th October 1908 and state whether he could not pay off this small decree without allowing the property to be sold. So far from paying any attention to this notice, on 27th May 1910, or some 18 months after the auction, he purchased the house himself from the decree holder. A suit was instituted on 12th February 1920 by the sons after attaining their majority and a decree was given by the Trial Court. The appeal to the District Judge was accepted, and the suit was dismissed on the finding that, although there was a strong presumption that the guardian had acted in collusion with the decree-holder and although it was clear that he had neglected his duty, section 47 of the Civil Procedure Code and Article 12 of the Limitation Act barred the suit. The only questions to be decided on second appeal are whether section 47 of the Civil Procedure Code applies and, if not, whether the case is governed by Article 12 or Article 144. Counsel for the appellants relies on *Chotha Ram* v. *Karmon Bai* (1) and *Nusrat Ali* v. *Sakina Begam* (2) while Counsel for the respondents quotes *Gulzari Lal* v. *Madho Ram* (3) and *Munnu Lal* v. *Ghulam Abbas* (4) and *Imam Din* v. *Puran Chand* (5), *Gulzari Lal* v. *Madho Ram* (3) has been dissented from in *Bhagwati* v. *Banwari Lal* (6) and in both *Munnu Lal* v. *Ghulam Abbas* (4) and *Imam Din* v. *Puran Chand* (5) the only point before the Court was whether the non-observance of the rule prescribing that an affidavit shall accompany the application for guardian invalidates the subsequent proceedings where the guardian has acted on behalf of the minors. Here the guardian has not acted as held by the District Judge. He has shown considerable negligence and there can be no doubt that he could have arranged to avoid the auction-sale of the house for the outstanding (amount) of the decree was Rs. 16-7-0 only. Not only did he pay no attention to the notice on 8th July 1903 and failed to appear when specifically invited to do so, but he himself purchased the property 18 months later for very

(1) 44 Ind. Cas. 169; 8 P. R. 1918.

(2) 53 Ind. Cas. 460; 121 P. R. 1919; 78 P. L. R. 1920.

(3) 26 A. 447; A. W. N. (1904) 61; 1 A. L. J. 65.

(4) 6 Ind. Cas. 788; 32 A. 287; 12 Bom. L. R. 439; 11 C. L. J. 557; 14 C. W. N. 744; 8 M. L. T. 57; 13 O. C. 123; 20 M. L. J. 591; 37 I. A. 77 (P. C.).

(5) 55 Ind. Cas. 833; 1 L. 27; 84 P. L. R. 1920; 37 P. W. R. 1920.

(6) 1 Ind. Cas. 416; 31 A. 82 (F. B.); 6 A. L. J. 71; 5 M. L. T. 185.

nearly double the price realised at the auction sale. The position being, therefore, that not only was the affidavit not put in but that no body acted for the minors or protected their interest. I think, it is clear that they never became parties and as they never became parties section 47 cannot apply.

The second point is, whether Article 12 or 144 of the Limitation Act governs the case. Counsel for the appellants refers me to *Purna Chandra* v. *Bejoy Chand* (7) and *Hira Singh* v. *Ghulam Qadir* (8) and it is very clear that where a suit is instituted by a stranger to the sale proceedings, for this is what these plaintiffs are, inasmuch as they were never validly made parties to the execution proceedings, Article 12 does not apply. The suit is brought not to set aside the sale which is merely voidable, but to have it declared that the sale in question was in its inception null and void against the plaintiffs. The suit, therefore, having been brought within 12 years is within time and on the concurrent findings of both the Courts as to the merits of the case the plaintiff must succeed. I, therefore, accept the appeal and restore the order of the Trial Court. The defendants will pay the plaintiff's costs throughout.

Appeal accepted.

S. D.

(7) 18 Ind. Cas. 859; 18 C. L. J. 18; 17 C. W. N. 549.

(8) 48 Ind. Cas. 399; 113 P. R. 1918.

OUDH JUDICIAL COMMISSIONER'S COURT.

RENT APPEAL No. 32 OF 1920.

March 9, 1921.

Present :—Pandit Kanhaiya Lal, J. C.

KUER BEHARI LAL—PLAINTIFF—APPELLANT

versus

KALKA AND OTHERS—DEFENDANTS—RESPONDENTS.

Provincial Insolvency Act (III of 1907), ss. 16, 28—Insolvent tenant—Rents due after adjudication, whether provable under the Act—Suit for recovery with leave of Insolvency Court, whether maintainable.

Where, after a tenant is adjudged insolvent, his rent falls into arrears, the arrears of rent so due stand on the same footing as a debt or liability incurred after the order of adjudication and do not constitute a debt provable under the Provincial Insolvency Act, because the obligation or liability to pay the arrears did not arise till after the adjudication was made A suit, therefore, to recover such arrears is maintainable without the leave of the Insolvency Court. [p. 550, col. 1.]

Raghubir Singh v. *Ram Chandar*, 12 Ind. Cas. 927; 34 A. 121; 8 A. L. J. 1287, referred to.

Appeal from a decree of the Additional Judge, Lucknow, dated 30th March 1920, reversing that of the Honorary Deputy Collector, Lucknow, dated 25th September 1919.

Mr. *P. C Gupta*, for the Appellant.

Mr. *Rajeshwari Prasad*, for Respondents Nos. 1, 2 and 4.

JUDGMENT.—The suit which has given rise to this appeal was filed by the plaintiff for the recovery of arrears of rent alleged to have been due by the defendants, Kalka, Chheda, Baldeo and Lal, who are the sons of Bhabhuti. Bhabhuti and Kalka were the original tenants of the land Both of them were adjudged insolvents on the 3rd February 1913. The present plaintiff was one of the creditors to whom a notice of the application for insolvency had gone. The arrears of rent now claimed were entered by Bhabhuti and Kalka in their application for adjudication. In fact they had not fallen due till then. None of the creditors proved his debts and no Receiver was appointed to take charge of the estate of the said insolvents.

The present suit relates to the arrears of rent of certain land for the period from Kharif 1323 to the end of Rabi 1326 Fasli. The defendant, Kalka, pleaded *inter alia* that no suit was maintainable against him without the leave of the Insolvency Court. That plea was disallowed by the Court of first instance but accepted by the lower Appellate Court which dismissed the suit.

Section 16 of the Provincial Insolvency Act (III of 1907), then in force, provided that on the making of an order of adjudication the whole of the property of the insolvent other than that exempted from attachment and sale in execution of a decree would vest in the Court or in a Receiver appointed to take charge of the same and that thereafter, except as provided by the Act, no creditor, to whom the insolvent was indebted in respect of any debt provable under the Act, would, during the pendency of the insolvency proceedings, have any remedy against the property or person of the insolvent in respect of the debt or commence any suit or other legal proceeding, except with the leave of the Court and on such terms as the Court might impose. Section 28 provides that, except demands in the nature of unliquidated damages arising

otherwise than by reason of a contract or breach of trust, all debts and liabilities, present or future, certain or contingent, to which the debtor is subject when he is adjudged an insolvent or to which he may become subject before his discharge by reason of any obligation incurred before the date of such adjudication, shall be deemed to be debts provable under the Act.

It is admitted that Kalka has not yet obtained his discharge. The question for consideration is, whether the arrears of rent claimed for the period subsequent to the order of adjudication can be deemed to be debts provable under the Act or, in other words, whether the obligation to pay those rents arose before the date of the adjudication or after such date. The obligation to pay rent is distinguishable from the obligation to pay the arrears of rent claimed. The arrears arose after the date of adjudication. The liability to rent was based on the previous contract of tenancy; but the obligation or liability to pay the arrears did not arise till after the adjudication was made. The arrears of rent so due stand on the same footing as a debt or liability incurred after the order of adjudication or the rates or taxes or wages or salaries of servants which become payable thereafter. Section 29 provides that the creditor may prove for a debt existing at the time the adjudication is made not payable till some time afterwards as if it were payable presently. Section 43 specifies cases in which priority is to be given in the distribution of the property of the insolvent and, among other cases, mentions all debts due to the Crown or to any local authority; and all salaries or wages, not exceeding twenty rupees in all, of any clerk, servant or labourer for services rendered to the insolvent during four months before the date of the presentation of the petition.

If the Court or the Receiver takes charge of the tenancy of the insolvent and superintends the cultivation of the land included in that tenancy, the rent due on account of the land would be a charge on the produce of the land and the Receiver will be liable to pay those rents before appropriating the produce and distributing it among the scheduled creditors. If the Court or the Receiver does not take charge of the cultivation and leaves the insolvent to look after the cultivation himself, it might still be open to him to take possession of the crop, provided an arrangement is made for the payment of the rent due in respect of the same and such allowance is given for the support of the insolvent and his family as might be considered necessary. The rents which fall due after the making of the order of adjudication cannot in any event be treated as debts existing on the date of the making of such an order because the liability does not arise till some time afterwards. It is not a liability directly arising from the previous obligation and section 28, therefore, does not apply.

It is further argued that the plaintiff is not competent to commence the suit for such arrears of rent against the insolvent without the leave of the Court which passed the order of insolvency. But the suit does not relate to a debt provable under the Act because the obligation to pay the rent arose subsequently. In *Raghubir Singh* v. *Ram Chandar* (1) the question whether a suit would lie for arrears of rent against an insolvent after he had been adjudicated as such was not raised or considered.

The appeal is, therefore allowed and the case remanded to the lower Appellate Court with a direction to re-admit the appeal under its original number and to dispose of it after determining the other points involved therein in the manner required by law. The costs here and hitherto will abide the event.

W. C. A. *Appeal allowed.*

(1) 12 Ind Cas 927; 34 A. 121; 8 A. L. J. 1287.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No 153 OF 1921.

June 16, 1922.

Present:—Mr Justice Coutts and Mr. Justice Adami.

Musammat SURAJ JOTE KUER *alias Bibi* ASHRAFUNNISSA—DEFENDANT No. 1—APPELLANT

versus

Musammat ATTAR KUMARI—PLAINTIFF—RESPONDENT

Hindu Law—Dayanandis, whether Hindus—Hindu widow—Conversion—Re-marriage—Forfeiture of life-estate—Hindu Widows' Re-marriage Act (XV of 1856), s. 2, whether includes Hindu widows after conversion.

A Dayanandi, that is to say, a follower of Pandit Dayanand Saraswati, the founder of the Arya Samaj, is a Hindu. [p 554, col. 1]

Bhagwan Koer v. *Bose*, 31 C. 11; 30 I. A 249; 7 C. W. N. 895; 5 Bom. L. R. 845; 13 M. L. J. 381; 34 P.

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R. 1903; 135 P. L. R. 1903: 8 Sar. P. C. J. 543 (P. C.), referred to.

A Hindu widow after conversion and subsequent re-marriage forfeits her rights to her husband's property [p. 5[illegible], col. .]

Matungini Gupta v. *Ram Rutton Roy*, 19 C. 289; 9 Ind. Dec. (N. S.) 6[illegible]8 (F. B.), *Murugayi* v. *Viramapali*, [illegible] M. 296; 1 Ind. Jur. 234; 1 Ind. Dec. (N. S.) 149, *Vitta Tayaramma* v. *Chatakondu Sivayya*, [illegible] Ind. Cas. 50; 41 M. 1078; 35 M. L. J. 3[illegible]7; 24 M. L. T. 1[illegible]3; (1918) M. W. N. 625; 8 L. W. 480 (F. B.), *Mohamad Umar* v. *Man Koer*, 40 Ind. Cas. 783; 21 C. W. N. 906, *Rasul Jehan Begum* v. *Ram Surun Singh*, 23 C. 589; 11 Ind. Dec. (N. S.) 892, *Gouri Churn Patni* v. *Sita Patni*, 5 Ind. Cas. 710; 14 C. W. N. 846 and *Nityа Madhav Das* v. *Srinath Chandra Chuckerbutty*, 8 C. L. J. 54[illegible], followed.

Abdul Aziz Khan v. *Nirma*, 2[illegible] Ind. Cas. 835; 35 A. 4[illegible]6; 11 A. L. J. 678, *Har Saran Das* v. *Nandi*, 11 A. 330; A. W. N. (1889) 77; 6 Ind. Dec. (N. S.) 638, *Gajadhar* v. *Kaunsilla*, [illegible] Ind. Cas. 76[illegible]; 31 A. 16[illegible]; 6 A. L. J. 107 and *Mula* v. *Partab*, 6 Ind. Cas. 116; 32 A. 489; 7 A. L. J. 417, disapproved.

Section 2 of the Hindu Widows' Re-marriage Act (XV of [illegible]56 includes all persons who being Hindus become widows [p. 55[illegible], col. 2.]

The Hindu Widows' Re-marriage Act applies even to those sects of Hindus, in which widow re-marriage is recognised. The Act validates the marriage of a Hindu widow and still deprives her of her property. [p. 55[illegible], col. 1.]

Even in the case of those classes of Hindus amongst whom widow re-marriage is recognised, a widow would lose her rights to her husband's property, unless it is established affirmatively, that by custom the recongition of re-marriage carries with it the right to retain the deceased husband's estate [p. 5[illegible]3, col. .]

Har Saran Das v. *Nandi*, 11 A. 330; A. W. N. (1889) 77; 6 Ind. Dec. (N. S.) 638, *Gajadhar* v. *Kaunsilla*, 1 Ind. Cas. 761; 31 A. 161; 6 A. L. J. 107 and *Mula* v. *Partab*, 6 Ind. Cas. 116; 32 A. 489; 7 A. L. J. 417, not followed.

A Hindu widow's right to succession is based on the ground that she is half of the body of her deceased husband and that she is capable of conferring spiritual benefits on him. When she re-marries she ceases to be half of the body of her late husband or to be able to confer spiritual benefits on him and she becomes the wife and half of the body of her new husband. The reason, therefore, for her keeping the estate of her deceased husband disappears [p. 55[illegible], col. 2.]

Appeal from a decision of the Subordinate Judge, Darbhanga.

Mr. *Hasan Jan*, for the Appellant.

Messrs. *Sunil Madhab Mullick* and *Naresh Chandra Sinha*, for the Respondent.

JUDGMENT.

COURTS, J.—This was a suit for declaration of title to and confirmation of possession of an eight-anna share in Tauzi Nos. 1300, 1516 and 1519 and a two anna-share in Tauzi No. 1303 in Mauza Usthua.

The facts are not disputed and are shortly as follows: The defendant No. 1, *Musammat* Suraj Jote Kuer, was the wife of Ramdhari Prasad, son of the plaintiff, *Musammat* Attar Kumari. After the death of Ramdhari Prasad, the defendant No. 1 left her husband's house and went to live in the house of defendant No. 2, Muhammad Yasin, a Muhammadan whose mistress she became. Subsequently, she was converted to Muhammadanism and was married to Muhammad Yasin. She, however, still retained the estate of her deceased husband and this suit by her mother in-law was instituted to recover the estate on the ground that having re-married she had lost all her rights in her deceased husband's property. During the lifetime of her husband both he and defendant No. 1 were Dayanandis, that is to say, followers of Pandit Dayanand Saraswati, founder of the Arya Samaj, and the questions which have arisen in this case are whether a Dayanandi is a Hindu, if so, whether a Hindu widow belonging to this sect forfeits her rights to her husband's property on re-marriage, and whether a Hindu widow after conversion and subsequent re-marriage forfeits her rights to her husband's property. It has been decided by both the Courts below that a Dayanandi is a Hindu and that, in accordance with the Hindu Law, the widow of a Dayanandi after conversion and re-marriage loses her rights to her husband's property. The suit has accordingly been decreed and against this decision defendant No. 1 has appealed.

The questions that arise in this second appeal are the questions I have indicated above and I shall first deal with the question of whether a Hindu widow after conversion and subsequent re-marriage forfeits her rights to her husband's property.

So far as this Court is concerned, the matter is one of first impression but the question has arisen directly in the High Courts of Calcutta, Madras, Bombay and Allahabad. The decisions in Calcutta, Madras and Bombay are unanimously to the effect that in such a case a Hindu widow loses her property, whereas the Allahabad High Court has taken a directly contrary view and it is contended by the learned Vakil for the appellant that it is the Allahabad view which is correct and the view which we ought to follow. The argument of the learned Vakil for the appellant is based on the interpretation which has

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been placed on section 2 of the Hindu Widows' Re-marriage Act, (Act XV of 1856) by the Allahabad High Court. The Hindu Widows' Re-marriage Act, it is argued, deals with the case of Hindu widows who had up to that time been held to be incapable of contracting a valid marriage; by that enactment such marriages were legalised and the issue of such marriages was legitimatized, but the old Hindu rule of law was retained that on re-marriage the widow lost her rights to her deceased husband's property, for section 2 of the Act enacts that "all rights and interests which any widow may have in her deceased husband's property by way of maintenance shall upon her re marriage cease and it shall be determined as if she had then died." It is contended that "widow" in this section can only mean "Hindu widow" so that if a Hindu widow changes her religion and becomes a Muhammadan she is no longer a Hindu widow and if she re marries section 2 of the Act does not apply and she does not lose her husband's estate. This is the view which, as I have already said, has been adopted consistently in the Allahabad High Court and I need only refer to the last case on the point *Abdul Aziz Khan* v. *Nirma* (1) which followed the previous decision of that Court. I may mention in this connection, however, that at least one of the learned Judges who was a party to that decision in another case, expressed a doubt as to the correctness of this view but did not dissent because of the long course of decisions in that Court. The Calcutta High Court has taken an entirely different view which has been expressed in the judgment of the majority in the Full Bench case of *Matungini Gupta* v. *Ram Rutton Roy* (2). In that case, on an interpretation of section 2 of the Act, four of the learned Judges who decided that case held that it includes all widows who are within the scope of the Act, that is to say, all persons who being Hindus become widows, and they say that it must follow from this that if any such widow marries she is deprived of the estate which she inherited from her Hindu husband. Prinsep, J., recorded a dissenting judgment being unable to adopt this interpretation of the section and his view was the same as that which has been adopted in Allahabad In Madras and in Bombay, so far as the interpretation of the Act is concerned, there has been a difference of opinion amongst the learned Judges. The wording of the section is curious and it certainly lends itself to the interpretation which has been put upon it by the Allahabad High Court and by the learned Judges who have adopted the same view, but the reasoning of the majority of the Full Bench of the Calcutta High Court appears to me to be correct and, in my opinion, section 2 of the Act includes all persons who being Hindus become widows and that any such widow if she re-marries loses the estate which she inherited from her deceased Hindu husband. On the interpretation of the Statute alone, therefore, in my opinion, a Hindu widow who becomes a Muhammadan and re marries, loses her right to her husband's property. But even if this interpretation be wrong it is not sufficient to say that if the Act does not apply a Hindu widow who changes her religion and re-marries retains her deceased husband's estate. In such circumstances we are relegated in coming to a decision to the general rule of Hindu Law and in regard to this I think there can be no doubt.

A widow's right to succession is based on the ground that she is half of the body of her deceased husband and that she is capable of conferring spiritual benefits on him. When she re marries she ceases to be half of the body of her late husband or to be able to confer spiritual benefits on him and she becomes the wife and half of the body of her new husband. The reason, therefore, for her keeping the estate of her deceased husband disappears. Formerly, by changing her religion a widow lost her estate but since Act XXI of 1850 this is not so. Although, however, she does not lose her estate by a change of religion, it seems clear that she must lose it by re marriage when the whole reason for holding the estate disappears. Moreover, ordinarily, both under the Hindu Law and by the enactment, a Hindu widow on re-marriage loses her estate. If, however, the contention of the learned Vakil for the appellant were correct, by doing another act which is repugnant to Hindu ideas, namely, by becoming a Muhammadan, she would save her estate. It is difficult to conceive that this could be a correct view of the Hindu Law.

Looked at from another point of view, the

(1) 20 Ind. Cas. 335 35 A. 466, 11 A. L. J. 678.
(2) 19 C. 289; 9 Ind. Dec. (N. S.) 638 (F. B.).

contention is equally difficult to accept. The estate which a Hindu widow has, she has from her deceased husband and it is distinctly limited in character, one limitation being that she loses it if she re-marries. She cannot get a larger estate than she got from her husband, yet it is suggested that by changing her religion she does in fact enlarge her estate inasmuch as she can continue to hold it on re-marriage. I am unable to accept this contention and in support of the view I have taken I would refer to the decisions of Wilson, J., and Banerji, J., in the Full Bench decision in the case of *Matungini Gupta* v. *Ram Rutton Roy* (2). This view has been accepted in the later cases of the Calcutta High Court. The question has never been considered from the point of view of the general Hindu Law in the Allahabad High Court, but the view I have expressed has been generally accepted in Madras and Bombay. In all the Courts then in which the matter has been considered from the standpoint of the general rule of Hindu Law it has been held that a Hindu widow after conversion and subsequent re-marriage forfeits her rights to her husband's property and this is, in my opinion, the correct view of the law.

It is next contended that, even if this be so, if a Hindu widow belongs to a sect such as the Arya Samaj in which widow re-marriage is allowed she does not forfeit her rights to her husband's property on re-marriage. It is, in the first place, urged that this cannot be so because it would be anomalous for any sect to approve of widow re-marriage and at the same time to deprive the widow who re-marries of her estate. The fact of an apparent anomaly, however, will not establish the correctness of the contention put forward and I may remark that this is exactly the position created by the Hindu Widows' Re-marriage Act. The marriage of Hindu widow has been validated but she is still deprived of her property. It is next urged that the Hindu Widows' Re-marriage Act does not apply to sects of Hindus in which widow re-marriage is recognised and that consequently section 2 of the Act does not apply. I am not prepared to accept this proposition, but even accepting it, the question remains: "What rule does apply" and here again we are thrown back on the general rule of Hindu Law which I have discussed above. It may be that certain classes of Hindus recognise widow re-marriage either by custom or as a tenet of their sect, but even where this is so it would be necessary to establish affirmatively that this recognition carries with it the right to retain the deceased husband's estate, for to do so is against both the general rule of the Hindu Law and against the provisions of the Statute. I doubt whether in the case of any class amongst whom widow re-marriage is recognised it has been established that this carries with it the right to retain the deceased husband's estate but certainly in this case it has not been proved. In support of the contention of the learned Vakil for the appellant we have been referred to the rulings in the cases of *Har Saran Das* v. *Nandi* (3), *Gajadhar* v. *Kaunsilla* (4) and *Mula* v. *Partab* (5). There is no doubt that in the Allahabad High Court the view contended for by the learned Vakil for the appellants has been generally accepted, but in none of these cases has the general principle of Hindu Law been considered. It has merely been said that because section 2 of the Act does not apply, therefore, where widow re-marriage is recognised, the widow does not lose her husband's property, but with due respect to the learned Judges who decided these cases this does not dispose of the matter. If the Act does not apply we must fall back on the general rule of the Hindu Law, and this is that a widow loses her property on re-marriage. This is the view which has been taken in the other High Courts and I would refer to the decisions in the cases of *Murugayi* v. *Viramapali* (6), which has been followed in a series of cases ending with the case of *Vitta Tayaramma* v. *Chatakondu Sivayya* (7), *Mohamad Umar* v. *Man Koer* (8), *Kasul Jehan Begum* v. *Ram Surum Singh* (9), *Gouri Churn Patni* v. *Sita Patni* (10), and *Nityu Madhav Das* v. *Srinath Chandra Chuckerbutty* (11).

(3) 11 A. 330; A. W. N. (1889) 77; 6 Ind. Dec. (N. S.) 638.

(4) 1 Ind. Cas. 761; 31 A. 161; 6 A. L. J. 107.

(5) 6 Ind. Cas. 1 6; 32 A. 489; A L. J. 417.

(6) 1 M 226; 1 Ind. Jur. 234; 1 Ind. Dec. (N. S.) 149.

(7) 48 Ind Cas. 50; 41 M. 1078; 35 M. L. J. 317; 24 M. L. T. 18; (1918) M. W. N 625; 8 L. W. 48 (F. B.).

(8) 40 Ind Cas 783; 21 C. W. N. 906.

(9) 22 C. 589; 11 Ind. Dec. (N. S.) 392.

(10) 5 Ind. Cas. 710; 14 C. W. N. 43.

(11) 8 C. L. J. 542.

SHEO LAIQ SINGH v. AUSAN SINGH.

The last contention is that a Dayanandi is not a Hindu. It is somewhat difficult to define the term Hindu and there are several castes and sects who, although nonconformists, are still classed as Hindus. I can find no decision on the question of whether Dayanandis are Hindus. The sect which approaches most nearly to the Dayanandis, however, are the Brahmos, and in the case of *Bhagwan Koer* v. *Bose* (12) in which their Lordships of the Privy Council discussed this question of whether Brahmos are Hindus or not they have said: "The learned Judges of the Chief Court examined the literature bearing upon the Brahmo society; they had before them much important evidence with reference to the Brahmos and the relation of their principles and their organisation to the Hindu system; and they came to the conclusion that a Sikh or Hindu by becoming a Brahmo did not necessarily cease to belong to the community in which he was born." We may, therefore, now take it as settled law that Brahmos are Hindus. Their creed is directed against caste and idolatory and the object of the founder, Raja Rammohan Roy, was to found a pure monotheistic religion. The sect of Dayanandis was founded by Pandit Dayanand Saraswati and it is now known as the Arya Samaj and it too is directed against caste and idolatory but they follow the Vedas; and as Dr. Gour in his Hindu Code has said: "If the Brahmos are Hindus the Arya Samajists are more so because though professing to be monothesists they believe in the spremacy of the Vedas" (Gour's Hindu Code, 1919, page 182, paragraph 300). In my opinion there can be no doubt that the Dayanandis are Hindus. This being so the defendant No. 1 in this case was a Hindu, she continued to be a Hindu up till the time she adopted the Muhammadan religion and for the reasons I have given she has forfeited her right to her husband's estate on her re marriage.

The suit has, therefore, been rightly decreed in both the Courts below and I would dismiss this appeal with costs.

ADAMI, J.—I agree.

S. D.

Appeal dismissed.

(12) 31 C. 11; 30 I. A. 249, 7 C. W. N. 895; 5 Bom. L. R. 845; 13 M. L. J. 381; 84 P. R. 1903; 135 P. L. R. 1905; 8 Sar. P. C. J. 543 (P. C.).

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No 338 OF 1921.

December 2, 1921.

Present:—Mr. Lyle, A. J. C.

SHEO LAIQ SINGH—DEFENDANT No. 1—APPELLANT

versus

AUSAN SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS

Civil Procedure Code (Act V of 1908), O III, r 5—Pleader's duties and responsibilities—His appointment, determination of—Notice to Pleader, notice to client.

When a Pleader accepts a brief, it is his duty to attend to his client's interest throughout the proceedings in the case unless his appointment be determined with the leave of the Court by a writing signed by him or his client and filed in Court

In an appeal filed by a Pleader, a notice of the date fixed for hearing was served on him On that notice, the Pleader made the following entry, "The appellant should be informed He has his papers with him and has not left his address with me." On the date of hearing no body put in an appearance:

Held, rejecting the appeal, that the appellant must be deemed to have had notice of the date fixed for hearing

Appeal from a decree of the Officiating Subordinate Judge, Unao, dated the 27th July 1921, modifying a decree of the Munsif, Purwa, dated the 28 h January 1921.

JUDGMENT.—No one appears in support of this appeal. The appeal was filed by Mr. Makhan Lal Misra, a Pleader of this Court, and notice of the date fixed for hearing was served on him. On that notice he has written as follows:—"The appellant should be informed. He has his papers with him and has not left his address with me." This is an extraordinary statement to be made by a Pleader. When a Pleader accepts a brief it is his duty to attend to his client's interest throughout the proceedings in the case unless his appointment be determined with the leave of the Court by a writing signed by him or his client and filed in Court. Rule 5 of Order III of the First Schedule of the Civil Procedure Code provides that any process served on the Pleader of any party shall be presumed to be duly communicated and made known to the party whom the Pleader represents and, unless the Court otherwise directs, shall be as effectual for all purposes as if the same had been given to or served on the party in person. As no appearance has been made, though the appellant has had

notice of the date fixed, the appeal must be and it hereby is rejected.

N. H.

Appeal dismissed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No 135 OF 1918.
December 17, 1921.
Present:—Mr. Justice Chevis and Mr. Justice Campbell.

DHANNUN AND ANOTHER, MINORS, THROUGH *Musammat* RALLI THEIR GRANDMOTHER —PLAINTIFFS—APPELLANTS

versus

Musammat BHAGWANI—DEFENDANT—RESPONDENT.

Custom—Proof Gift—Re-marriage of widow in donee's line—Collaterals of donor, rights of.

Custom must be proved by evidence and Courts cannot deduce the existence of one custom from that of another. It is not the function of a Court to say what a custom ought to be, its duty is confined to enforcing such customs as are shown to exist. [p. 556, col 1.]

The existence of a custom enabling the descendants of a donor to deprive the widow of the last male holder of the donee's family of her life-estate on her re-marriage cannot be presumed by analogy. A person relying upon such a custom must prove it. [p. 556, col 2.]

The heirs of a donor may succeed eventually to an estate gifted by their predecessor, but their position is not necessarily the same as that of the heirs to an estate which has descended by succession from a common ancestor. The latter are members of the family of the deceased male holder, the former may not be. [p. 556, cols 1 & 2.]

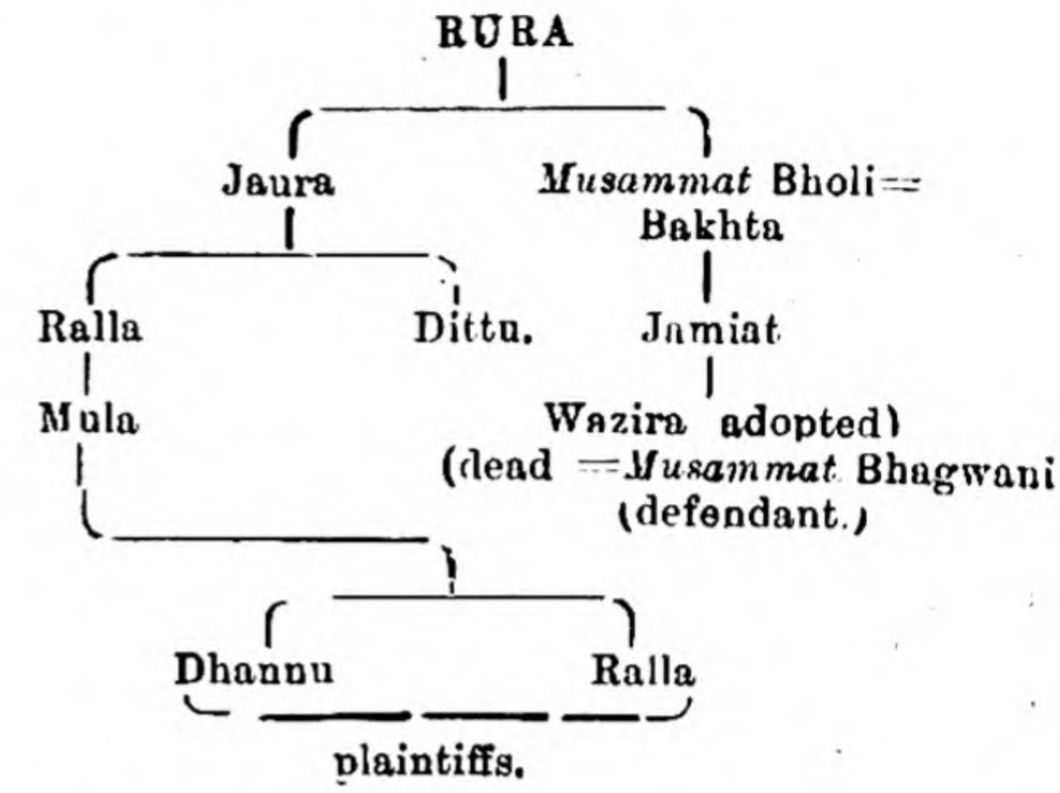
The re-marriage of a widow means something more to the members of the family than to strangers Such a marriage might seem to the late husband's family equivalent to misconduct while by a donor's descendants it might only be regarded as an excuse for getting possession of the land. [p. 556, col. 2.]

Second appeal from a decree of the District Judge, Hoshiarpur, dated the 20th October 1917, affirming that of the Munsif, First Class, Garh Shankar, District Hoshiarpur, dated the 16th March 1916.

Lala *Fakir Chand*, for the Appellants.

Mr. *N. C. Pandit*, for the Respondent.

JUDGMENT.—The following pedigree table is necessary for the understanding of this appeal:—



The land in suit was gifted by Jaura either to *Musammat* Bholi or to her son Jamiat. It is contended that the statement in the lower Appellate Court's judgment that Jamiat was the donee is incorrect, but the point is not material for our present purpose. Jamiat in any case held the land and on his death it went to Wazira, his adopted son, and after Wazira's death to his widow *Musammat* Bhagwani. The plaintiffs sued for possession on the ground that *Musammat* Bhagwani by re-marriage had forfeited her rights in the estate, and that they as descendants of Jamiat, the donor, were entitled to succeed to it on the extinction of the line of the donee. No claim has been made by the plaintiffs on the ground of their relationship to Jamiat.

The First Court dismissed the suit and after a remand the order was upheld on appeal by the District Judge. The plaintiffs have preferred a second appeal with a certificate on the question of custom, whether, if the widow of the last owner in the line of a donee remarries, the land reverts to the donor's line in the presence of daughters of the original donee.

Jamiat apparently had left daughters but *Musammat* Bhagwani was the only defendant and she did not in her plea contest the suit on the ground that these daughters were in existence She denied that the property belonged to Jaura and denied her own re-marriage or unchastity. The question

whether the line of the donee was altogether extinct, was put in issue by the learned District Judge, for the first time, when he ordered the remand.

Before considering the effect, if any, of the existence of these daughters it is necessary to determine the question whether the re-marriage of *Musammat* Bhagwani would entail reversion of the estate to the family of the original donor if there were no other representative of the descendants of the donee. The gift by Jaura has been held to be a fact, and the learned District Judge has also held that the tie between *Musammat* Bhagwani and a man named Maya, with whom she is held proved to be living, amounts to a marriage.

Counsel for the appellants has been unable to point to a single instance of the widow of the last descendant of a donee losing her estate to the descendants of the donor by re-marriage. He has asked us, however, to hold that this is the custom by inference from the following general rules of the Customary Law: –

(1) when an owner of land dies without issue his widow succeeds to his estate;

(2) this custom, at any rate in the case of Hindu tribes, is derived from the widow's right to maintenance from the estate;

(3) the widow holds a life-estate with strictly limited powers of alienation in the presence of near agnatic heirs of her deceased husband;

(4) on her re-marriage she loses her life-estate in favour of those agnatic heirs;

(5) on the extinction of the line of descendants of a donee the land gifted reverts to the male descendants of the original donor.

It is also argued that the descendants of the donor would have the same right to contest alienations by a widow of gifted property as would be possessed in regard to other property by her husband's agnates, if there were any, and that, therefore, the rule of reversion on re-marriage must be taken to be the same.

Custom, however, must be proved by evidence and Courts cannot deduce the existence of one custom from that of another. It is not the function of a Court to say what a custom ought to be, its duty is confined to enforcing such customs as are shown to exist. The heirs of a donor may succeed eventually to an estate gifted by their predecessor, but their position is not necessarily the same as that of the heirs to an estate which has descended by succession from a common ancestor. The latter are members of the family of the deceased male holder, the former may not be. The re marriage of a widow means something more to the members of the family than to strangers. Such a marriage might seem to the late husband's family equivalent to misconduct while by a donor's descendants it might only be regarded as an excuse for getting possession of the land. In any case, we are not prepared to say without positive proof that there is a custom applicable to the parties now before us enabling the descendants of a donor to deprive the widow of the last male holder of the donee's family of her life-estate when she re-marries.

It is, therefore, unnecessary to consider other points which might arise, such as the position of Jamiat's daughters and the agnates of Wazira, *Musammat* Bhagwani's first husband, who himself was an adopted son of or donee from Jamiat.

The appeal fails and is dismissed with costs.

Z. K.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 31 OF 1921.

December 23, 1921.

Present:—Pandit Kanhaiya Lal, J. C. and Mr. Lyle, A. J. C.

MUHAMMAD YAQUB KHAN—DEFENDANT—APPELLANT

versus

MUHAMMAD SHAHID ALI KHAN—PLAINTIFF—RESPONDENT.

Oudh Estates Act (I of 1869), s. 2—Will, requirements of Family agreement embodying testamentary instructions—Family agreement, binding nature of—Construction of document—Document to be interpreted as a whole—Interpretation to be consistent.

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A Will as defined by section 2 of the Oudh Estates Act is a legal declaration of his intentions by a testator with respect to his estate which he desires to be carried into effect after his death. It has to be in writing and registered in the manner required by law. It need not be in any particular form. It must contain a declaration by the testator of his intention regarding the devolution of his estate after his death. [p. 558, col. 1]

In all cases the primary duty of a Court is to ascertain the true intention of the testator from an examination of the entire Will. The Court is in fact entitled to put itself into the testator's chair and say what, having regard to the language used in the different clauses when read together, his intention was. [p. 559, col. 2.]

If a consistent interpretation can be placed on all the clauses of a document it should be adopted in preference to any other which might lead to inconsistent results. [p 559, col. 2.]

A family settlement is binding on the parties thereto because the object of such settlement is the reconciliation of existing differences and the avoidance of future disputes [p. 561, col. 1.]

Khunni Lal v. *Gobind Krishna Narain*, 10 Ind. Cas. 477; 33 A. 356; 15 C. W. N. 545; 8 A. L. J. 552; 13 C. L. J. 575; 13 Bom. L. R. 427; 10 M. L. T. 25; (1911) 1 M. W. N. 432; 21 M. L. J. 645; 38 I. A. 87 (P. C.) and *Gandharp Singh* v. *Nirmal Singh*, 54 Ind. Cas. 325; 22 O. C. 300; 6 O. L. J. 529, referred to

Three brothers *K.*, *M.* and *A* entered into a family agreement which recorded that they would have no power to make a gift or Will of their properties in favour of any person other than their children and wives of equal status, (*aulad wa azwaj najib-ut-tarfain*), that after they died their *najib-ut-tarfain* children and widows would be their heirs and representatives and that children and widows as were not *najib-ut-tarfain* would be entitled only to maintenance. But that if any of them died without *najib-ut-tarfain* issue, then their issue who were not *najib-ut-tarfain* would inherit. This agreement was duly signed and registered *A.* died childless and the question was whether the above agreement constituted a Will on the part of *A.* whether it was binding on all the brothers and if so what interest in *A.*'s property was taken by his *najib-ut-tarfain* widow:

Held, (1) that the agreement constituted a valid Will on the part of *A.* as it satisfied all the requirements of a Will under section 2 of the Oudh Estates Act to which the parties were subject; [p 560, col. 1.]

Hurpershad v. *Sheo Dyal*, 3 I. A. 259 at p. 276; 26 W. R. 55; 3 Sar. P. C. J. 611; Bald. 25; 3 Suth. P. C. J. 304; Rafique & Jackson's P. C. No 41 (P. C.), *Haidar Ali* v. *Tasudduk Rasul Khan*, 18 C. 1; 7 I. A. 82; 5 Sar. P. C. J. 529; 9 Ind Dec. (N. S.) 1 (P. C.), *Balraj Kuar* v. *Mahadeo Pal Singh*, 44 Ind. Cas. 59; 20 O. C. 360; 4 O. L. J. 589, *Kalian Singh* v. *Sanwal Singh*, 7 A. 163; A. W. N. (1884) 337; 4 Ind. Dec (N. S.) 378 and *Mathura Das* v *Bhikkan Mal*, 19 A 6; A. W. N. (1896) 171; 9 Ind. Dec (N. S.) 11, referred to.

(2) that by the family agreement all the brothers relinquished their rights of succession to each other which they had under the Oudh Estates Act and that the agreement was binding on them as well as on all persons claiming through them; [p. 560, col. 2.]

(3) that under the Will of *A.* his widow succeeded to his property absolutely with full power to bequeath it to any person she liked, [p. 559, col. 2.]

Appeal from a decree of the Subordinate Judge, Rae Bareli, dated the 8th March 1921.

Mr. *Niamat Ullah*, for the Appellant.

Mr. *M. Wasim*, for the Respondent.

JUDGMENT.—The dispute in this case relates to a 6-pies share of an estate comprising a 4-annas share out of 17 villages, forming the Pahreman estate. The estate is entered at No. 197 of List I and No. 67 of List III appended to Act I of 1869. Karam Ali Khan held a 4-annas share in the said estate. He had three brothers, Ahad Ali Khan, Muzaffar Ali Khan and Raza Ali Khan. Raza Ali Khan died leaving a widow, *Musammat* Umrao Bibi. There were apparently some disputes between Karam Ali Khan and his brothers about the estate. On the 25th February 1884 Karam Ali Khan, Ahad Ali Khan and Muzaffar Ali Khan executed an agreement under which it was arranged that the 4-annas share held by Karam Ali Khan in the estate should be divided into 5 equal parts of 9 pies 12 *kirants* each, one part going to each of the three brothers, one part to their mother, *Musammat* Munni Bibi, who was then alive, for her life with reversion on her death in favour of her sons and the fifth part to *Musammat* Umrao Bibi, the widow of Raza Ali Khan, with a power to devise the same in writing in favour of any one of the three surviving brothers of her husband whom she might choose. Out of the 9 pies 12 *kirants* allotted to Ahad Ali Khan, 3 pies 4 *kirants* were given to his wife, *Musammat* Hashmat Bibi, for her life with reversion to Ahad Ali Khan and his personal heirs (*waris zati*). *Musammat* Munni Bibi died in 1890 and in accordance with the agreement her share was equally divided among her three surviving sons. Ahad Ali Khan thus became the owner of a 9 pies 12 *kirants* share and Karam Ali Khan and Muzaffar Ali Khan became the owners of a 12-pies 16 *kirants* share each. Muzaffar Ali Khan died in 1895 and his share devolved on his two surviving brothers, Karam Ali Khan and Ahad Ali Khan. The share of Ahad Ali Khan thus amounted to 16 pies.

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Ahad Ali Khan sold his entire share in 5 villages. He also gave his share in a sixth village to his wife, *Musammat* Bandi Jan. He had thus a 16 pies share left in 11 villages. He died on the 4th April 1911 leaving two widows, *Musammat* Hashmat Bibi and *Musammat* Bandi Jan, surviving him. *Musammat* Hashmat Bibi was an *ahle biradri* wife. *Musammat* Bandi Jan is said to have been a prostitute whom he had married. On his death mutation of names was effected in respect of the said 16-pies share in favour of his two widows in equal shares. *Musammat* Hashmat Bibi subsequently transferred her original 3 pies 4-*kirants* share in 17 villages along with her two pies out of the 8-pies share in 11 villages to her sister's son, Mustafa Khan, keeping only a 6-pies share in the 11 villages to herself.

Musammat Hashmat Bibi died on the 25th October 1919. On her death the defendant-appellant, her brother's son, who was her heir under the Muhammadan Law, obtained possession of the said 6 pies share and got mutation of names effected in his favour. The plaintiff respondent is the son of a daughter of Karam Ali Khan. He bases his claim to that share on a Will executed by Karam Ali Khan on the 12th September 1918. His contention is that Karam Ali Khan succeeded to the entire property left by Ahad Ali Khan under section 22 of Act I of 1869 in preference to *Musammat* Hashmat Bibi, his widow. The defendant-appellant, however, contends that by virtue of clause 11 of the agreement of the 25th February 1884 *Musammat* Hashmat Bibi became entitled to the entire property left by Ahad Ali Khan on his death and that Karam Ali Khan was excluded from inheritance and had in any event no title to the property in question.

The learned Subordinate Judge found that clause 11 of the agreement of the 25th February 1884 operated as a testamentary disposition by Ahad Ali Khan of his share in favour of his wife, *Musammat* Hashmat Bibi, but notwithstanding that finding he decreed the claim on the ground that by virtue of that disposition she was not entitled to anything more than a life interest and that Karam Ali Khan had a vested interest therein, which devolved on his death on the plaintiff-respondent. The defendant appeals.

The first question for consideration is whether clause 11 of the agreement of the 25th February 1884 operated as a testamentary disposition by Ahad Ali Khan in favour of his wife, *Musammat* Hashmat Bibi, giving her an absolute estate in the property left by him at the time of his death. It appears that after the agreement of the 25th February 1884 an attempt was made by Karam Ali Khan to resile from it, but a suit was filed by Ahad Ali Khan for recovery of possession of the property awarded to him, which was decreed on the 18th August 1884 (Exhibit A-1). In that suit it was held that the agreement was binding and enforceable. Paragraph 2 of the agreement described the manner in which the 4 annas share of the estate was to be divided and mentioned the limited rights which *Musammat* Munni Bibi, the mother of the executants, and *Musammat* Umrao Bibi, the widow of Raza Ali Khan, and *Musammat* Hashmat Bibi, the wife of Ahad Ali Khan, were to possess in the shares respectively allotted to them. Paragraph 5 stated that Karam Ali Khan and his brothers, who were parties to the agreement, would have no power to make a gift or Will in favour of any person other than their children and widows of equal status (*aulad wa azwaj najib ut tarfain*) but they would not be debarred from alienating their personal shares by sale or mortgage in case of necessity. Paragraph 10 described the manner in which the *lambardari* of the 4-annas share of the estate was to devolve. Paragraph 11 stated that after them their *najib-ut-tarfain* children and wives (*aulad wa azwaj*) shall be their heirs and representatives in respect of their shares and such of their children and wives, as were not *najib-ut-tarfain* would only be entitled to maintenance as against the *najib-ut tarfain* ones, and that if any co sharer was devoid of *najib-ut-tarfain* issues then those who were not *najib-ul-tarfain* would be entitled to get his share. The decision of the appeal turns on the construction to be placed on the last clause in the light afforded by the language used in that clause and the other parts of the agreement.

It is not disputed that Ahad Ali Khan was the next younger borther of Karam Ali Khan and that in respect of the share assigned to him by the agreement he was governed by section 22 of Act I of 1869. If there was no testamentary disposition by Ahad Ali Khan and no family arrangement

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binding on Karam Ali Khan excluding him from inheritance in the presence of *Musammat* Hashmat Bibi, the widow of the former, Karam Ali Khan would have been entitled to the share left by Ahad Ali Khan at the time of his death under section 22, clause (6), read with section 14 of the Act. A Will is defined by section 2 of that Act as a legal declaration of his intentions by a testator with respect to his estate, which he desires to be carried into effect after his death. It has to be in writing and registered in the manner required by law. It need not be in any particular form. It must contain a declaration by the testator of his intention regarding the devolution of his estate after his death. The declaration made in paragraph 11 of the agreement says:—"After us our *najib-ut-tarfain* children and wives shall be our heirs, and representatives in respect of our shares and such of our children and wives as be not *najib-ut-tarfain* shall be entitled to maintenance only as against *najib-ut-tarfain* ones." It gives preference to *najib-ut-tarfain* children and *ahle-biradri* wives over non-*najib-ut-tarfain* issues and non *ahle biradri* wives. At the same time it declares that the former shall in the first instance be the heirs and representatives of the executants after their deaths in respect of their shares in the estate. The declaration of the intention is there. The time when it is to take effect is also mentioned The persons in favour of whom the declaration is made are also specified by a description of the class to which they are to belong. The manner in which the distribution is to be made between the wives and children, so taking under the Will, is not stated, but that difficulty does not here arise, because it is admitted that Ahad Ali Khan left no children *najib-ut-tarfain* or otherwise, surviving him but had only two wives, *Musammat* Hashmat Bibi and *Musammat* Bandi Jan, who survived him. The former was an *ahle biradri* wife, the latter was not. The devise must, therefore, take effect in favour of *Musammat* Hashmat Bibi and she became consequently entitled to the property comprised in the agreement, which her husband left at his death.

It is argued on behalf of the plaintiff-respondent that clause 5 of the agreement gives no power to the executants to make a gift or Will in favour of any but the children and wives of equal status and that if clause 11 be treated as a testamentary disposition by them in favour of children and wives of equal status and in their absence in favour of the children, born of non-*najib-ut-tarfain* wives, an inconsistency would be created which the executants could never have contemplated. But the agreement must be read as a whole; and if a consistent interpretation can be placed on all the clauses, it should be adopted in preference to any other which might lead to inconsistent results. Clause 5 evidently refers to circumstances where there are children and wives of equal status and also of an inferior status. It debars the executants from making a gift or Will in those circumstances in favour of any but the children and wives of equal status, for the same intention runs in clause 11 also, where preference is given to *najib-ut-tarfain* children and wives over non *najib ut-tarfain* ones but the latter are not absolutely excluded. In all cases the primary duty of a Court is to ascertain the true intention of the testator from an examination of the entire Will. The Court is in fact entitled to put itself into the testator's chair and say whether, having regard to the language used in the different clauses when read together, his intention was to debar non *najib ut-tarfain* absolutely from receiving the benefit of a gift or Will or only relatively when *najib-ut-tarfain* children were also in existence. There was a non *ahle-biradri* wife here in existence, whom *Musammat* Hashmat Bibi allowed to remain in possession of an 8-pies share, but by virtue of clause 11 *Musammat* Hashmat Bibi had become entitled to the entire estate as the sole *ahle biradri* wife of Ahad Ali Khan and it was open to her to forego any portion of it in favour of *Musammat* Bandi Jan. A special provision had been made for the maintenance of *Musammat* Hashmat Bibi during the lifetime of Ahad Ali Khan by the grant of a 3 pies 4 *kirants* share to her for her life, because Ahad Ali Khan had married a prostitute who was living with him. Where it was intended by the agreement to give the females, including the mother of the executants and the widow of Raza Ali Khan, a limited interest, the agreement specifically said so. Where it was intended to place no such restriction no limitation was mentioned. The devise in favour of *Musammat* Hashmat Bibi was absolute and clause 11 cannot be

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read as prescribing a line of inheritance varying the ordinary rule of succession.

In *Hurpershad* v. *Sheo Dyal* (1) a declaration made by a *taluqdar* in regard to the devolution of his estate after his death in reply to certain enquiries addressed to him by the Government was held to amount to a testamentary disposition which he intended to be carried into effect after his death. In *Haidar Ali* v. *Tasadduk Rasul Khan* (2) a written statement made by a *taluqdar* in reply to enquiries made by the Government regarding his succession was treated as a Will within the meaning of section 2 of Act I of 1869. In *Balraj Kuar* v. *Mahadeo Pal Singh* (3) a document signed by a person containing relevant particulars relating to the history of his estate and a declaration as to who was to be his successor in pursuance of an advertisement appearing in a paper, announcing the intention of the advertiser to prepare a compilation, showing the family history of the *Taluqdars* of Oudh, was treated for the purposes of Hindu Law as a testamentary declaration by him of his intention with respect to his property, which he desired to be carried into effect after his death. In *Kalian Singh* v. *Sanwal Singh* (4) and *Mathura Das* v. *Bhikhan Mal* (5) testamentary statements in official papers were similarly held to operate as Wills.

Musammat Hashmat Bibi had relied on the agreement of the 25th February 1884 in the mutation proceedings which were instituted after the death of Ahad Ali Khan. She subsequently filed a suit for dower in which she allowed a reduction on account of the $\frac{1}{4}$th share to which she was entitled under the Muhammadan Law, but, in view of the fact that Karam Ali Khan was denying her title to the estate, her desire to sue for the recovery of her dower which was in any case secured before her claim became barred by limitation can easily be understood. She was in possession of the estate of her husband jointly with *Musammat* Bandi Jan; but the possibility of Karam Ali Khan seeking to dislodge her from her possession had not ceased, when the suit for dower was filed. She only wanted to strengthen her hands by having a second string to her bow and it cannot be legitimately said that by allowing a reduction from the dower to the extent of the share of the estate to which she would have been entitled under the Muhammadan Law she surrendered her rights under the agreement or testamentary disposition of the 25th February 1884.

The learned Counsel for the plaintiff respondent does not contest that if clause 11 of the agreement operates as a testamentary disposition in her favour she would be entitled to an absolute estate. He also does not contest that on that interpretation Karam Ali Khan would not be entitled to any vested interest in the share left by Ahad Ali Khan. The defendant-appellant is the rightful heir of *Musammat* Hashmat Bibi, and the plaintiff-respondent, who claims through Karam Ali Khan, has no right to oust him from his possession.

The next question for consideration is whether the plaintiff-respondent was excluded from inheritance in the presence of *Musammat* Hashmat Bibi by the agreement of family settlement, aforesaid, and if so, had he any right to bring the suit. The effect of clause 11 of the agreement was that the share of each of the executants was to devolve on his death on his wives and children, who were *nasib ut-tarfain*, to the exclusion of others, and that each of them agreed to the exclusion of himself, if the other left persons of the class mentioned in clause 11 in existence at the time of his death. In other words, Karam Ali Khan agreed to forego his right under section 22 of Act I of 1869 as the brother of Ahad Ali Khan to succeed to his share, if Ahad Ali Khan left a widow, and it is not open to him or to the plaintiff-respondent, who claims through him, to go behind that agreement in order to claim a right which was surrendered at that time. As explained in *Khunni Lal* v. *Gobind Krishna Narain* (6)

(1) 3 I. A. 259 at p. 276; 26 W. R. 55; 3 Sar. P. C. J. 611; Bald. 25; 3 Suth. P. C. J. 304; Rafique & Jackson's P. C. No 41 (P. C.).

(2) 18 C. 1; 17 I. A. 82; 5 Sar. P. C. J. 522; 9 Ind. Dec. (N. S.) 1.

(3) 44 Ind. Cas. 59; 20 O. C. 360; 4 O. L. J. 589.

(4) 7 A. 163 (P. C.); A. W. N. (1884) 337; 4 Ind. Dec. (N. S.) 378.

(5) 19 A. 16; A. W. N. (1896) 171; 9 Ind. Dec. (N. S.) 11.

(6) 10 Ind. Cas. 477; 33 A. 353; 15 C. W. N. 545; 8 A. L. J. 552; 13 C. L. J. 575; 13 Bom. L. R. 427; 10 M. L. T. 25; (1911) 1 M. W. N. 432; 21 M. L. J. 645; 38 I. A. 87 (P. C.).

and *Gandharp Singh* v. *Nirmal Singh* (7) a family settlement is binding on the parties thereto because the object of such settlement is the reconciliation of existing differences and the avoidance of future disputes. It has already been pointed out that the agreement was held to be binding and enforceable in the previous suit to which Karam Ali Khan and Ahad Ali Khan were parties. If Karam Ali Khan then agreed to his exclusion in the presence of the widow of Ahad Ali Khan he had no right which he could have conveyed to the plaintiff-respondent.

It is unnecessary to consider whether *Musammat* Hashmat Bibi was also entitled to a lien for her dower.

The appeal is, therefore, allowed and the claim of the plaintiff-respondent dismissed with costs throughout.

N. H.

Appeal allowed.

(7) 54 Ind. Cas. 325; 22 O. C. 300; 6 O. L. J. 529.

PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT.

December 20, 1921.

Present:—Lord Buckmaster, Sir John Edge, Mr. Ameer Ali and Sir Lawrence Jenkins.

GOPAL LAL SETT—APPELLANT

versus

PURNA CHANDRA BASAK AND OTHERS—RESPONDENTS.

Hindu Will—Construction—Provision for worship of family idols—No gift to idols—Shebaitship—*Destination of property*—Res judicata.

The Will of a Hindu testatrix was addressed to her grandson and directed that out of the income of certain specific property, he should perform the worship of the family idols and that the balance of the income should be divided between the representatives of the three branches of her own family. There was no provision for the worship of the idols after the death of the grandson. On the death of the grandson, administration proceedings were taken and it was decided that out of the produce of the houses belonging to the estate of the testatrix, the worship of the idols should be performed and that the surplus should be paid equally to the three branches of the family. This was adopted in a decree of 1888 to which the respondents' branch was a party:

Held, (1) that there was no gift of the whole property to the idols; [p. 563, col. 1.]

(2) that no heritable *shebaitship* was established; [p. 563, col. 1.]

(3) that the representatives of the three beneficiaries under the Will were entitled to the residue absolutely and in equal shares; [p. 563, col. 1.]

(4) that the gift being a private trust section 92 of Civil Procedure Code did not apply and, therefore, the establishment of a scheme for its administration was inappropriate; and [p. 564, col. 1.]

(5) that the order in the administration suit was binding on all the parties and operated as *res judicata*. [p. 564, col. 1; p. 565, col. 1.]

Peareth v. *Marriott*, (1883) 22 Ch. D. 182 at p. 191; 48 L. T. 170; 52 L. J. Ch. 221; 31 W. R. 68, followed.

Consolidated appeals from a decree of the Calcutta High Court in its Ordinary Civil Jurisdiction, the suit having been heard by a Special Division Bench of two Judges to avoid the necessity of an appeal to the Appellate Jurisdiction of the Court.

FACTS.—One Gobinda Chandra Basak, a Hindu governed by the Bengal School of Hindu Law, died in 1810. He had two wives, Kanakmoni and Bhaggobati and had children by both. Bhaggobati alone survived her husband. She executed a Will which is the subject-matter of the present litigation and died in 1841. The Will was addressed to her grandson, Udoy Chand. The respondents represent the branch of the children of Gobinda Chandra by Kanakmoni.

The provisions of the Will and the history relating to the conduct of the parties are fully set out in the judgment of Judicial Committee.

The present suit was brought by the first respondent for the construction of the Will and for a declaration that he was entitled to the *shebaitship* of the family idols.

The Division Bench of the High Court which tried the suit held that the respondents were not heirs of Bhaggobati and had no right to the *shebaitship*; that no heritable right of *shebaitship* was conferred upon Udoy Chand by the Will; that the succession to the *shebaitship* opened on the death of Udoy Chand; that the appellant Gopal Lal Satt and his brother were not entitled to succeed to the *shebaitship* and the properties. They directed that certain accounts should be

taken, and that a scheme should be submitted for the approval of the Court by the persons declared to be *shebaits* for carrying out the religious trusts of the Will.

Messrs *De Gruyther, K. C., Dunne, K. C., Ramsay* and *S. C. Chaudhuri*, for the Appellant.

Sir *George Lowndes, K. C.*, Messrs. *Raikes* and *Dube* for the Respondents representing the descendants of Kanakmoni.

Mr. *Upjohn, K. C.*, and Mr. *Brown*, for the Respondents representing the descendants of Bhaggobati.

Mr. *Tarikh* for Khoka, a minor respondent, through his guardian *ad litem*.

JUDGMENT.

LORD BUCKMASTER.—The history of the litigation of which these appeals form part, extending over a period of sixty-five years, has been carefully and minutely examined in the judgment of the learned Judges of the High Court of Judicature at Fort William in Bengal, from which these appeals have been brought. Their Lordships, therefore, do not propose to attempt a repetition of the facts, except so far only as may be necessary to explain the reasons for the opinion they have formed.

Several questions of interest and of importance have indeed been raised and argued upon these appeals; but the true construction of the Will of the testatrix, Bhaggobati Dasi, lies at the threshold of the dispute, and, on the view taken by their Lordships of the true meaning of this document, these larger questions do not arise.

The testatrix, who died on the 29th May 1841, was the second wife, and at her death had been for thirty years the widow of one Gobind Chand Basak, a Hindu governed by the Bengal School of Hindu Law. By him she had had three sons and two daughters. The eldest of these sons was Pran Krishna Basak, who predeceased his mother and left two children, Monmohini Dasi and Udoy Chand Basak. The second son, Joy Krishna, was found to be a person of unsound mind in 1838, but he was not a congenital lunatic. The third son, Raj Krishna, died in 1821, leaving no children. The eldest daughter, Tripura Sundari Dasi, died before her mother, leaving a son, Radha Kanta, and the second, Golap Dasi, or, as she is sometimes called, Golapmoni, survived. By the first marriage of Gobind Chand Basak there had been two sons, Radha Krishna Basak and Sri Krishna Basak, both of whom survived the widow, from them there have been numerous descendants, who will be referred to merely by way of description as the Basak Branch of the family. In truth, the real quarrel in the present case lies between the two branches of the same family descending from the two wives. Bhaggobati's Will was executed on the day of her death. Some question has arisen as to the true translation of the Will. The differences do not seem vital, but in any case their Lordships accept the official translation Exhibit A in the suit No. 711 of 1907. It is addressed to Udoy Chand Basak, her grandson, and contains, on the face of it, the following statement:—

"Reliance on the feet of Sri Sri Hariji.

Joy Gopal, *Shiba Thakur's.*

Anandamoyi *Gopal Lal Ji's.*"

Thakuranee's.

This fact that it is addressed to Udoy Chand is important to bear in mind in construing the provisions of the Will, for the duties that it imposes are clearly placed on him. It relates first to certain property which is referred to as the Company's Paper standing in the name of the testatrix and directs that out of the income "you" (that is Udoy Chand) "shall perform the *sheba* (worship, &c.) of Sri Sri Iswar and the *sheba* of the ancestral Sri Sri Iswar, 'you' shall perform the *sheba* of the said Iswarjew out of the income of the ancestral garden called Iswar Gopal Lal Ji's garden, purchased in his name. 'You' shall be the person in charge of the *sheba* of all the deities." There is then introduced a separate and definite gift with regard to two houses, namely, a house at Chowringhee and a house at Pathuriaghata, out of which was directed there should be performed the *sheba* of Sri Sri Iswarjew "as it is at present," and that the remainder of the income should be divided between three people, namely, Monmohini, Radha Kanta, the son of Tripura, and Golapmoni, thus making provision for each one of the surviving branches of her own family except Joy Krishna, who was insane. The testatrix then refers again to the balance of the

interest accruing from the Company's Paper, and directs how that is to be dealt with in connection with religious services There is no definite gift of the residue.

The first question that arises is, whether the gift is a gift to the idols, or whether there was a gift to any other person or persons charged with the maintenance of the idols. The Will is most obscure, but their Lordships think that there is certainly no direct gift of the whole property to the idols, nor in the circumstances ought one to be implied. It is consequently necessary to see in what capacity and by virtue of what right the worship of the idols is to be carried out. The person on whom the duty was cast was undoubtedly Udoy Chand, and the conclusion which their Lordships have reached is that if, as they think, there is no gift to the idols it is only possible to give effect to the provisions of the Will by treating it as conferring the property upon Udoy Chand. The Will is addressed to him; upon him throughout all the burdens of performing different duties are cast, and this necessarily involves the ownership of the property.

Their Lordships agree with the High Court in thinking that no heritable *shebaitship* was established by the Will. Udoy Chand was to be *shebait* during his lifetime, and, so far as the *sheba* of Iswar Thakorani was concerned, he was directed to perform the ceremonies "according to the existing arrangements of the *sheba*" in concert with his step-mother, Shiba Sundari; but after his death no express provision was made for the worship, and the necessary duties will have to be performed by persons properly appointed for that purpose.

Although this has never been declared the true interpretation of the Will, it is the construction that has in effect been acted upon for a considerable period of time, for Udoy Chand died on the 8th July 1842, and upon his death administration proceedings were instituted by Golap Dasi asking for the usual administration relief. It is unnecessay to pursue the whole course of this suit. Shiba Sundari was, on the 14th December 1857, appointed, jointly with the executors of Udoy Chand, to take charge of the idols, and on her death on the 14th August 1858, members of the branch of the family known as the Basak Branch were introduced into the suit, and from that time down to now some of them have been associated with the performance of the duties.

The result of litigation and other expenses, however, has, as the Board is informed, completely exhausted the greater part of the moneys derived from the Company's Paper set apart for the worship of the idols, and the claim has consequently been put forward for the balance of the rents from the two houses, on the ground that the whole of the property was dedicated for the worship of the gods. It is unnecessary for their Lordships to determine whether the effect of the gift in the Will which gave the income of this specially appropriated property to the three named beneficiaries without any limitation of time would be sufficient to create an absolute gift, for, on the 14th December 1857, by an order made in the administraion proceedings, the Court declared that out of the produce of the houses belonging to the estate of the testarix, situate at Chowringhee and Pathuriaghata, the worship of Sri Joy Gopal should be performed, and that the surplus of the said produce should be paid as follows, namely, to the representatives of Radha Kanta Sett, deceased, one equal third part; to the representatives of Srimati Gopal Dasi, deceased, one equal third part and to Srimati Monmohini during her lifetime and to her representatives after her death the remaining one equal third part or share. This order, although it contains no express words to that effect, amounts to a clear and effective declaration by the Court as to the absolute interests taken by each of the three named beneficiaries in the Will, for the payment to the representatives of the named beneficiaries admits of no other explanation, but to this order the Basak Branch of the family were not parties. They were, however, parties to a suit instituted in 1881, upon which an order was made on the 15th March 1882, when it was directed that the sum of Rs. 6,849 should be regarded as the surplus income derived from the property set apart for Sri Joy Gopal, and it was ordered that the trustees should divide and pay the same between the parties entitled in the proportions mentioned in the decree of the 14th December 1857, that is, to the representatives of the three named beneficiaries in equal shares. There has consequently been an

order binding all parties, based upon the view that the property in which the three beneficiaries mentioned were interested was segregated from the rest of the estate and set apart for the upkeep of the named idol (Sri Joy Gopal Ji), the surplus belonging to them absolutely in equal shares. This disposes of the whole matter in dispute upon appeal. The learned Judges of the High Court who carefully examined all these proceedings, thought that the question as to the absolute interests of the three named beneficiaries had never been definitely raised and decided, and that the directions already mentioned were only made pending the administration suit. But there is no such limitation in the terms of the order, and such a direction given in an administration suit has the effect of an order binding all parties and determines the construction to which it gives effect, so that after the lapse of time necessary for appeal it becomes final and conclusive. [See *Peareth* v. *Marriott* (1).]

The questions raised as to whether Joy Krishna was prevented from inheriting by virtue of his lunacy, and the point decided by the High Court as to the true reading of the Dayabhaga do not arise, and their Lordships make no pronouncement upon these points. It is only necessary to add that both from the terms of the Will of Bhaggobati herself and from the information afforded by the documents, it would appear that one at least of the idols mentioned in the Will was ancestral, but even if that were the case their Lordships agree with the High Court in thinking that there is not sufficient evidence to prove any endowment prior to her death. Their Lordships see no reason to doubt that the Court executing the duty of appointing trustees would pay due regard to the claims of that branch of the family with whom the worship was established and by whom the services performed, but they regard the gift as in effect a private trust to which the provisions of section 92 of the Code of Civil Procedure would not apply, and consequently the establishment of a scheme for its administration, as provided by the decree of the High Court, is inappropriate.

(1) (1883) 22 Ch. D. 182 at p. 191; 48 L. T. 170; 52 L. J. Ch. 221; 31 W. R. 68.

There remains nothing but the question of costs. The appellants have to a certain extent succeeded, but they have gained a barren victory; they have, moreover, taken 14 years to bring this matter before the Board since the judgment at the High Court. Their Lordships will, therefore, make no order as to their costs. The cross-appellants, represented by Sir George Lowndes, have failed. Mr. Parikh's client appears in the same interest. The only persons who have succeeded at all are the representatives of the three original beneficiaries; but although the point on which they succeed was undoubtedly raised and argued in the High Court, for reasons that it is not easy to understand, the point was never clearly and definitely raised before this Board, and no complaint was made by them against the judgment of the High Court, although it was adverse upon the point. There was, however, sufficient mention of the matter in the respondents' case to permit of its argument, and when argued no answer to it could be found. Their Lordships are not prepared in the circumstances to allow them any costs.

Their Lordships will, therefore, humbly advise His Majesty, (1) that the Appeal No. 169 of 1919 should be allowed in part and the Cross-Appeal No. 170 of 1919 dismissed; (2) that the decree of the High Court of Judicature at Fort William in Bengal, dated the 10th day of January, 1908, should be varied by (*a*) discharging so much thereof as directs a scheme to be submitted for carrying out the trusts created by the Will of Srimati Bhaggobati Dasi deceased, (*b*) by declaring that according to the true construction of the said Will, the whole of the property of the testatrix, with the exception of the houses at Chowringhee and Pathuriaghata, was given absolutely to her grandson, Udoy Chand Basak, charged with the performance of the worship of the deities mentioned in the said Will except the deity Sri Sri Iswarjew and (*c*) by further declaring that it appearing that by virtue of two decrees, dated the 14th day of December 1857, and the 15th day of March 1888, the residue of the income arising from the said houses has been directed to be paid in proportions to the three named beneficiaries, Monmohini, Radha Kanta and Golapmoni and their res-

pective representatives, the question as to the absolute interests taken by the said beneficiaries under the said Will is *res judicata* between the parties to these appeals; and (3) that there should be no order as to the costs of these appeals.

K. V. L. N.

Appeal allowed in part.

Solicitors for the Appellant.—Mr. *T. L. Wilson & Co.*

Solicitors for the Respondents.— Messrs. *W. W. Box & Co*, *Watkins & Hunter*, *J. Page Thomas.*

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 1118 OF 1918.

April 20, 1922.

Present:—Mr. Justice Broadway and Mr. Justice Campbell.

RAM SARAN DAS—DEFENDANT—APPELLANT

versus

TULSI RAM—PLAINTIFF—RESPONDENT.

Evidence Act (I of 1872), ss. 65, 91—Secondary evidence—Contract reduced to writing—Promissory-note.

The language of section 91 of the Evidence Act is uncompromising, and whenever the terms of a contract are reduced to writing and that writing is, for any reason, inadmissible in evidence, the promisee must lose his remedy. The test is whether there is a complete cause of action independently of the document which is inadmissible. [p. 568, col. 2.]

Gurdas Mal Singh v. *Ishar Das*, 60 Ind. Cas. 107; 3 U. P. L. R. (L.) 15; 3 L. L. J. 157, *Sheikh Akbar* v. *Sheikh Khan*, 7 C. 756; 8 C. L. R. 528; 3 Ind. Dec. (N. S.) 718, followed.

Where a suit is based on a promissory-note which is alleged to have been lost, but the loss is not proved, secondary evidence of the promissory-note cannot be given and the suit must be dismissed. [p. 568, col. 1.]

First appeal from a decree of the Senior Subordinate Judge, Delhi, dated the 7th January 1918.

Lala *Moti Sagar*, R. S., for the Appellant.

Dr. *Gokal Chand Narang*, Kanwar *Dalip Singh*, and Lala *Amar Nath Chona*, for Mr. *Anant Ram*, for the Respondent.

JUDGMENT.—The appeal is by Ram Saran Das, Municipal Tax Inspector, Delhi, against a decree for Rs. 9,318, in favour of Tulsi Ram of Multan.

The basis of the suit was a promissory-note alleged to have been executed by the defendant-appellant on the 7th December 1915. The plaintiff said that this sum was an ordinary cash loan and that the defendant agreed to pay interest at 60 per cent. per annum. He claimed Rs. 13,720-8-9, principal and interest up to the date of suit. The plaint was filed in the Court of the District Judge, Delhi, on 15th February 1917 and before the defendant's written statement was put in the following proceedings took place.

On the 26th February the plaintiff applied for attachment of the defendant's property before judgment. On the 28th February the property specified in the application was attached. On the 1st March objection was made by the defendant and Counsel for both parties were in Court. A statement was made to the Court on that day by Lala Madan Mohan Lal, Pleader, brother of the plaintiff and also his Counsel, that the original promissory-note which had been filed with the plaint was no longer attached to it and that a copy had been substituted. Lala Ram Kishore Pleader, for the defendant, also stated, on instructions from his client, that the document on the record was not the original promissory-note. The District Judge recorded the statements of these two gentlemen, those of four officials of his Court and that of the defendant. Counsel on both sides then stated that, despite the summary inquiry held by the District Judge about the promissory note, they desired the suit to be heard by him. Lala Madan Mohan Lal added that he had a copy of the original note which he would produce at the next hearing together with a receipt by the defendant and another document.

On the 5th March the defendant put in his written statement and admitted having signed a promissory-note and a receipt for Rs. 8,000 in favour of the plaintiff in the following circumstances. Lala Madan Mohan

RAM SARAN DAS v. TULSI RAM.

Lal was anxious to secure a certain house adjoining that of the defendant. The house was to be sold by the owner Radhe Lal to one Mahtab Rai. It was arranged that the defendant was to pre empt and to transfer to Lala Madan Mohan Lal "for a reasonable price to be fixed by mutual settlement." The defendant accordingly bought the house from Radha Lal for Rs. 8,000 and Lala Madan Mohan Lal paid the price exclusive of a sum of Rs. 544 due to a mortgagee and a small item payable as house-tax. The promissory note and receipt were executed by way of security until such time as the house should be conveyed by the defendant to Lala Madan Mohan Lal. Owing to a dispute this conveyance was not effected.

The defendant pleaded that no suit could be brought on the promissory note, that Lala Madan Mohan Lal could recover the money paid by him for the house provided the agreement to sell to him was cancelled, and that in any case a suit brought not on the original promissory-note but on a forgery must be dismissed. The defendant further denied any agreement to pay interest.

The parties were next examined. The plaintiff admitted that Radha Lal sold a house to the defendant, that he (plaintiff) was in possession of the house as a tenant, and that the lease was in the name of his brother, Lala Madan Mohan Lal. He repeated that the consideration for the promissory-note was a cash loan and said that the writer of it was one Reoti Saran.

The defendant said that the note signed by him was not that in Court and that he had not read the note which he had signed.

The plaintiff filed three documents, (1) what is admitted to be the original receipt for Rs. 8,000, dated 7th April 1915, (2) a photograph which the plaintiff alleged was of the original promissory note, and (3) what he termed the office copy of the note.

The Court proceeded to frame issues as follows:—

1. Was there any agreement to pay interest? If so, at what rate?

2. Did the consideration Rs. 8,000 entered in the receipt not pass?

3. Was the pro note executed only as a security for an obligation to re convey the house to Madan Mohan Lal?

4. Is the rate (presumably of interest) unconscionable?

5. To what relief is the plaintiff entitled?

The defendant's Counsel inspected the photograph and at his request a sixth issue was added.

6. Is the whole suit liable to dismissal owing to the original pro note having been tampered with by addition of words as regards interest?

On the 12th March, Lala Ram Kishore stated that his client asserted the words relating to interest to have been added after execution without his knowledge or consent. Lala Madan Mohan Lal replied that the words had been written at the same time by the same scribe "without any appreciable interval of time between the writing of the preceding pro note as to interest" and with the consent and knowledge of the defendant before he signed the note.

On the 15th April the suit was transferred to the Court of the Senior Subordinate Judge, Delhi, and it was decided by Mr. Tapp's judgment, dated the 7th January 1918, now under appeal.

The finding on the first issue was in the affirmative. Mr. Tapp held also, (1) that the plaintiff or Lala Madan Mohan Lal had used the defendant for the acquisition of the house, (2) that the promissory-note had been executed in order to show that the transaction was a genuine one, and (3) that the rate of interest was unconscionable. He gave the plaintiff a decree for the principal sum of Rs. 8,000 with interest at 12 per cent. per annum, Rs. 9,133 in all, *plus* future interest at 6 per cent. up to the date of payment.

There are cross-objections against both rates of interest. We have heard a great deal of argument upon what would be the two main points for decision in the appeal if it were held that secondary evidence of the contents of the promissory note was inadmissible, namely, whether the defendant agreed to pay interest and whether the plaintiff is not entitled to a decree of any kind because he has based his suit on a forged document. The learned Advocate for the defendant, however, contended throughout that unless it be held that the promissory note, on which the suit

is based, has been lost no decree can be given to the plaintiff.

The judgment of the lower Court is not very satisfactory upon this question of loss and of the admissibility of secondary evidence. The learned Subordinate Judge held that the original note had been filed with the plaint and declined to decide the question of responsibility for its removal. He did not record a clear finding that the note had been lost. He may have thought that loss was admitted by the defendant before the case was transferred to him, and this may be the explanation of an order passed by him on 30th October 1917, that it was unnecessary to call evidence as to the loss of the pro-note and of the following passage in his judgment:—

"It is not for me to determine how or by whom the document was removed, nor must I be taken as imputing blame in the matter to any one or making the least reflection on any of the persons concerned with the case. It is not necessary for me to do so, *as for the purpose of deciding whether or not there has been any alteration the photographs in the case have proved amply sufficient.*"

Elsewhere, however, he hints pretty strongly at an opinion that the note was removed from the record by or at the instance of the defendant. It appears to us that this was in fact his opinion and he might well have used plain language and said so.

We can find no trace of any admission by the defendant that the note has been lost and the defendant could scarcely have made such an admission without acquiessing in the insinuation against him of theft. Moreover, at the first hearing of evidence in the lower Court on 23rd March 1917, specific objection was taken to the proof of the photograph as secondary evidence of the original.

The only evidence that the original note was filed with the plaint is the deposition of Lala Madan Mohan Lal, who is an interested party. The District Judge's Clerk of Court was examined as a witness and said that he did not know what documents were put in with the plaint. At the preliminary inquiry by the District Judge held on 1st March both the Court Ahlmad and an employed candidate declared that the document then attached was the one which had been filed with the plaint. These men were not put into the witness-box subsequently.

It has been contended for the plaintiff respondent that the lower Court refused to allow him to produce two other important witnesses on this point, the photographer who, he says, took the photograph at Multan in August or September 19 5 and a Pleader, Lala Chandar Bhan, who was present when the photograph was taken. Application was made for these witnesses to be summoned and they are said not to have been summoned because of the learned Subordinate Judge's decision on the 30th October 1917, already referred to, and that it was unnecessary to call evidence as to the loss of the promissory-note.

The plaintiff's explanation of how he came to possess a photograph of the note was given by Lala Madan Mohan Lal in the witness-box. He said that the photograph was taken "in August or September 1916" in connection with a partition of joint property between the two brothers in order to enable one to hold the original while the other kept a replica. He wished to examine the photographer and Lala Chandar Bhan in order that they might corroborate this story. If, however, they had done so their evidence would not have taken the case any further in the direction of proving loss. It might have helped to repel a suggestion that the plaintiff filed the original with the plaint, removed it substituting another document, and then had it photographed in order to conceal the method in which it had been tampered with; but it would not have proved that the note was lost after the date of presentation of the plaint, nor that the plaintiff did not file the copy in the first instance in order to manufacture evidence of loss.

The plaintiff has not seen fit to give evidence and we are left with nothing but the statement of his brother, Lala Madan Mohan Lal, unsupported by any Court official who handled the plaint, that the original note was put into Court with the plaint. The inferences in favour of the truth of this statement deduced by the learned Subordinate Judge from "attendant circumstances" do not impress us and it is unnecessary to repeat them.

Now, Lala Madan Mohan Lal, in the first place, is a person strongly interested in the subject matter of the suit Although the promissory note was in his brother's name

he has admitted that the debt which it purports to create is joint property of himself and his brother. He also took a prominent part in the transactions of 17th December 1915, whatever their precise character was, and the house purchased on that day by the defendant is admittedly occupied by him.

In the second place, Lala Madan Mohan Lal has shown himself open to the accusation of having a treacherous memory. As Counsel for the plaintiff he stated in Court on 12th March 1917 that the disputed words "with interest, etc." had been written before the defendant's signature, and he had previously told an expert witness, Mr. Hardless, the same when he first took him the photograph for examination, so Mr. Hardless says. As a witness on the 13th August 1917 Lala Madan Mohan Lal said that, as far as he remembered, the defendant signed the paper before the promissory-note was written out. On the 18th April 1917 he on the one side and the District Judge and his Reader on the other were found to disagree in their respective recollections of an explanation given when the photograph was first produced of how the plaintiff came to possess it, and the disagreement resulted in the suit being transferred by the learned District Judge to another Court. On the 13th August 1917 when cross-examined about a certain alleged relationship, Lala Madan Mohan Lal said that he did not know whether his father had a sister.

We are unable to hold on his uncorroborated statement that the original promissory-note was filed with the plaint. In addition to the contradiction by two Court officials there is the fact which Lala Madan Mohan Lal himself admitted, and his admission was recorded, that on the 1st March the spurious note was found to have exactly the same number of pinholes in places corresponding as the list of documents filed which he attached to the plaint. It is not impossible, of course, that a person substituting another document may have been at pains to fabricate the pinholes, but it does not strike us as certain that he would do so.

We hold that the promissory-note on which the suit was based is not proved to have been lost and that secondary evidence of its existence and contents, therefore, could not be given. The terms of the alleged contract of the 7th December 1915 by which the defendant agreed to pay the plaintiff Rs. 8,000 on demand in consideration of having received this sum having been reduced to the form of a document no evidence could be given of those terms except the document itself or secondary evidence of its contents (section 91, Indian Evidence Act).

It was held by a Division Bench of this Court in *Gurdas Mal Singh* v. *Ishar Das* (1), that the language of section 91 is uncompromising and that whenever the terms of a contract are reduced to writing and that writing is, for any reason, inadmissible in evidence, the promisee must lose his remedy. A large number of previous authorities were reviewed in the judgment including *Sheikh Akbar* v. *Sheikh Khan* (2). It was pointed out that the test was, "has the creditor a complete cause of action independently of the document which is inadmissible?" In the present case, according to the plaint, the alleged loan and the execution of the promissory note were simultaneous transactions and the contract for re-payment was embodied in the promissory-note.

Following this ruling we hold that the plaintiff is not entitled to any decree. It has been urged that he could be given a decree on the defendant's admission that he signed a promissory-note for Rs. 8,000 and that he has acquired a house for which the greater part of the price of Rs. 8,000 was paid by the plaintiff. The first admission, however, is a piece of secondary evidence of the existence of the promissory-note on which the suit is based and so cannot be taken into consideration. The second admission is not an admission of liability. In fact the defendant had denied what the plaintiff asserts, that a loan of Rs. 8,000 was made to him, and he has also denied that he is liable to pay this sum. Whether the plaintiff should receive any remedy by application of the doctrine of equity would depend upon an examination of the nature of the contract entered into between the parties and this cannot be proved.

We, therefore, accept the appeal, set aside the decree of the lower Court, and order

(1) 60 Ind. Cas. 107; 3 U. P. L. R. (L.) 15; 3 L. L. J. 157.
(2) 7 C. 256; 8 C. L. R. 528; 3 Ind. Dec. (N. S.) 713.

that the plaintiff's suit be dismissed with costs throughout. The cross-objections fail and are dismissed.

Z. K.

Appeal accepted.

PRIVY COUNCIL.

APPEAL FROM THE ALLAHABAD HIGH COURT.

April 10, 1922.

Present :—Lord Shaw, Lord Phillimore, Sir John Edge and Mr. Ameer Ali.

CHET RAM AND OTHERS—PLAINTIFFS—APPELLANTS

versus

RAM SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—"Antecedent debt"—Debt secured by mortgage of joint property, whether antecedent—Son's pious obligation to pay father's debts—Doctrine, whether can be invoked during father's lifetime—Mitakshara—Alienation by co-parcener.

Under Hindu Law a debt to be "antecedent" must not only be antecedent to the alienation in time but must have been incurred wholly apart from the ownership of the joint estate or the security afforded or supposed to be available by such joint estate. [p. 571, col. 1.]

Sahu Ram Chandra v. *Bhup Singh*, 39 Ind. Cas. 280; 39 A. 437; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 44 I. A. 126 (P. C.) and *Chandradeo Singh* v. *Mata Prasad*, 1 Ind. Cas. 479; 31 A. 176; 6 A. L. J. 282, referred to.

Therefore, a mortgage which is at its date an invalid deed in so far as it purports to encumber the joint family property cannot, on the principle of "antecedent debt," become a just and valid consideration for an alienation by the father of a Hindu joint family. [p. 570, col. 2; p. 571, col. 1.]

The doctrine of the "pious obligation" of a Hindu son to pay his father's debts cannot be invoked during the father's lifetime. Thus, the grandson's assets cannot be made liable for his grandfather's debts while the father is alive. [p. 571, col. 2.]

Sahu Ram Chandra v. *Bhup Singh*, 39 Ind. Cas. 280; 39 A. 437; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 44 I. A. 126 (P. C.), referred to.

According to the *Mitakshara* Law, joint family property cannot be the subject of a gift, sale or mortgage by one co-parcener except with the consent, express or implied, of all the other co-parceners. Any deed of gift, sale or mortgage granted by one co-parcener on his own account of or over the joint family property is invalid, the estate is wholly unaffected by it, and stands entirely free of it. [p. 570, col. 1.]

Sahu Ram Chandra v. *Bhup Singh*, 39 Ind. Cas. 280; 39 A. 437; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 44 I. A. 126 (P. C.), relied upon.

Appeal against a decision of their Lordships of the Allahabad High Court (Refique and Lindsay, JJ.,), dated the 11th March 1919, and reported as 51 Ind. Cas. 119, reversing that of the First Sub-Judge, Meerut, dated the 31st March 1916.

JUDGMENT.

LORD SHAW.—This is an appeal from a decree, dated the 11th March 1919, of the High Court of Judicature at Allahabad, which varied a decree dated the 31st March 1916.

The suit was brought on the 24th July 1915 in the Court of the Subordinate Judge of Meerut. The plaintiffs were minors and sued through their guardian, Ram Singh.

No pedigree need be given. It is sufficient to bear in mind that Amar Singh succeeded on the death of his father. Nawal Singh, to a half of Nawal's property. This half, thus ancestral family property, was, at the date of the mortgage and sale after mentioned, the joint family property of Amar, of his two sons, Bharat and Kehar, and of Ram, son of Bharat, and Mahabir and Gajraj, the two sons of Kehar. This ancestral joint undivided estate was thus owned by two sons and three grandsons. The two sons as well as the three grandsons, the plaintiffs, were all alive at the date of the mortgage and sale after mentioned, and they are still alive. Amar, the grandfather, died in 1909.

On 23rd March 1904 Amar executed a mortgage over this family property for Rs. 8,000. It is a fact beyond dispute that Amar, whom the Subordinate Judge finds to have been a man of extravagant habits, not leading a moral life and addicted to drink, incurred this debt for his own personal purposes. It was, with the doubtful exception of Rs. 1,000 to be presently referred to, neither incurred nor used for family purposes

or necessity, nor was it an antecedent debt. It was scheduled upon the mortgage as "Received in cash at the village before registration, Rs 1,000. Cash at the time of registration Rs. 7,000."

(As to the Rs. 1,000, the High Court has allowed it with certain interest as a good charge, and the respondents do not present any cross-appeal. The item may accordingly be dismissed from further consideration).

In short, Amar treated the property as his own and violated the well known rule of the Mitakshara, under which, as clearly laid down in *Sahu Ram Chandra* v. *Bhup Singh* (1), joint family property "cannot be the subject of a gift, sale or mortgage by one co-parcener except with the content, express or implied, of all the other co-parceners. Any deed of gift, sale or mortgage granted by one co-parcener on his own account of or over the joint family property is invalid, the estate is wholly unaffected by it, and it stands entirely free of it."

This law has been, in substance, repeated again and again. It is in entire accord with the ancient texts. It was accepted law long prior to *Sahu Ram Chandra's case* (1), a convenient instance being Lord Watson's judgment in *Madho Parshad* v. *Mehrban Singh* (2) and it has been followed by the cases after referred to.

The exception to this rule is where the consideration for the transaction is an antecedent debt of the vendor or mortgagor, and the judgment of Sir John Stanley on this part of the law in *Chandraleo Singh* v. *Mata Prasad* (3), and expressly affirmed by this Board in *Sahu Ram Chandra* v. *Bhup Singh* (1), appears to this Board exactly to cover the present case.

Before passing from the mortgage, however, their Lordships desire to note that it was, by its terms, a usufructuary mortgage, and was for the period of ten years running from its date, that is, from 1907—1917. It is stipulated that, possession and occupation being given to the mortgagee:—

"The profits of the mortgaged land will be equal to the interest of the amount of mortgage until redemption of the mortgage..... Whenever, after the expiry of ten years, I, the executant, shall have paid the entire amount of mortgage in a lump sum to the mortgagee, I shall get the property mortgaged by me redeemed. I shall not have power to the redemption of the mortgage before the expiry of ten years."

Apparently, however, the profuse scale of the father's personal expenditure continued, and he was again willing to put, or attempt to put, in jeopardy the joint family property. Notwithstanding the ten years' provision of the usufructuary mortgage, he (Amar Singh) within three years from its date—namely, on the 16th July 1907—sold his equity of redemption in the property to the mortgagees for Rs. 13,500. In the specification of the consideration he "allowed credit," to the vendees for the Rs. 8000 obtained from the mortgage, and the balance was put down,

"Received in cash at the time of the registration."

Beyond all question with regard to this latter sum, here was a sale in flat defiance of the law. For what is not pretended to be any family purpose or necessity, he had improperly and illegally sold the family property; and such a sale cannot stand.

This case is singularly clear because it is not affected by other considerations such as the property having been publicly sold; there are no rights of execution-creditors or auction purchasers to be considered.

But an argument was submitted, supported by the judgment of the Subordinate Judge, to the effect that although by the rules of the Mitakshara Law a mortgage is at its date an invalid deed in so far as purporting to encumber the joint family property, yet when it purports to become the consideration for a sale, it then becomes a just and a legal consideration on the principle of "antecedent debt." The family property could not be affected by such an invalid mortgage, but it could be sold next year or next day to the mortgagee for an 'antecedent' debt—namely, the mortgage debt itself! Thus by turning the 'antecedent debt' simply into a debt 'antecedent' to the sale, the whole doctrine of 'antecedent debt'

(1) 39 Ind. Cas. 280; 39 A. 437; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 2[illegible]; 6 L. W. 213; 44 I. A. 126 (P. C.).

(2) 18 C. 157; 17 I. A. 194; 5 Sar. P. C. J. 583; Rafique & Jackson's P. C. No. 121; 9 Ind. Dec. (N. S.) 10[illegible] (P. C.).

(3) 1 Ind. Cas. 479; 31 A. 176; 6 A. L. J. 263.

is reduced *ad absurdum*, the principle of the Mitakshara Law is circumvented, and the rights of the junior members of a Hindu family are no longer protected but can be easily destroyed. Their Lordships cannot hold that this is in accordance with law. The views of the Board have been expressed quite recently in *Sahu Ram Chandra's case* (1), and in *Jogi Das* v. *Ganga Ram* (4) about to be referred to.

As to the matter of the antecedency of debts, it is clear beyond question that the antecedency is antecedency to the mortgage itself. And it is more than that—it is disconnection with the mortgage in fact as well as in time. In no other way can the law of Indian joint family property protect itself against being undermined.

These sentences from *Sahu Ram Chandra's case* (1) may be quoted as particularly applicable to the circumstances of this appeal:—

"In their Lordships' opinion these expressions, which have been the subject of so much difference of legal opinion, do not give any countenance to the idea that the joint family estate can be effectively sold or charged in such a manner as to bind the issue of the father, except where the sale or charge has been made in order to discharge an obligation not only antecedently incurred, but incurred wholly apart from the ownership of the joint estate or the security afforded or supposed to be available by such joint estate. The exception being allowed, as in the state of the authorities it must be, it appears to their Lordships to apply, and to apply to the case where the father's debts have been incurred irrespective of the credit obtainable from immoveable assets which do not personally belong to him but are joint family property. In their view of the rights of a father and his creditors, if the principle were extended further, then the exception would be made so wide as in effect to extinguish the sound and wholesome principle itself, namely, that no manager, guardian, or trustee can be entitled for his own purposes to dispose of the estate which is under his charge."

(4) 42 Ind. Cas. 791; 21 C. W. N. 957; (1917) M. W. N. 739 (P. C.).

The law thus laid down was followed in *Lachhman Prasad* v. *Sarnam Singh* (5). Further, to employ the *resume* made by the learned Judgee of the High Court:—

The point was again considered by their Lordships of the Privy Council in the case of *Jogi Das* v. *Gonga Ram* (4) where Lord Haldane interpreted the judgment in the case of *Sahu Ram Chandra* v. *Bhup Singh* (1) as follows:—"In that case it was laid down in effect that joint property could not be alienated as against co-sharers by way of mortgage, or otherwise, except for necessity, or for payment of an actual antecedent debt, quite distinct from the debt incurred in the mortgage itself and that in consequence the transaction in that case could not stand, and it was added that the mere circumstance of a pious obligation does not validate the mortgage."

This body of law is rightly followed and applied by the High Court, and their Lordships fully approve of the judgment delivered.

A separate and protracted argument was laid before the Board to the effect that the respondents, the grandsons of Amar Singh, are not entitled to have their property against his invalid proceedings by reason of 'pious obligation.' It is sufficient to say that no such doctrine can be invoked in the circumstance of the present case. In *Sahu Ram Chandra's case* (1) a similar appeal to the "pious obligation" doctrine was made during the father's lifetime, and the point was thus dealt with:—

"While the father, however, remains in life, the attempt to affect the sons' and grandsons' shares in the property in respect merely of their pious obligation to pay off their father's debts; and not in respect of the debt having been truly incurred for the interest of the estate itself, which they with their father jointly own...must fail; and the simplest of all reasons may be assigned for this, namely, that before the father's death he may pay off the debt, or after his death there may be ample personal estate belonging to the father himself out of which the debt may be discharged. In short, responsibility to meet the father's

(5) 40 Ind. Cas. 284; 39 A. 500; 15 A. L. J. 584; 2 P. L. W. 29; 21 C. W. N 990; 33 M. L. J. 39; 19 Bom. L. R. 646; 26 C. L. J. 97; (1917) M. W. N. 516; 6 L. W. 334; 44 I. A. 163 (P. C.).

debts is one thing and the validity of a mortgage over the joint estate is quite another thing."

In the present case the doctrine is invoked against grandsons and in the lifetime of sons.

Nothing more need be said. The invocation of the doctrine entirely fails.

Their Lordships will humbly advise His Majesty that the appeal should be refused with costs.

S. D. & N. H. *Appeal dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEALS NOS. 143 AND 144 OF 1921.

February 1, 1922.

Present:—Mr. Daniels, A. J. C., and Mr. Lyle, A. J. C.

BIJAI PARTAB SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

RAGHURAJ SINGH AND OTHERS—PLAINTIFFS

FAQIR SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

AND

FAQIR SINGH AND OTHERS—DEFENDANTS APPELLANTS

versus

RAGHURAJ SINGH AND OTHERS—PLAINTIFFS LOCHAN SINGH *alias* DHOKAN SINGH—DEFENDANT—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 134—Purchaser from mortgagee of mere mortgagee rights as full proprietary rights, position of—Notice constructive, rule of—Special fact—Burden of proof— Biswi *mortgage—Under-proprietary tenure subject to redemption—Compromise terminating mortgage, effect of—Adverse possession.*

A person who purchases a right which he honestly believes to be full proprietary right and which is so described in the deed of sale, can claim the benefit of Article 134, Indian Limitation Act, even though by the exercise of diligence he might have discovered that his transferor was only a mortgagee. Mere constructive notice without actual knowledge is not sufficient to deprive the purchaser of the benefit of the Article. [p. 573, col. 2.]

Drigpal Singh v. *Kallu*, 30 Ind. Cas. 956; 37 A. 660; 13 A. L. J. 945, *Mahbub Ali* v. *Muhammad Husain*, 57 Ind. Cas. 427; 23 O. C. 125; 7 O. L. J. 319, *Radanath Doss* v. *Gisborne & Co.*, 14 M. I. A. 1 at p. 15; 15 W. R. P. C. 24; 6 B. L. R. 530; 2 Suth. P. C. J. 397; 2 Sar. P. C. J. 636; 20 E. R. 687 and *Pandu* v. *Vithu*, 19 B. 140; 10 Ind. Dec. (N. S.) 95, referred to.

It is for the person who asserts that a transaction was something different from what on the face of it it purports to be, to substantiate that assertion, that is to say, a *special fact* must be proved by the party who relies on it. [p. 574, col. 1.]

Biswi mortgage is something like an under-proprietary tenure but it is subject to the right of redemption. [p. 575, col. 1.]

Though the general principle of law is that no act of the mortgagee can by itself change the character of the possession which was originally acquired yet, where both the parties have treated a mortgage as terminated, the case stands on a different footing. [p. 575, col. 2.]

Mahendra Bahadur Singh v. *Chandrapal Singh*, 63 Ind. Cas. 284; 24 O. C. 155; 8 O. L. J. 622, followed.

Therefore, where under a compromise the equity of redemption is released by the mortgagor but the compromise is ineffectual for any defect of registration or otherwise, the possession of the mortgagee would be considered to be adverse from the date when the compromise was entered into. [p. 576, col. 2.]

Ehtisham Ali v. *Jamna Prasad*, 64 Ind. Cas. 299; 9 O. L. J. 71; 24 O. C. 272; 15 L. W. 104; 30 M. L. T. 132; 24 Bom. L. R. 675 (P. C.), distinguished.

Appeals from a decree of the District Judge, Fyzabad, dated the 25th February 1921, modifying that of the Subordinate Judge, Sultanpur, dated the 12th December 1918.

Messrs. *Haider Husain* and *M. A. Khan*, for the Appellants in Appeal No. 143.

Messrs. *Ehsanulrahman* and *Niamat Ullah*, for Respondents Nos. 1 to 3 in Appeal No. 143.

Mr. *Haider Husain*, for the Appellants in Appeal No. 144.

Mr. *Niamat Ullah*, for the Respondents in Appeal No. 144.

JUDGMENT.—These two connected second appeals arising out of the same suit have been referred for decision to a Bench as involving an important question of interpretation of Article 134 of the First Schedule to the Limitation Act. The suit was one for redemption of a mortgage of a nine pies share in two villages executed by one Rachhpal Singh in favour of Balka an Singh. Both parties to the transaction are long since dead and the plaintiffs are the representatives of the mortgagor. There were sixty eight defendants to the suit and it is owing to the difficulty of effecting service of process on all these persons that this litigation has been pending for more than seven years. The suit was instituted on the 15th November 1914. There were two appeals to the Court below and though filed in 1917

were not decided till February 1921. The fact that the delay occurred chiefly in the lower Appellate Court seems to point to the desirability of some amendment of our rules for the service of process on the lines of that adopted by the Allahabad High Court.

The defendants Nos. 1 to 33 are representatives of the original mortgagee. The defendants Nos. 34 to 42 are representatives of the mortgagor who have not joined in the suit. The defendants Nos. 43 to 68 are transferees from some of the first 33 defendants. Two appeals have been filed to this Court. Appeal No. 143 of 1921 is by certain transferees. Appeal No. 144 of 1921 is by 21 of the representatives of the mortgagee.

The sole question for decision in Appeal No. 143 is the construction of Article 134. The memorandum of appeal in Appeal No. 144 filed by the mortgagees raises five pleas, none of which has been pressed in the precise form in which they appeared in the grounds of appeal. The pleas actually pressed have been—

1. That the mortgage created an under-proprietary right which entitled the mortgagees to retain actual possession of the share even after redemption.

2. That the mortgagor's right was extinguished by a compromise between the parties in connection with certain litigation in the year 1884.

3. That even if that compromise is not legally valid its effect was to make the possession of the defendants adverse from the date of its execution.

The appellants' Counsel contends that these pleas are covered by his second ground of appeal which runs—

"Because in a suit for redemption the plaintiff must prove *prima facie* that the mortgage is redeemable on the date of the institution of the suit."

On the question of construction of Article 134 the only difference between the parties in this Court has been one of the burden of proof. Both parties accept the view laid down in *Drigpal Singh* v. *Kallu* (1) that a person who purchases from a mortgagee with full knowledge that the latter has only a mortgagee right cannot claim the benefit of the Article even though the sale may ostensibly be one of full proprietary right. Both parties equally accept the view that a person who purchases a right which he honestly believes to be full proprietary right and which is so described in the deed of sale can claim the benefit of the Article, even though by the exercise of diligence he might have discovered that his transferor was only a mortgagee. In other words, both parties accept the principle that the mere constructive notice without actual knowledge is not sufficient to deprive the purchaser of the benefit of the Article. In this case there is no evidence and no finding of the Courts below that the transferees had actual knowledge that their transferors were mere mortgagees. All the transfers in question purported to transfer full proprietary right. The case has been decided by both the Courts below on this footing. A doubt was suggested in argument before us as to one of them, Exhibit VVI, but we have examined the document and there is no doubt that it purports to be a transfer of full proprietary interest. The appellants contend that it was for the plaintiffs who allege that these transfers were something other than they purported on their face to be, to show that the purchasers had knowledge of the real state of affairs. The plaintiffs, on the other hand, contend that it was for the transferees who claimed the benefit of Article 134 to prove affirmatively that they were ignorant of the real state of the mortgagors' title.

As Appeal No. 143 has been referred to this Court for an authoritative decision on the question involved it is desirable to say that the position accepted by the parties is that to which the authorities lead. The lower Appellate Court has based its decision on a finding that the tranferees did not take in good faith as defined in the Limitation Act, because they might if they had made proper enquiries have ascertained the true state of facts; in other words, they had constructive notice. The definition of "good faith" in section 2 (1) provides that "nothing shall be deemed to be done in good faith which is not done with due care and attention." The words "good faith" do not, however, occur in Article 134. They do occur in the corresponding

(1) 30 Ind. Cas. 956; 37 A. 660; 13 A. L. J. 945.

provision of the Acts of 1859 and 1871 but were omitted in the Limitation Acts of 1877 and 1908. There is no justification for reading into the Act words which were deliberately omitted from it. A purchaser who bought what purported to be and what he believed to be full proprietary right cannot be deprived of the benefit of the Aritiele by failure to make enquiries as to the true state of the title.

The rule laid down in *Drigpal Singh* v. *Kallu* (1) and *Mahbub Ali* v. *Muhammad Husain* (2) that a purchaser who buys knowing full well that he is buying a mortgagee right is not entitled to the benefit of the Ariele may be based on two distinct grounds.

The first is that stated by the Privy Council in *Radanath Dass* v. *Gisborne & Co.* (3) a case decided under the Act of 1859. Their Lordships say: "What is the meaning of the term 'purchaser' in this section? It cannot be a person who purchases a mortgage as a mortgage, because that would be merely equivalent to the assignment of a mortgage."

The second is that where the transferor and transferee combine to represent what is really a mortgagee right as proprietary right they are really combining to practise a fraud upon the true owner and no party is entitled to take advantage of his own fraud.

Neither of these considerations applies to the case of mere constructive notice without actual knowledge. This is also the view taken by the Bombay High Court in *Pandu* v. *Vithu* (4).

The burden of proof, in our opinion, lay on the plaintiffs and not on the defendants. It is for the person who asserts that a transaction was something different from what, on the face of it, it purports to be to substantiate that assertion. The transactions impugned are transactions which, on the face of them, are exactly covered by the language of the Article. The plaintiffs seek to take the case out of the Article by alleging a special fact, namely, knowledge on the part of the transferees that the vendor's title was that of a mortgagee. They must prove the fact on which they rely. The Court cannot accept the mere allegation as sufficient, nor can it assume without evidence that the transferees were endeavouring to perpetrate a fraud. In one of the cases most relied on by the respondents both in this Court and in the lower Court, *Drigpal Singh* v. *Kallu* (1), it is suggested in the judgment that one reason for the omission of the words "in good faith" from the Act of 1877 was that their retention would have thrown on the transferee the onus of proving that he had no knowledge of his vendor's title. The learned Judges point out that this would be in many cases a hardship on the person in possession of the property and that, he would have to prove a negative possibly after the lapse of many years. The view of the learned Judges clearly was that though proof of knowledge of the true state of the title would take the suit out of the operation of the Article 134 such knowledge must be proved like any other fact which it was necessary to establish in order to enable the plaintiffs to succeed.

Appeal No. 143 must, therefore, be allowed. We have dealt with this appeal on the assumption that proper enquiry would have satisfied the transferees that what they were purchasing was merely a mortgagee right, as this is a finding of fact of the lower Appellate Court which is binding on us in second appeal. In view of the compromise of 1886 to which we shall have to refer in dealing with Appeal No. 144 we should be disposed to hold, if the matter were open, that it is very doubtful whether enquiry would have led them to any such conclusion.

The only substantial plea pressed in Appeal No. 144 is that of adverse possession. The first two require very little discussion. The mortgage was what is known as a *biswi* mortgage. This is described in Sykes (Compendium on Talukdari Law, page 193) as "a special class of mortgage by the proprietor to a cultivator of the latter's holding for a sum of money paid down." Generally a low rent called *piramsana* was reserved which represented the difference between the interest due on the money and the full rent. Such was the case with the mortgage in suit. The full rent of the holding was Rs. 182 15 6. The mortgage provided that the mortgagee should retain Rs. 127.6.0

(2) 57 Ind Cas. 497; 23 O.C. 125; 7 O.L.J. 319.

(3) 14 M.I.A. 1 at p. 15; 15 W.R. P.C. 24; 6 B.L.R. 530; 2 Suth. P.C.J. 397; 2 Sar. P.C.J. 636; 20 E.R. 687.

(4) 19 B. 140; 10 Ind. Dec. (N.S.) 95.

BIJAI PARTAB SINGH v. RAGHORAJ SINGH.

in lieu of interest and Rs. 2-7-6 on account of *sarawal* (winter clothing) and pay the balance of Rs. 53-2 0 to the mortgagor as *paramsana* or rent. On redemption the mortgagor was to get back his deed and full rent was to become payable. The appellants rely on the fact that *biswi* is described by Sykes as an under proprietary tenure. The same authority makes it clear, however, that it was an under-proprietary tenure subject to redemption. This is stated more explicitly in an authority to which the appellants themselves have referred us, Col. MacAndrew's "Some Revenue Matters, chiefly in the Province of Oudh," published in 1876. Col. MacAndrew was Commissioner of Sitapur at the time. Speaking of the tenure, he says, that it differs from all other under-proprietary tenures in being liable to redemption, and he goes on to say that in his opinion a mistake was made in describing these tenures as under proprietary at all in the Settlement Records and that, it would have been better to treat them as simple mortgages. There is absolutely nothing in the terms of the deed in suit to warrant the suggestion that a permanent under-proprietary right was conferred by it.

The second and third pleas are based on the same transaction. In the year 1885 the mortgagor instituted a suit for redemption of the mortgage now in dispute (Exhibit 4). This was in the lifetime of the original motgagee. The parties came to terms and by a compromise dated 27th February 1886 it was provided.—

First, that the defendants would pay the Government revenue and certain other expenses.

Second, that the defendants should remain in possession with under-propietary right paying thirteen per cent. of the Government revenue as *malikana* allowance to the mortgagee.

Third, that the share in suit should be included in *mahal* Hasanpur Patti,

Fourth, that the property should not be liable to redemption, and

Fifth, that if the defendants fail to pay the thirteen per cent. *haq malikana* it should be recoverable from their moveable and immoveable property.

Unfortunately for the defendants the plaintiff mortgagor had failed to pay the full Court fees on his plaint. An order was passed to the effect that if the plaintiff paid into Court the amount found due on the mortgage and made up the deficiency in Court-fees a decree for redemption should be passed in his favour This order was passed on 11th February 1886 before the parties had come to terms. After the compromise was effected the plaintiff, probably thinking that as the matter had been settled it would be a useless expence to pay additional Court-fees, failed to make up the deficiency with the result that instead of the decree being passed in terms of the compromise the suit was dismissed for non-payment of Court-fees. The effect of this was that the compromise, not having been embodied in a decree of the Court, remained invalid for want of registration. These facts are not disputed by the learned Counsel for the appellants and though he had announced as his second plea that the mortgage was extinguished by virtue of this compromise he was unable, when it came to the point, to contend in view of the provisions of sections 17 and 49 of the Registration Act that the two unregistered applications put in by the parties embodying the terms of the compromise could confer a right in immoveable property. As their Lordships of the Privy Council remarked in a recent case [*Ehtisham Ali* v. *Jamna Prasad* (5)] "when a deed of sale has been once executed and registered it can only be avoided by a subsequent registered transfer." The original mortgage in this case was, it is true, not registered, but that is because it was executed at a time when no law requiring registration was in force.

In their grounds of appeal the appellants took a plea that the dismissal of the previous suit for redemption barred the present suit under the rule of *res judicata*, but as they had taken a similar plea in the Court below and then abandoned it they have not pressed it here. They do, however, contend that the effect of the compromise was to make their possession adverse from its date. They fully accept the principle that during the continuance of the mortgage no act of the mortgagee alone can make his possession adverse but they contend that where both parties have treated the mortgage as termi-

(5) 64 Ind. Cas. 299; 9 O. L. J. 71; 24 O. C. 272; 15 L. W. 104; 30 M. L. T. 132; 24 Bom. L. R. 675 (P. C.).

ated the case stands on a different footing. *Mahendra Bahadur Singh* v. *Chandrapal Singh* (6) is a direct authority in their favour. The facts were very similar to those of the present case and are indistinguishable in principle. The mortgagor had effected an out and out sale of the mortgaged property to the mortgagee but, as in the present case, the deed in which the transaction was embodied was invalid for want of registration. The learned Judicial Commissioner held that from the date of the deed the possession of the mortgagee became adverse. He said:—

"The law is that no act of a mortgagee can by itself change the character of the possession which was originally acquired.

"But in the present case the facts are different. The act upon which the defendant-appellant relies was not his own act but was an act to which both the mortgagor and the mortgagee were parties. This is not a case of mere repudiation of the mortgagor's title or mere assertion of adverse title by a mortgagee in possession. It seems to me that it must be held that from the date on which these two documents were executed, that is to say, on the 21st of November 1889, the possession of the defendant-appellant became adverse to the mortgagor. The possession of a grantee under a void grant is adverse to the grantor."

The respondents raised a preliminary objection to the plea being heard on the ground that it was not explicitly taken in the grounds of appeal.

The plea was directly raised in the Trial Court and an issue was framed on it. Issue No. 18 ran:—

"Have the defendants been in adverse possession of the property in suit for more than twelve years before the suit?"

It was also raised in the first ground of appeal to the Court below. If not directly raised it was clearly implied in the first ground of appeal to this Court which was that the plaintiff's suit is barred by the rule of twelve years' limitation. Even if we considered that it was not stated with sufficient clearness in that ground we should be prepared to allow the appellants to urge it under O. XLI, r. 2, of the Code of Civil Procedure. To prevent any possibility of the respondent being taken by surprise we offered to allow their learned Advocate further time to prepare his arguments on his point, but he stated that he did not require. Apart from this technical objection he relies on the observations of their Lordships of the Privy Council in *Khiarajmal* v. *Daim* (7) that as between mortgagor and mortgagee—

"Neither exclusive possession by the mortgagee for any length of time short of the statutory period of sixty years, nor any acquiescence by the mortgagor not amounting to a release of the equity of redemption, will be a bar or defence to a suit for redemption if the parties are otherwise entitled to redeem."

The circumstances relied on as establishing adverse possession are stated on prge 311* of the report. They were that no accounts had been demanded by or rendered to the mortgagors or their representatives, no payments of subsistence money which they were entitled to under the mortgages had been made to them and the parties after the sale ceased to cultivate the land, and left the village, and renewed *pattas* had been granted to the nominees of the mortgagees. The present case is not one of acquiescence at all. It is a case of direct release by the mortgagor of the equity of redemption though that release was not clothed in the appropriate legal form. The observations of their Lordships deal only with a plea of acquiescence and not with the case of a direct renunciation of his right on the part of the mortgagor. The effect of the compromise was that both parties, the mortgagor as well as the mortgagee, treated the mortgagee right as having come to an end and the mortgagee as holding in adverse under proprietary right. It is difficult to see what more could be required in order to render the mortgagee's possession adverse. We think, therefore, that the mortgagees are entitled to succeed on this issue.

The result is that we allow both appeals and dismiss the suit with costs in favour of the appellants in all Courts.

N. H. *Appeals allowed.*

(6) 63 Ind. Cas. 284; 24 O. C. 155; 8 O. L. J. 622.

(7) 32 I. A. 23; 32 C. 296; 1 C. L. J. 584; 8 Sar. P. C. J. 734; 9 C. W. N. 201; 2 A. L. J. 71; 7 Bom. L. R. 1 (P. C.).

*Page of 32 C.—[*Ed.*].

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 246 OF 1922.
May 1, 1922.

Present:—Mr. Justice Abdul Qadir.

KUNJ LAL—CONVICT—APPELLANT

versus

EMPEROR—RESPONDENT.

Evidence Act (I of 1872), s. 32—Dying declaration—Proof.

Witnesses should not be allowed to prove a dying declaration as if it were a substantial piece of evidence in the case. The relevant fact to be proved is the statement made by a deceased person admissible under section 32 of the Evidence Act and that statement is not the document made by the Magistrate but the verbal statement made by the deceased person. [p. 579, col. 1]

The only way of proving a dying declaration is by the evidence of some witness who heard it made, the witness being at liberty to refresh his memory by referring to the note made by him or read over by him at or about the time the statement was made. [p 579, col. 1]

King-Emperor v *Mathura Thakur*, 6 C. W. N. 72, *Samiruddin, In the matter of the petition of*, 8 C. 211; 10 C. L. R. 11; 4 Ind. Dec. (N. S.) 135, *Gouridas Namasudra* v *Emperor*, 2 Ind. Cas 841; 36 C. 659; 13 C. W. N 680; 10 Cr. L. J. 186, relied upon.

Ghazi v *Emperor*, 4 Ind. Cas. 4 7: 17 P R. 19 1 Cr.; 13 Cr L. J. 225; 48 P. W. R 1911 Cr., referred to.

Appeal from an order of the Magistrate, First Class, with enhanced powers under section 30, Criminal Procedure Code, Lahore, dated the 10th March 1922.

Lala *Mool Chand*, R. S., for the Appellant.

Sheikh *Niaz Ali*, for the Government Advocate, for the Respondent.

JUDGMENT.—This judgment will dispose of two connected appeals and one criminal revision. Two persons, namely, Salig Ram and Kunj Lal, have been convicted under section 304, Part II, Indian Penal Code, for having caused the death of Jowinda Mal, and have been sentenced to five years' rigorous imprisonment each. They have both appealed to this Court, while Durga Das, complainant, has filed a petition for enhancement of their sentences on the ground that the offence committed by them was one falling under section 302, Indian Penal Code. I have heard Pandit Sheo Narain on behalf of Salig Ram, appellant, Mr. Mool Chand for Kunj Lal, appellant, and Mr. Dhanraj Shah in the revision petition.

The facts of the case are given at length in the judgment of the Trial Court and are briefly as follows:—Kunj Lal is the son of Jowinda Mal, deceased, from his first wife. The relations between father and son were strained, because Jowinda Mal had children from his second wife, whom he favoured, and was displeased with Kunj Lal, whose mother had died about 14 years ago. He did not allow Kunj Lal to share the business of cloth merchants which he was carrying on jointly with his brothers. On the 20th December 1921, Jowinda Mal was going home from his shop about 7 P. M. when he was assaulted and beaten with *dangs* in Bhadarkali Lane, inside Lahore City. He was removed to his house, which was not far from the place where he was assaulted, and the next day at 1 P. M a report was made to the Police by Durga Das, brother of the deceased, in which it was stated that Jowinda Mal had been beaten by Kunj Lal and by one other who was a friend of the latter. The injuries of the deceased were examined by Lieutenant Clarke, Assistant Surgeon, who detailed them in a certificate which he gave to the relations of the deceased, and which was produced before the Police at the time of the report. It showed that the deceased had altogether six injuries on his person, three of which were on the head and three on the other parts of the body, all caused by some blunt weapon. One of the injuries on the head was described as serious, and probably led to Jowinda Mal's death five or six days later. The Police started investigation on the very day when the report was made and the Sub-Inspector, Mr. Muhammad Asghar, (P. W. No. 8), recorded the statement of the deceased with regard to his injuries, in which Jowinda Mal stated that he had been assaulted by four or five persons including Kunj Lal and Salig Ram, but that he had not identified the other men, who seemed to be Muhammadans. After taking down this statement, the Sub-Inspector thought that the condition of the deceased was precarious and he asked a Magistrate, M. Abdur Rahim, (P. W. No. 3) to come and take down the statement of Jowinda Mal regarding his assailants. The Magistrate came and questioned the deceased and took down his statement, which was practically the same as had already been made to the Sub Inspector. In the first report Hari Chand and Fakir Chand had been mentioned

as witnesses of the occurrence and in the two statements which Jowinda Mal made to the Sub-Inspector and the Magistrate, respectively, he mentioned the name of Fakir Chand only, though it was said that others also had seen the occurrence. It is unfortunate, however, that Hari Chand was not produced as a witness in Court and Fakir Chand who had been cited and was present was given up. One Muhammad Bakhsh was produced who did not profess to have seen anything and only stated that he had seen Jowinda Mal lying injured. The only man who professed to be an eye witness in Court was Jiwan Lal (P. W. No. 4). He deposed that he had seen Kunj Lal and Salig Ram and three other men, whom he did not identify and who seemed to be Muhammadans beat Jowinda Mal with sticks. Durga Das was also examined as P W. No. 1 and stated that the information given by him in his report was obtained by him from the deceased, who told him about 9 P. M. on the same evening on which he was injured and soon after the assault, that he had been beaten by Kunj Lal and Salig Ram and others. He added that at the time of making the report he forgot to mention the name of Salig Ram and also to say that there were other assailants besides the two. The statements as regards his injuries, made by Jowinda Mal, to the Sub-Inspector and M. Abdur Rahim have been proved by the production of both these witnesses and, with the exception of the statement of Jiwan Mal, constitute the main evidence for the prosecution in this case.

It is contended by the learned Counsel for Salig Ram, appellant, that there is no evidence worth the name against his client. He argues that the evidence of Jiwan Lal should not be relied upon because he does not appear to be a genuine eye witness. He is not only not mentioned in the first report as a man who saw anything, but even the two statements which have been treated as dying declarations do not make any mention of him though it is shown by the statement recorded by M. Abdur Rahim that Jiwan Lal was present when the deceased was describing the incident. After having thus criticised Jiwan Mal, Mr S ee Narain proceeds to attack the dying declarations so far as their effect against his client is concerned. He says that the weight that ordinarily attaches to such statements is not present in this case, because there is nothing to show that the deceased thought that he was dying, beyond the apprehension which the Sub-Inspector entertained at the time he got the statement of the deceased recorded by the Magistrate. He also urges that it should be presumed from the first report, which was made after considerable delay, that till the time that the report was made the name of Salig Ram was not given out by the deceased, who mentioned it only at the time of making his statement to the Sub Inspector and repeated the same to M. Abdur Rahim and this, he says, must have been due to some erroneous impression. He suggests that Jiwan Mal, who has had some litigation with the father of Salig Ram, and is on bad terms with the latter, might have put the notion into the mind of the deceased that the friend of Kunj Lal, about whose identity he was not clear, was Salig Ram, and if, under these circumstances, Jowinda Mal named Salig Ram much importance should not be attached to his naming him, because it may be due only to accepting the suggestion made to him and not because he had really identified Salig Ram. He, therefore, argues that his client is entitled to acquittal because, on the facts referred to above, a substantial doubt in his favour is created even if the dying declarations are believed to be correct and are given effect to, though he adds that they are not dying declarations properly speaking.

Mr. Mool Chand, on behalf of Kunj Lal, says that if the evidence of Jiwan Mal is eliminated, as it is doubtful that he had seen anything, then the statements of the deceased are the only things remaining against the appellants. He points out that the statements of the deceased were, according to the prosecution witnesses, made on several occasions Firstly, those made by him during the night to Durga Das and other people as to who his assailants were; secondly, the account of the occurrence given by him to the Sub Inspector, and, thirdly, a similar account given by him to M. Abdur Rahim, Magistrate.

With regard to the earliest statement, Mr. Mool Chand says that the prosecution have

produced none of the other persons who saw the deceased on the evening in question and have contented themselves only with the testimony of Durga Das on the point. He says that Durga Das should not be regarded as independent and reliable, that he is not independent because he may be interested in depriving his nephew, Kunj Lal, of the share of the property of the deceased, and that he is not reliable because he exaggerates his statements in Court and improves on what his brother had told him. He has given a good deal beyond the information he gave in the first report and made the addition of the name of Salig Ram when giving his evidence in Court.

As regards the statements made by the deceased to the Sub-Inspector and the Magistrate and recorded by each one of them, Mr. Mool Chand raises a technical objection against them. He says that these statements should have been proved by questioning the witness to whom they were made as to what the deceased told them, and should not have been proved by simply showing them their recorded statements and proving them as if they were documents which could be proved as such under section 91 of the Evidence Act. In this connection he refers to *King-Emperor* v. *Mathura Thakur* (1) in which the following observations were made by Taylor, J.:—

"Witnesses should not be allowed to prove a dying declaration as if it is a substantial piece of evidence in the case. The relevant fact to be proved is the statement made by a deceased person admissible under section 32 of the Evidence Act, and that statement is not the document made by the Magistrate but the verbal statement made by the deceased person."

"The only way of proving a dying declaration is by the evidence of some witness who heard it made, the witness being at liberty to refresh his memory by referring to the note made by him or read over by him at or about the time the statement is made."

He also refers to *Samiruddin, In the matter of the petition of* (2) in which also the principle referred to above was recognised as sound. He further refers to *Gouridas Namasudra* v. *Emperor* (3) which is a ruling similar to the two already mentioned. He, therefore, argues that these dying declarations should be excluded from consideration and his client should be acquitted. He argues, in the alternative, that even if the dying declarations are treated as evidence, they should not be believed, because the time when the deceased was assaulted was a dark December evening, which was also cloudy, and, therefore, it is probable that the deceased, on being suddenly assaulted, could not identify his assailants and the name of Kunj Lal probably was introduced because suspicion fell on him. He says that on a former occasion, when fire had been set to the shop which Jowinda Mal and his brothers and their father owned, suspicion had fallen, though wrongly, on Kunj Lal and, therefore, there is nothing strange in his being suspected again. He also urges that the deceased not having had any scruples about adding to his story as time elapsed made himself further unworthy of credit.

Mr. Niaz Ali replying to the above arguments on behalf of the Crown says the dying declarations are worthy of belief and that the technical objections raised against them by Mr. Mool Chand should not result in their exclusion. He argues that it is shown clearly by the evidence on the record, both of medical men as well as of laymen, that the deceased was capable of speaking after the first shock of his injuries was over and continued to be so. He mentioned his assailants to his brother, then to the Sub-Inspector and then to the Magistrate. All the three witnesses have been produced in Court and examined to prove those statements and if there is any defect in the form in which the depositions of the two witnesses last referred to have been recorded, that should not take away from the effect of that testimony. He points out that in the case reported as *Gouridas Namasudra* v. *Emperor* (3) what happened was that an attempt was made to treat a dying declaration as proved, simply by the production of the magisterial record of it, without producing the Magistrate as a witness. It was held by the Calcutta High Court that the record

(1) 6 C. W. N. 72.
(2) 8 C. 211; 10 C. L. R. 11; 4 Ind. Dec. (N. S.) 135.
(3) 2 Ind. Cas. 841; 36 C. 659; 13 C. W. N. 680; 10 Cr. L. J. 186.

KUNJ LAL v. EMPEROR.

was not proved by him and that in that case the recorded statement was rightly held to be not proved, but such is not the case here. Here, the Magistrate as well as the Sub-Inspector have been duly put into the witness box. He cites *Ghazi* v. *Emperor* (4) which was a case in which a statement of a dying man recorded in Hospital by a Magistrate was brought on the record without the Magistrate having been summoned to prove it and it was pointed out by the learned Judges of the Chief Court that it should have been proved by taking the statement of the Magistrate. He goes on to argue that as to the credibility of these statements there should be no doubt, because it does not stand to reason that the deceased could have failed to identify his own son, even if it was dark at the time and it is also unlikely that he would falsely name his own son in such a serious case in spite of relations between him and the son being strained. As regards Salig Ram, he says that he was the man described in the first report as a friend of Kunj Lal, and it is possible that the memory of Durga Das failed him at the time of making the report so far as the name of this appellant was concerned.

After carefully considering the arguments addressed to me on both sides, I am of opinion that the appeal of Kunj Lal must be rejected and that of Salig Ram must be accepted. I share the doubts expressed on behalf of the appellants as to the genuineness of Jiwan Mal as an eye-witness and do not, therefore, attach any weight to his evidence in this case, but I regard the statements made by the deceased as to his principal assailant, namely, his son Kunj Lal, first of all to his brother Durga Das, then to the Sub-Inspector, and then to the Magistrate, as quite credible and entitled to every weight. The statement made to Durga Das about Kunj Lal is proved by Durga Das in Court I hold that probably the only name mentioned by the deceased at first was that of Kunj Lal and that is the reason why that is the only name which was mentioned in the first report. I do not think it likely that Durga Das would have forgotten the name of Salig Ram if it had been given to him. It is true that Durga Das in Court states that the deceased had mentioned both Kunj Lal and Salig Ram from the very outset, but I am not prepared to believe that part of his story, because it is contradicted by the first report made by him. I have no doubt that he is telling the truth so far as Kunj Lal is concerned. There is, therefore, this piece of evidence against Kunj Lal to which no such technical objections can be raised as have been raised against the two recorded statements, proved by the evidence of the Sub-Inspector and the Magistrate As to these, I think, Mr. Mool Chand's criticism is valuable and I wish to take this occasion of drawing the attention of the learned Magistrate to the rule laid down in *King-Emperor* v. *Mathura Thakar* (1) as to the manner in which statements purporting to be dying declarations should be recorded. But in view of the fact that in the case before me the two witnesses to whom the statements were made by the deceased have been produced in Court and were available for cross-examination, I do not see that the defect in the form in which these statements were taken down destroys their value to such an extent as to make it necessary to exclude them from consideration. There is no reasonable doubt left in my mind as to truth of the dying declarations of the deceased so far as Kunj Lal is concerned and I dismiss Kunj Lal's appeal.

As regards Salig Ram, I am not prepared to say that the deceased told a deliberate lie when he named Salig Ram before the Sub Inspector and the Magistrate. It is quite possible that owing to the serious injury that he had received to his brain the name of the other man escaped his memory and at the time of giving instructions to his brother he could not tell anything more than that Kunj Lal was accompanied by a friend of his. He may have recollected the name at the time the Sub-Inspector arrived. It is quite possible that Salig Ram may have been the companion of Kunj Lal, referred to in the first report, but it is conceivable that the deceased may have readily accepted a suggestion coming from a

(4) 14 Ind. Cas. 417; 17 P. R. 1911 Cr.; 18 Cr. L. J. 225; 48 P. W. R. 1911 Cr.

man like Jiwan Mal, who is admittedly hostile to Salig Ram and may have given this name owing to the suggestion thus received. Thus a doubt in favour of Salig Ram is created which is strengthened by the absence of his name from the first report, and also by the absence of motive on his part to join the assault. It is also significant and may be mentioned for whatever it is worth, that I find, on reference to the Police diaries, that the earliest statement of Jiwan Mal contained no mention of Salig Ram but simply gave the name of Kunj Lal. This lends colour to the theory that the addition of the name of Salig Ram and the statement that two or three other men took part in the affair are developments of the case, which cannot be easily treated as reliable. Therefore, I acquit Salig Ram, giving him the benefit of the doubt.

Coming to the petition of enhancement I do not think much need be said on the point after the view of the case I have taken above. It may be mentioned that the plea urged on behalf of the complainant-petitioner was that the assault was made with the intention of committing murder and, therefore, deserved the punishment provided for that offence, but the circumstances of the case do not lead to that conclusion. I have seen the plan on the record, which shows that there are other lanes leading to the house of the deceased and there is nothing to show that any assailant of his could have known which of those he would pass through on his way home on that particular evening. Moreover, I have no doubt that there were not more than two men concerned in the assault, as shown by the first report. The mentioning of four or five persons was an exaggeration and after-thought simply to increase the gravity of the offence. The real facts as to how the assault was committed or what preceded the assault cannot be possibly known. Moreover, the nature of the injuries shows that only one of the injuries on the head was really serious and the man survived that injury for over six days. It is also conceivable that with better and more careful treatment he might possibly have got better, because it is in evidence that the relations of the deceased were directed by Lieutenant Clarke to take him to the Hospital for treatment, but they refrained from doing so and he was kept all the time at home. Presumably, he had better chances of recovery by going to the Hospital than by remaining at his house. In such circumstances, I think the Court below was justified in framing a charge under section 304, Part II, Indian Penal Code, and there is no sufficient cause for an enhancement of the sentence. The petition for enhancement is, therefore, rejected.

Z. K.

Appeal & Petition rejected.

PATNA HIGH COURT.

JURY REFERENCE No. 2 OF 1922.

March 31, 1922.

Present:—Mr. Justice Jwala Prasad and Mr. Justice Coutts.

EMPEROR—PROSECUTOR

versus

PUNIT CHAIN AND OTHERS—ACCUSED—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 307—Reference—Verdict of Jury—Reasons for verdict—Sessions Judge to give reasons for his opinion—High Court's duty to consider evidence, etc.—Ground for setting aside verdict of Jury.

The verdict of a Jury must not be lightly disregarded by the High Court Due weight must be given to it, and whenever it is set aside, it must be upon a very substantial ground and not merely upon the ground that another view of the evidence might have been taken [p. 584, col .]

Emperor v. *Neamatulla*, 21 Ind Cas. 56; 17 C. W. N. 1077; 14 Cr. L. J. 556, referred to

In referring a case under section 307, Criminal Procedure Code, it is not sufficient for the Sessions Judge to say merely that he believes the evidence of witnesses on whose evidence the Jury has returned a verdict of not guilty; he should give reasons for his opinion in sufficient detail to enable the High Court to appreciate it and to give due weight to it. [p. 584, col 2.]

On a reference under section 307, Criminal Procedure Code, the High Court has to consider the entire evidence in the case and to give due weight to the opinions of the Sessions Judge and of the Jury. [p. 583, col. 2.]

Per *Jwala Prasad, J.*—In making a reference, under section 307, Criminal Procedure Code, disagreeing with the verdict of the Jury, the Sessions Judge should ask for their reasons for the verdict. [p. 583, col. 1.]

EMPEROR v. PUNIT CHAIN.

Where the Sessions Judge and the Jury differ and there is a division in the opinion of the Jury, the High Court will consider not only the opinion of the majority but also of the minority of the Jury [p. 583, col. 1.]

Emperor v. *Musammat Zohra*, 55 Ind. Cas. 294; 1 P. L. T. 6[illegible]7; 21 Cr. L. J. 27[illegible], referred to.

Per *Coutts, J.*—The opinion of a Jury is its verdict and not the reasons on which the verdict is based. [p. 584, col. 2.]

The High Court is not bound to act in accordance with the verdict of the Jury even where it is unanimous. [p. 584, col. 2.]

Emperor v. *Lyall*, 29 C. 128; 6 C. W. N. 253, referred to.

Reference under section 307 of the Criminal Procedure Code by the Sessions Judge, Patna, dated the 24th January 1922.

Mr. *H. L. Nandkeolyar*, Assistant Government Advocate, for the Crown.

Messrs. *P. E. Lal* and *I. B. Biswas*, for the Accused.

JUDGMENT.

JWALA PRASAD, J.—This is a Reference under section 307 of the Code of Criminal Procedure by the Sessions Judge of Patna recommending that Punit and Ramkhelawan be convicted of an offence under section 302, Indian Penal Code read with section 34, Indian Penal Code and under section 148, Indian Penal Code, and that Sita Ram and Indar be convicted of an offence under section 147, Indian Penal Code.

The above named four accused along with 17 others were tried by the learned Sessions Judge of Patna with the aid of Jury consisting of five gentlemen, on the charge of having murdered one Kokil Mahto. The Jury returned a divided verdict, three of the Jurors returned the verdict of not guilty and two a verdict of guilty. The learned Sessions Judge accepted the verdict of the majority of the Jury with respect to the 17 accused persons, and disagreeing with the verdict of the majority with respect to the aforesaid four persons has referred their case to us under section 307 of the Code of Criminal Procedure. The reason for the reference has been given by the learned Sessions Judge in his letter No. 329/XI, dated the 24th of January 1922, to this Court. He says.—"The evidence appears to me conclusive to establish the charges of rioting and to prove that the four men, Punit, Ram Khelawan, Sita Ram and Indar were members of the body of rioters, that the two former were armed with *bhalas*, that Sita Ram and Indar carried *lathis* and that either Punit or Ram Khelawan in furtherance of an intention which was common to both of them, caused the fatal wound in the chest of Kokil. My charge to the Jury will show the details of the evidence against each of these four men. I rely particularly on the evidence of Sardagar, *Musammat* Subhagia, *Musammat* Makhni, Ram Prasad Lohar, constable Ram Bilas Singh and Dahaur. I can find no reason why *Musammat* Subhagia or *Musammat* Makhni or Ram Prasad Lohar or constable Ram Bilas Singh or Dahaur should perjure themselves, and their demeanour in the witness-box was quite satisfactory. The evidence itself shows no grounds at all for considering their testimony to be inspired by any evil motives. As against all the four men with whom this reference is concerned there is the further fact that they were all arrested near the scene that night and also the fact that Sita Ram was found wearing a woman's garb."

It may incidentally be mentioned here that the charge to the Jury, the verdict of the Jury and the judgment of the Court all took place on the 21st of February 1922 as the order sheet and the verdict of the Jury and the judgment show, but the charge to the Jury bears the date "23rd February 1922," under the signature of the learned Sessions Judge. No doubt, the Jury was charged on the 21st and apparently a typed copy was placed before the learned Sessions Judge for his signature on the 23rd. It should have appeared on this copy when the Jury was actually charged.

In the letter of reference it would appear from the summary of the reasons quoted above that the learned Sessions Judge has not really discussed the evidence in the case for and against the accused persons, in order to justify the conclusion that the charge against the aforesaid four accused persons was established. He, however, refers to his charge to the Jury for details of the evidence against each of the aforesaid four persons.

[After referring at some length to the summary of the Sessions Judge's charge to the Jury, his Lordship proceeded as follows:]

Now, the learned Sessions Judge has not himself discussed the evidence in his letter of reference. He has simply said that the evidence of the witnesses mentioned above should be accepted. He ought to have given

his reasons for accepting the evidence. He ought to have met all the objections raised by the defence against the evidence of the aforesaid witnesses; in other words, he ought to have given his reasons for the decisions arrived at by him, that the evidence in the case establishes the guilt of the aforesaid four accused persons. Now, this was obviously more necessary in the present case because the learned Sessions Judge has deviated from the well-recognized principle that in making a reference under section 307 of the Code of Criminal Procedure disagreeing with the verdict of the Jury, the learned Sessions Judge should have asked for their reasons for the verdict. It was still more necessary as it was pointed out in the case of *Emperor* v. *Musammat Zohra* (1) that when the Jury had differed and there was a division in the opinion of the Jury we have to consider not only the opinion of the majority but also of the minority of the Jury. Section 307, clause (3) requires us to give "due weight to the opinion of the Sessions Judge and the Jury." We have in the present case got the opinion of the Judge, but we have not got the reasons and the opinion of the Jury except the verdict of "not guilty". We have, therefore, to depend entirely upon the record in the case or upon the arguments advanced on behalf of the defence in order to find out whether the evidence relied upon by the learned Sessions Judge should or should not be accepted as proving the guilt of the accused.

Now, we have given broadly, without having gone into minute details, the summary of the criticisms that might have been present in the minds of the Jurors when they discarded the evidence on behalf of the prosecution and held that the case against the accused was not proved. Whether there might have been the explanations for the Police to record late the statement of the principal witnesses for the prosecution, the defence is entitled to ask that the evidence of these witnesses should be discarded inasmuch as there was sufficient time and opportunity for being tutored. Thus eliminated, there was only the evidence of Dahaur and Ram Bilas Singh, against whom also there were reasons for holding that they did not come in proper time to identify the assailants. Therefore, the verdict of the Jury in the present case cannot be said to have been a perverse one. Upon the evidence, at the best, it can be said that there was room for another opinion, an opinion differing from that of the Jury. But that is not the criterion upon which a reference under section 307 of the Code of Criminal Procedure should be determined. True, on a reference the High Court is required to consider the entire evidence in the case, but that does not necessarily mean that the opinion of the Jury on the question of fact will be ignored. There must be something more than a mere estimate of the evidence on the facts that should entitle us to upset the verdict of the Jury. I do not think it is necessary in this case to discuss the various authorities placed before us on both sides. Each case was decided on its own merits: *vide Emperor* v. *Surnamoyee Biswas* (2), *Queen* v. *Sham Bagdi* (3), *Emperor* v. *Lyall* (4), *Emperor* v. *Chellan* (5) *Emperor* v. *Annada Charan Thakur* (6), *King Emperor* v. *Salimudi Sardar* (7), *Emperor* v. *Nezmatulla* (8), *Emperor* v. *Musammat Zohra* (1) and *Emperor* v. *Bhuilotan Singh* (9).

Now, the meaning and scope of section 307 was discussed by me in the case already referred to above, namely, *Emperor* v. *Musammat Zohra* (1). I do not propose in this case to go into that discussion again, but I have not still come across a single case where the verdict of the Jury on a question of fact has been set aside without there being an astounding reason for it. The case of the *Emperor* v. *Nezmatulla* (8) is an instance of the kind. There, the verdict of the Jury was set aside when there was an omission in the Sessions Judge's charge to the Jury of a very material fact, namely, of incriminating articles in the shape of ornaments with blood stains found in the possession of the accused.

(1) 55 Ind. Cas. 294; 1 P. L. T. 657; 21 Cr. L. J. 278.

(2) 21 Ind Cas 900; 41 C. 621; 14 Cr. L. J 660.

(3) 13 B. L. R. App. 19; 20 W. R. Cr. 73.

(4) 29 C. 128; 6 C. W. N. 253.

(5) 29 M. 91; 8 Cr. L. J. 371.

(6) 2 Ind Cas. 497; 36 C. 629; 13 C. W. N. 757; 9 C. L. J. 638; 10 Cr. L. J. 32.

(7) 16 C. W. N. cvii (107).

(8) 21 Ind. Cas. 156; 17 C. W. N. 1077; 14 Cr. L. J. 556.

(9) 64 Ind. Cas. 379; 2 P. L. T. 655; 6 P. L. J. 234; 23 Cr. L. J. 11.

Under these circumstances his Lordship, Sir Lawrence Jenkins, C. J., held that a proper case was made out for differing from the opinion of the Jury and for convicting the accused. Therefore, whenever a verdict of a Jury is set aside it must be upon a very substantial ground, and not merely upon the ground that another view of the evidence might be taken. In the present case the facts and the criticisms of the learned Judge were placed before the Jury in his charge and the Jury upon a consideration of the evidence and the circumstances gave a decided and unambiguous verdict of 'not guilty.' We have also duly considered the entire evidence in the case and the opinion of both the Jury and the learned Sessions Judge and we have come to the conclusion that this is not a case in which we should interfere.

We, cannot, therefore, accept the reference. The verdict of the Jury is accepted and the accused are acquitted.

COUTTS, J.—I agree that this reference must fail; but I am not certain that I would accept all the remarks which have been made by my learned brother. Section 307, sub-clause (3) of the Criminal Procedure Code requires that the High Court shall, after considering the entire evidence and after giving due weight to the opinions of the Sessions Judge and the Jury, acquit or convict the accused of any offence of which the Jury could have convicted him upon the charge framed and placed before it, and in many cases the High Court has convicted accused persons in respect of whom there has been an unanimous verdict of 'not guilty'. The case of *Emperor* v. *Lyall* (4) was such a case. In that case it was contended on behalf of the accused that the High Court was bound to act in accordance with the unanimous verdict of the Jury unless it was shown to be perverse or clearly and manifestly wrong. It was held, however, that this was not so and that since the alteration of the section by the Act of 1898 the High Court was bound to consider the entire evidence of the case and to give due weight to the opinion of the Sessions Judge and of the Jury and not to rely solely on the verdict of the Jury. This is, in my opinion, the correct view of the law as it now stands. The opinion of a Jury is its verdict and not the reasons on which the verdict is based. But although when a case has been referred, the High Court is bound to consider the entire evidence, the verdict of the Jury must not be lightly disregaded, due weight must be given to it and in referring a case under this section it is not sufficient for the Sessions Judge to say merely that he believes the evidence of witnesses on whose evidence the Jury has returned a verdict of not guilty; he should give reasons for his opinion in sufficient detail to enable the Court to appreciate it and to give due weight to it.

S. D. *Reference answered in the negative.*

LAHORE HIGH COURT.

CRIMINAL REVISION PETITION No. 1185 OF 1921.

February 4, 1922.

Present:—Mr. Justice Martineau.

JHANDA RAM AND ANOTHER—ACCUSED—PETITIONERS

versus

TOPAN RAM—COMPLAINANT—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 145, 435 (3)—Proceedings under section 145—Dispute, finding as to, whether necessary—Revision—High Court, power of interference of.

Section 145 of the Criminal Procedure Code does not require a Magistrate to give in his final order a finding that there is a likelihood of a breach of the peace. After he has made an order in writing under sub-section (1) of section 145, the only matter which he has to determine is the question of the possession of the disputed property.

Having regard to the provisions of section 435 (3) of the Criminal Procedure Code the High Court has no power to interfere in revision with an order under section 145 of the Code, even though such order was made without affording the aggrieved party an opportunity of producing evidence, having had no notice that the case would come up on a certain date. [p 585, col 1.]

Kamal Kutty v. *Udayavarma Raja*, 17 Ind. Cas. 65; 36 M. 275; 12 M. L. T. 439; 23 M. L. J. 499; (1912) M. W. N. 1 54; 13 Cr. L. J. 758, relied upon.

Nojem Mirdha v. *Jamalali Khalifa*, 12 C. W. N. 771; 8 Cr. L. J. 27, dissented from.

Petition, under section 439, Criminal Procedure Code, for revision of an order of the Magistrate, First Class, Montgomery, dated the 5th May 1921.

Mr. *Harcharn Das Bhalla*, for the Petitioners.

Diwan *Mehr Chand*, for the Respondent.

JUDGMENT.—This is an application for revision of an order passed under section 145, Criminal Procedure Code. One point urged on behalf of the petitioners is that the order made under sub-section (1) did not mention the existence of a dispute likely to cause a breach of the peace. This is true, but the Magistrate said in that order that the report of Sadat Ali Khan (to whom the case had been sent for inquiry) supported the complaint, and as both the report and the complaint mentioned that there was a dispute between the parties likely to cause a breach of the peace it may be taken that the Magistrate was satisfied before making the order, that such a dispute existed.

The next point taken is that the Magistrate in his final order has given no finding that there is a likelihood of a breach of the peace. As to this it is sufficient to say that section 145 does not require the Magistrate to give a finding on that question. After he has made an order in writing under sub-section (1) the only matter which he has to determine is the question of the possession of the disputed property.

The third point is that the petitioners were not given an opportunity of producing evidence, having had no notice that the case was to come up before the lower Court on the 6th May, when the order under revision was passed, but thought that it was to come up before the Tahsildar, to whom the Court had ordered that it should be sent for investigation. This appears to be correct, at least there is nothing on the record to show that the petitioners were informed that the case would be taken up by the lower Court on the 6th May. But the irregularity or illegality committed by the lower Court in this respect will not, in my opinion, justify this Court in interfering in revision. It is laid down in section 435 (3) that proceedings under Chapter XII are not proceedings within the meaning of that section, and I do not see how it is possible to hold that the lower Court's proceedings are not proceedings under Chapter XII, in which section 145 is included.

Nojem Mirdha v. *Jamalali Khalifa* (1), a case in which a Magistrate had passed an order under section 145 without taking evidence, no doubt supports the contention of the petitioners' Counsel, but I cannot follow it in the face of the clear provisions of section 435.

The question of the power of the High Court to interfere in revision in cases under section 145 was carefully considered by the Madras High Court in *Kamal Kutty* v. *Udoyavarma Raja* (2). It was there held that the essential requisite to give a Magistrate jurisdiction under section 145 is that he must be satisfied from information of some sort that a dispute exists likely to cause a breach of the peace concerning land or water or the boundaries thereof in his jurisdiction and that once he is so satisfied his jurisdiction is complete, and his subsequent action must be considered in relation to procedure, not jurisdiction. That is, in my opinion, a correct view of the law, and I accordingly hold that the application for revision in the present case cannot be entertained, and I dismiss it.

Z. K. & W. C. A.

Application dismissed.

(1) 12 C. W. N. 771; 8 Cr. L. J. 27.

(2) 17 Ind. Cas 65; 36 M. 275; 12 M. L. T. 439; 23 M. L. J. 499; (1912) M. W. N. 1154; 13 Cr. L. J. 753.

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REFERENCE No. 1 OF 1920.

February 3, 1920.

Present:—Mr. Lindsay, J. C.

EMPEROR—COMPLAINANT

versus

PANCHU—ACCUSED.

Criminal Procedure Code (Act V of 1898), s. 110—Surety young and living at some distance from accused—Ground for rejecting.

Where in a proceeding under section 110 of the Criminal Procedure Code the accused is required to furnish sureties, the mere fact that the surety offered resides at some distance away from the accused and is a young man, is no reason for refusing to accept him, if otherwise he is a fit and proper person to be surety. [p. 586, cols. 1 & 2.]

Reference made by the Officiating Additional Sessions Judge, Bahraich.

FACTS appear from the following Referring Order of the Officiating Additional Sessions Judge, Bahraich:—

"This is an application for revision against the order of Mr. Hari Shankar, First Class Magistrate of Bahraich, dated the 5th November 1919.

Panchu Lodh of Bishanpur was sent to jail on the 17th November 1919, for failing to furnish security (two sureties for Rs. 250 each),

SOHANA RAM v. EMPEROR.

Abdul Aziz and Riaz-ud-din of Bahraich offered the required security.

It is admitted that the sureties bear satisfactory character, and that the properties hypothecated are also sufficient.

Thus the sureties are admittedly persons of adequate means, position and respectability.

The learned Magistrate has rejected Abdul Aziz, surety, for the following reasons:—

(a) Panchu's house is four miles away from Bahraich.

(b) 'Abdul Aziz Khan is quite young and looks a boy yet and inexperienced. He will be weak to take proper care of Panchu.'

I have heard the learned Counsel on both sides. I have also seen Abdul Aziz. I have recorded his statement. He has a younger brother and he has been appointed the guardian of the person and property of his minor brother by the District Judge of Gonda. The certificate was granted to him in March 1919. His statement and appearance show that he is not less than 22.

In rejecting sureties, the Magistrate is given wide discretion of course; but the discretion is not arbitrary or absolute but judicial. I think a surety should not be rejected simply because he resides at some distance from the place where the man for whom he is to be a surety lives. 'A surety should not be rejected as unfit merely because he resides in a different Tahsil' [See *King Emperor* v. *Mangal* (1)].

Undue and unnecessary difficulties should not, I think, be thrown in the way of persons attempting to furnish the required securities. I think Abdul Aziz, surety, should not be rejected simply because he lives at the distance of some four miles from Panchu's village.

The second ground also does not appear to be a good ground. The learned Magistrate bases his finding on this point on the Patwari's evidence. The Patwari states, of course, that Abdul Aziz will not be able to take proper care of Panchu; but he says so, simply because the surety lives at Bahraich and Panchu at Bishanpur. The distance is four miles only. I have already observed that, in my opinion, Abdul Aziz surety should not be rejected simply because he lives at a distance of four miles from Panchu's village.

As to the age of Abdul Aziz, he is not, surely, a boy. He is, of course, a young man. I do not think that a man of his age will necessarily be 'weak to take proper care of Panchu.' I think he can manage to control Panchu. In my opinion, the reasons for which Abdul Aziz, surety, has been rejected are not good and sufficient. I think I should submit the case under section 438, Criminal Procedure Code, for the orders of the High Court of this Province.

I direct that the case be reported to the Hon'ble Court of the Judicial Commissioner of Oudh, for orders (after obtaining the explanation of the Magistrate)."

The Government Pleader, for the Crown.

JUDGMENT.—I have read the Referring Order of the Additional Sessions Judge and after a consideration of the report submitted by the Deputy Magistrate, I think the reference ought to be accepted, and that the order rejecting Abdul Aziz as unfit to be a surety of Panchu Lodh should be set aside. There seems to be no really good reason why the security of Abdul Aziz should not be accepted. Let the papers be returned.

W. C. A. *Reference accepted.*

(1) 6 O. C. 199 at p. 201.

LAHORE HIGH COURT.

CRIMINAL REVISION No. 1375 OF 1920.

December 17, 1920.

Present:—Mr. Justice Martineau.

SOHANA RAM—CONVICT—PETITIONER

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 295—Damage to mosque by placing rafters of house in walls thereof—Absence of knowledge of damage or insult to Muhammadan religion—Offence.

When a person in re-building his house has no idea that he is likely to do damage to the walls of a mosque by placing the ends of his rafters thereon, or without knowledge that such damage was likely to result, as would be considered by Muhammadans, as an insult to their religion, his conviction under section 295 of the Penal Code, is not justified. [p. 587, cols. 1 & 2.]

Petition, under section 439 of the Criminal Procedure Code, for revision of an order of the District Magistrate, Jhang, dated the 8th June 1920, affirming that of the

EMPEROR v. MIAN JAN.

Magistrate, Second Class, Jhang, dated the 22nd March 1920.

Mr. *Mukund Lal Puri*, for the Petitioner.

Sayad *Mohsin Shah*, for the Complainant-Respondent.

JUDGMENT.—The petitioner has been convicted, under section 295, Indian Penal Code, of damaging a mosque by placing the rafters of his house on the wall of the mosque, with the knowledge that such damage was likely to be considered by Muhammadans as an insult to their religion.

The petitioner's house adjoins the west and south walls of the mosque, and the damage done appears to have resulted from his re-building the house. The Trial Magistrate has accepted as true the statement of the witness Jahana, who says that the ends of the petitioner's rafters were in the west wall of the mosque before the re-construction took place, but that they have been placed in that wall at a lower level than they were before. It cannot be supposed that the petitioner knew that he was likely to damage the wall by placing the ends of his rafters higher up than they were at first.

Mr. Mohsin Shah, who appears in support of the conviction, lays stress on the fact that the petitioner has also placed the ends of some of his rafters in the south wall of the mosque, where they did not exist before he re-built the house. But it does not appear that any damage has resulted from this act. The Magistrate found on inspecting the mosque that the west wall was cracked in two or three places, but his judgment does not show that any damage had been done to the south wall.

It is also argued that as the petitioner's house is *pukka* he must have known that he was likely to do damage by placing the ends of his rafters in the walls of the mosque, which are *kacha*. This argument, however, is sufficiently answered by the fact that, so far as appears from the Trial Magistrate's judgment, the south wall did not actually sustain any damage from the petitioner's rafters resting on it.

It appears to me that the petitioner, when he was re-building his house had no idea that he was likely to do any damage to the walls of the mosque by placing the ends of his rafters in them. Much less could he have known that such damage was likely to result as would be considered by Muhammadans as an insult to their religion.

I accept this application, set aside the conviction and sentence, and acquit the petitioner. The fine, if paid, will be refunded.

W. C. A.

Revision accepted.

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REFERENCE No. 12 OF 1920.

April 20, 1920.

Present:—Mr. Lindsay, J. C.

EMPEROR—COMPLAINANT

versus

MIAN JAN—ACCUSED.

Criminal Procedure Code (Act V of 1898), s. 263—Judgment—No reasons given—Conviction illegal.

Where no reasons whatever are given in support of a conviction, there is no compliance with the provisions of section 6 , Criminal Procedure Code, and the conviction should be set aside.

Reference made by the District Magistrate, Lucknow.

FACTS appear from the following Referring Order of the District Magistrate, Lucknow:—

"The judgment of the learned City Magistrate contains practically nothing for the information of a Court acting in revision. The learned City Magistrate has not complied with the provisions of section 264 (1), Criminal Procedure Code; and I have no alternative but to report under section 435 (1), Criminal Procedure Code, for the orders of the Judicial Commissioner, the result of my examination of the record under section 435, Criminal Procedure Code. *Jagan Nath* v. *Emperor* (1) has clearly stated the law in trials of this nature. The applicant (accused) will remain on bail."

The Government Pleader, for the Crown.

Mr. *K. N. Chak*, for the Accused.

JUDGMENT.—This case has been reported by the District Magistrate of Lucknow. A

(1) 21 Ind. Cas. 466; 16 O. C. 357; 14 Cr. L. J. 594.

reference to the record of the lower Court shows that the objections taken to the judgment of the City Magistrate are well-founded. There has not been compliance with the provisions of section 263 of the Code of Criminal Procedure, for no reasons whatever are given in support of the conviction. In these circumstances I can only set aside the order of the Court below. It will be for the District Magistrate after an examination of the Police papers to say whether or not a fresh trial ought to be ordered.

S. D.

Order set aside.

LAHORE HIGH COURT.

CRIMINAL REVISION No. 962 OF 1920.

October 9, 1920.

Present :—Mr. Justice Wilberforce.

BAKHTAWAR SINGH—CONVICT—PETITIONER

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 417, 420—Conviction under s. 417—Offence disclosed under s. 420—Magistrate, 2nd Class, jurisdiction of, to try case.

Complainant, while under the influence of liquor administered to him by the accused, was induced to sign a document purporting to be a bond evidencing a loan of money but which, in reality, was a deed divorcing his wife: accused were convicted by a Magistrate of the Second Class of an offence under section 417 of the Penal Code: On revision:

Held, that the offence charged fell within the purview of section 420 and not section 417 of the Penal Code, and consequently the Trying Magistrate had no jurisdiction to enquire into or try the case.

Petition under section 439, Criminal Procedure Code, for revision of an order of the Additional District Magistrate, Amritsar, dated the 14th June 1920, affirming that of the Magistrate, 2nd Class, Amritsar, dated the 21st April 1920.

Mr. *B. N. Kapur* for Mr. *Ganpat Rai*, for the Petitioner.

JUDGMENT.—In this case the petitioners have been convicted of offences under section 417 and sections 417/109, Indian Penal Code, and have been sentenced to four months'

rigorous imprisonment each and fines. Their appeals to the Additional District Magistrate were unsuccessful and they have applied for revision to this Court on the ground that the Trying Magistrate who exercised Second Class powers had no jurisdiction to hear the case against them. The facts alleged by the prosecution were that the complainant was taken to another village on the pretence that a buffalo would be bought for him and the money necessary for this purpose would be advanced to him. He was then given a large amount of liquor to drink and when in the state of intoxication a document purporting to be a bond was executed and his signature was obtained. This document, it may be added, was a deed of divorce of his wife who was then taken away by some of the petitioners.

It is urged before me that the offence charged did not fall within the purview of section 417, but of section 420, Indian Penal Code. This is obviously correct and the Trying Magistrate, possessing as he did, only Second Class powers, had no jurisdiction to enquire into or try the case. I, therefore, accept the petition for revision, discharge the petitioners and direct the District Magistrate either himself or through another competent Magistrate to make further enquiry into the case.

W. C. A.

Petition accepted.

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REFERENCE No. 13 OF 1920.

April 20, 1920.

Present :—Mr. Lindsay, J. C.

EMPEROR—COMPLAINANT—APPELLANT

versus

FARRUKH HUSAIN—ACCUSED—RESPONDENT.

Penal Code (Act XLV of 1860), s 411—Receiving stolen property—Father convicted - Son livingin house, conviction of.

THAKARIA v. PURAN SINGH.

A father and son were living in the same house. After the conviction of the father under section 411, Indian Penal Code, the son was *challaned* and convicted under the same section on the same grounds but there was nothing to show that he was in possession of property which he knew or had reason to believe was stolen except that he had said to the Police that there was no stolen property in the house:

Held, that the conviction could not be sustained.

Reference made by the District Magistrate, Lucknow.

FACTS appear from the following Order of Reference of the District Magistrate, Lucknow.

"The father of the accused in this case was *challaned* under section 411, Indian Penal Code, on the same grounds, and was convicted. I have referred to the file of that case, and find from the evidence that the keys of the boxes in which the stolen property was found were in possession of the father at the time of the Police search. Father and son lived in the same house. There is nothing against the son except the statement that he told the Police there was no stolen property in the house. It can, of course, easily be argued that he was unaware of what his father had in the boxes. There is nothing to show that he was in possession of property which he knew or had reason to believe was stolen. I think *Bashir Ahmad Khan* v. *Emperor* (1) applies here.

"For the above reasons, I report the case for the orders of the Judicial Commissioner under section 438 (1), Criminal Prosedure Code, with a recommendation that the sentence be reversed. Meanwhile execution of the sentence will be suspended, and the accused will remain on the bail and recognizances already accepted."

The Government Pleader, for the Crown.

JUDGMENT.—For the reasons given in the Referring Order of the District Magistrate of Lucknow, I set aside the conviction and sentence of the accused, Farrukh Husain. The accused may now be released.

J. P. *Conviction set aside.*

(1) 54 Ind. Cas. 248; 22 O. C. 256; 21 Cr. L. J. 40; 2 U. P. L. R. (J. C.) 12.

LAHORE HIGH COURT.

CRIMINAL REVISION PETITION No 1027 OF 1921.

January 7, 1922.

Present:—Mr. Justice Abdul Qadir.

THAKARIA—ACCUSED—PETITIONER

versus

PURAN SINGH—COMPLAINANT—RESPONDENT

Criminal Procedure Code (Act V of 1898), s. 439—Accused merely summoned—Revision—High Court, power of, to quash proceedings—Penal Code (Act XLV of 1860), ss. 499, Excep. (9), 500—Defamation—"Pichhlag" *and* "lawaris," *whether defamatory.*

Where an accused person is only summoned and nothing further is done by a Subordinate Court, the High Court has power to quash the proceedings at that stage if it is apparent that grave injustice would be done if the proceedings were allowed to continue. [p. 590, col 1.]

Petitioner, who was a candidate for the post of *lambardar*, made a statement concerning respondent, a rival candidate for the post, that he was not the son of the deceased *lambardar* but was a *pichhlag* and *lawaris*. Respondent filed a complaint against petitioner under section 500 of the Penal Code, in pursuance of which a bailable warrant was issued against the petitioner to appear and answer the charge. Petitioner applied to the Sessions Judge to quash the proceedings and his application being rejected he moved the High Court in revision:

Held, (1) that the High Court had power to interfere in revision and quash the proceedings. [p. 590, cols. 1 & 2.]

(2) that the words '*pichhlag*', and '*lawaris*', did not mean illegitimate and were not defamatory; [p 590, col 2.]

(3) that even if they had amounted to defamation the case would have been covered by Exception (9) to section 499 of the Penal Code, the allegation having been made by the petitioner in an application made by him *bona fide*; [p. 590, col. 2.]

Emperor v *Bishen Das*, 8 Ind. Cas 1161; 33 P. R. 1910 Cr.; 12 Cr. L. J. 50; 57 P. L. R. 1911; 50 P. W. R. 1910 Cr., followed.

Azim Khan v. *Empress*, 45 P. R. 1885 Cr., not followed.

Petition, under sections 435-439 of the Criminal Procedure Code for revision of the order of the Sessions Judge, Lyallpur, dated 6th July 1921, affirming that of the Magistrate, First Class, Lyallpur, dated the 28th April 1921.

Lala *Ram Chand Manchanda*, for the Petitioner.

Sardar *Kharak Singh*, for the Respondent.

JUDGMENT.—One Puran Singh, claiming to be a son of Sundar Singh, brought a complaint against Thakaria, son of Fattu, under section 500, Indian Penal Code, for having defamed him in certain applications which he made to the Revenue Authorities in

a *lambardari* case and in certain statements that he made in support of his applications. In pursuance of that complaint, Thakaria was summoned as an accused person to answer the charge against him, but he made an application to the Sessions Judge, under section 435, Criminal Procedure Code, praying for interference on the ground that the words alleged to be used by him did not amount to defamation and that the complaint had been wrongly entertained. The Sessions Judge declined to interfere on the ground that he did not think that he was authorised to interfere at that stage.

Thakaria has now filed a revision in this Court and it is contended on his behalf that the complaint filed by Puran Singh did not disclose that any offence under section 499, Indian Penal Code, had been committed and that the case is a fit one for the proceedings before the Trial Court being quashed. Lala Ram Chand Manchanda, who has argued the case for the petitioner before me, urges that all that the petitioner alleged in the applications in question was that the respondent was not Sundar Singh's own son but a *pichhlag* of his wife. He adds that this was neither defamatory nor meant to be so and that the petitioner was within his rights in putting forward this plea in his own interests as a *bona fide* applicant for the *lambardari* for which Puran Singh was also a candidate and which had fallen vacant on the death of Sundar Singh. He says that even if the words used were held to be defamatory, Exception 9 to section 499, Indian Penal Code, covers the present case and shows that no offence has been committed by the petitioner. Sardar Kharak Singh, who appears for the respondent, urges, in the first place, that no revision lies and that this Court is not competent to interfere at a stage when no final order has been passed by the Trial Court and no penalty has been imposed upon the accused. He relies on *Azim Khan* v. *Empress* (1) as an authority supporting his contention. Lala Ram Chand's reply to this part of the argument is that this Court has extensive powers of revision under section 439, Criminal Procedure Code, and can interfere even with orders that are not final, where it is apparent that grave injustice would be done by allowing the proceedings before a subordinate Court to continue. He refers me to *Emperor* v. *Bishen Das* (2) which relates to a case in which an order framing a charge against an accused person was interfered with, though the order was not final and not appealable and no penalty had been imposed on the accused person. I see no reason why *Emperor* v. *Bishen Das* (2) should not be followed in this case so far as the question of the power of this Court to interfere in a case like the one before me is concerned.

On the merits, Sardar Kharak Singh argues that when Mr. Justice Martineau issued a notice in this case, he did so because it was represented to him that "all that the petitioner alleged was that the respondent was Sundar Singh's *pichhlag*," and that it was not brought to his notice that in one of the applications the petitioner has called the respondent *lawaris*. He contends that these two words used together amount to calling the respondent an illegitimately born person. He further argues that Exception 9 to section 499, Indian Penal Code, cannot apply to this case, because Thakaria was not a *bona fide* applicant for the *vacant lambardari* and had no real claim to it as he was only a maternal uncle's son of the deceased Sundar Singh. I am afraid there is not any force in both these contentions. The words *pichhlag* and *lawaris* do not mean an illegitimate child and, though Puran Singh alleged in his complaint that he had been called *wald-ul haram* (illegitimate) by Thakaria, there is nothing in Thakaria's applications and statements to show that any such word or any equivalent of this word was used.

As regards the question of the application of Exception 9 to section 499, Indian Penal Code, that question need hardly be discussed if the statement made is not defamatory in character, but it may be pointed out that it is clear from the record of this case that Thakaria was putting in applications as a *bona fide* applicant and it was obviously to his interest to point out any flaw in the status of a rival candidate. Exception 9 would, therefore, in such a case come to his help even if the alleged statement had been defamatory. It is clear, therefore, that the complaint filed by Puran Singh does not disclose the commission of an offence under section 499, Indian Penal Code, and that the

(1) 45 P. R. 1885 Cr.

(2) 8 Ind. Cas. 1161; 33 P. R. 1910 Cr.; 12 Cr. L. J. 50; 57 P. L. R. 1911; 50 P. W. R. 1910 Cr.

order passed against Thakaria was not justified under the circumstances. Accordingly I accept this revision. An *ad interim* order staying proceedings in the Trial Court had been passed when this petition was admitted to a hearing. Those proceedings are now quashed and the petitioner, who had been arrested on a bailable warrant, will be discharged from his bail-bond.

Z. K. *Revision accepted.*

LAHORE HIGH COURT.

CRIMINAL REVISION PETITION No. 1427 OF 1921.

March 6, 1922.

Present:—Mr. Justice Harrison.

NURA SON OF REHANA AND OTHERS—CONVICTS—PETITIONERS

versus

EMPEROR—RESPONDENT.

Criminal trial—Accused made to point out spot where certain incident occurred—Cross-examination of accused—Procedure

In a criminal case the accused put forward a defence, the principal incident of which was stated by them to have occurred on a certain spot in the neighbourhood of a village. In order to test the accuracy of the story told by the accused the Magistrate on his own motion took them to the neighbourhood of the village and made them point out the spot in turn In deciding the case he attached great importance to the fact that they did not all point out the same place. There was no evidence on the record as to what occurred when the Magistrate went to the spot and the Magistrate relied entirely on his own knowledge of the incident:

Held, (1) that in the absence of any evidence regarding this episode it must be totally ignored; [p. 591, col 2]

(2) that the conduct of the Magistrate in acting as he did verged dangerously near upon cross-examining the accused [p. 591, col. 2]

Petition, under section 439, Criminal Procedure Code, for revision of an order of the Sessions Judge, Montgomery, at Lahore, dated the 4th October 1921, varying that of the Magistrate, First Class, Montgomery, dated the 8th June 1921.

Mr. *Ghulam Rasul*, for the Petitioners.

Mr. *M. Sleem*, for the Government Advocate, for the Respondent.

JUDGMENT.—Four men, Nura son of Rehana, Nura son of Fattu, Baqar and Waryam have been convicted under section 457, Indian Penal Code, and sentenced to undergo two years' rigorous imprisonment each and in addition Nura son of Rehana has been ordered to pay a fine of Rs. 200. Their appeal has been dismissed by the Sessions Judge and they now apply for revision.

The facts as found are that these four men jumped over the wall into the *haveli* of one Bahadur, complainant, and tried to carry off his daughter, *Musammat* Fatima, aged 18, who was sleeping there beside him. Both she and her father are said to have woken up and to have seen all four accused as they ran away. One Imam Din, who lives next-door, is said to have come out and also to have identified the accused.

The story told by the accused is to the effect that Nura Mirasi, accused No. 1, had an assignation with *Musammat* Fatima in the jungle and was caught sitting with her there by her father and others. The other three accused then came up and rescued him and this false case was manufactured against them.

In order to test, as he states, the accuracy of the story told by the accused the Magistrate on his own motion took them to the neighbourhood of the village and made them point out in turn the place where they said that Nura Mirasi was sitting with the girl, and he has attached great importance to the fact that, as he says himself, they did not point out the same place. Now, the conduct of the Magistrate in acting, as he did, appears to me to verge dangerously near upon cross-examining the accused, but there is an even more serious and obvious objection, in that there is no evidence whatsoever on the record as to what happened when the test was applied. No witness has come forward to say that he saw the accused pointing out the different places, and the Magistrate has relied entirely on his own knowledge, he not having gone into the witness box nor subjected himself to cross-examination. In the absence of any evidence regarding this episode it must be totally ignored. The learned Sessions Judge has come to the conclusion that the identification of the four accused is sufficient. This identification rests on the evidence of three witnesses, Bahadur the complainant himself, *Musammat* Fatima and Imam Din Now, Bahadur has denied that his daughter was in the house at all when the accused came, and the Sessions Judge has held that he is obviously telling a lie when he does so. If a man lies on an all important points such as this it appears to me to be wholly impossible to place any reliance on the remainder of his evidence. It is true that *Musammat* Fatima in Court states

that she recognised all four accused but I find on reference to *zimnis* that she clearly stated to the Police when first examined that she recognised none and was subsequently told by her father who they were. She was produced at a very late stage of the case, her name not having been entered in the original *chalan* and apparently as an afterthought and it is certainly peculiar that she should be produced to give this evidence inspite of what she had stated during the investigation. This leaves Imam Din only and I do not consider his statement to be sufficient by itself, nor for that matter very satisfactory, when compared with his statement to the Police. One Imam Ali was produced also at a late stage of the case to give evidence as to a confession made by the accused. All that the Police diaries show is that he made the same statement during the investigation as Mehr Shah, *lambardar*, and the confession is shown as having been made to Mehr Shah, and yet he is quite silent on the subject though he was one of the original witnesses and his name was entered in the *chalan*.

Taking all these facts into consideration, I find that the guilt of the accused is not established.

I accept the application for revision, and set aside the convictions and acquit the accused.

Z. K. *Application accepted.*

PATNA HIGH COURT.

CRIMINAL MISCELLANEOUS CASE No. 79 OF 1921.

October 28, 1921.

Present:—Mr. Justice Ross.

SAROJ KUMAR MUKHERJI AND OTHERS—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 345—Assault—One transaction—Several accused—Compromise with one—Effect.

Where several persons join in committing an offence, and the complainant compounds the case with one of them, the case should be treated as compounded in respect of all.

Shyam Behari Singh v. *Sagar Singh*, 53 Ind. Cas. 824; 1 P. L. T. 32; 20 Cr. L. J. 824; (1921) Pat. 144, followed.

Criminal revision to quash the proceedings pending in the Court of the Sub-Divisional Magistrate, Purnea.

Mr. *S. P. Sen*, for the Petitioners.

Assistant Government Advocate, for the Opposite Party.

JUDGMENT.—This is an application to quash the proceedings in the Court of the Sub-Divisional Magistrate of Purnea against the petitioners. The complainant alleged that holding a second class ticket he was entering a first class compartment owing to the crowd of passengers but was obstructed by a peon who turned out to be the pay clerk's peon. He succeeded in getting in, but the peon abused and insulted him so that the complainant gave him a blow whereupon he was attacked by the petitioners. Five persons were named as accused and three sections were specified—Sections 323, 147 and 342, but summonses were issued under section 323 only. In his petition of complaint the complainant goes on to say that "the pay clerk's peon begged pardon of me and I gave him word that I would not proceed against him, so he is not included among the accused." The inference to be drawn from this statement is that if the peon had not been pardoned he would have been included among the accused. The whole proceeding was one transaction arising out of the attempt of the pay clerk's peon to prevent the complainant from entering the first class compartment. Apparently, if the peon had not apologised his name would have been among those who were entered in the petition of complaint as accused persons. His name was not so entered because the complainant had compromised the case with him. The case is, therefore, on the authority of *Shyam Behari Singh* v. *Sagar Singh* (1), one in which the whole offence has been compounded. The proceedings are, therefore, quashed.

N. K. *Proceedings quashed.*

(1) 53 Ind. Cas. 824; 1 P. L. T. 32; 20 Cr. L. J. 824; (1921) Pat. 144.

LAHORE HIGH COURT.
FULL BENCH.

SECOND CIVIL APPEAL No. 2420 OF 1918.
March 23, 1922.

Present :—Justice Sir William Chevis, Kt., Mr. Justice Abdul Raoof and Mr. Justice Abdul Qadir.

RAM LABHAYA—PLAINTIFF—APPELLANT

versus

FIRM MUKANDA MAL-KAPUR CHAND, THROUGH BALKISHEN DAS, PROPRIETOR AND MANAGER—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 47—Execution of decree—Suit for declaration that decree has been satisfied, whether maintainable.

A suit for a declaration that a decree has been fully satisfied and is incapable of execution is barred under the provisions of section 47 of the Civil Procedure Code. [p. 59, col.].

Azizan v. *Matuk Lal Sahu*, 21 C. 437; 10 Ind. Dec. (N. S.) 922, *Deno Bundhu Nundy* v. *Hari Mati Dassee*, 3 C. 480; 8 C. W. N. 395, *Manjunatha Chetty* v. *Appaya*, 38 Ind. Cas. 993; 3 M. L. J. 9, *Jaikaran Bharti* v. *Raghunath Singh*, 20 A. 254; A. W. N. (1898) 37; 9 Ind. Dec. (N. S.) 524, relied upon.

Karm Singh v. *Amin Chand*, 47 P. R. 1881, approved.

Diwan Singh v. *Amir Singh*, 5 Ind. Cas. 814; 16 P. R. 1910; 18 P. W. R. 1910; 62 P. L. R. 1910, *Jamna* v. *Beli Ram*, 21 Ind. Cas. 557; 190 P. W. R. 1913; 340 P. L. R. 1913, *Jamun Ram* v. *Kishen Ram*, 25 Ind. Cas. 64; 79 P. R. 1914; 42 P. R. 1914; 234 P. L. R. 1914, overruled.

Nubo Kishen Mookerjee v. *Debnath Roy*, 22 W. R. 194 and *Nujeem Mullick* v. *Erfan Mollah*, 22 W. R. 298, dissented from.

Second appeal from a decree of the District Judge, Shahpur at Sargodha, dated the 26th January 1918, affirming that of the Senior Subordinate Judge, Sargodha, dated the 9th August 1917.

Mr. *Mukand Lal Puri*, for the Appellant.

Lala *Faqir Chand*, for the Respondents.

JUDGMENT.—This was a suit for a declaration to the effect that the decree, dated the 15th November 1905, passed in favour of the firm called Mukanda Mal-Kapur Chand of Kalka against the plaintiff and Ram Narain, defendant, had been satisfied and was not executable. The plaintiff's case was that the defendant No. 1 held a decree of the Simla Court against the plaintiff and the defendant No. 2 for Rs. 19,502; that the plaintiff and the defendant No. 2 had paid the amount of the decree in full, but that the decree-holders had allowed payment of Rs. 17,161 only and taken out execution for Rs. 4,784 in the Court of the Subordinate Judge at Sargodha, and that on the 26th January 1916 the Subordinate Judge holding that Rs. 2,009 had been paid off had disallowed Rs. 1,600. Thus, the plaintiff owed nothing to the decree-holders and has, therefore, prayed for a declaration that the above-mentioned decree had been satisfied and was incapable of being executed. The defendant No. 1 denied the payment and pleaded that the suit was not maintainable and that in any case the suit, as framed, did not lie. The plea more clearly put was as follows, namely, that the suit was barred by the provisions of section 47, Civil Procedure Code, and that in any case as no consequential relief was claimed it could not be maintained with reference to the provisions of section 42 of the Specific Relief Act. The Trial Court, with reference to the decisions in *Jaikaran Bharti* v. *Raghunath Singh* (1), *Deno Bundhu Nundy* v. *Hari Mati Dassee* (2) and *Azizan* v. *Matuk Lal Sahu* (3), was inclined to take the view that the suit was barred by section 47 but it felt bound to follow the decision of the Punjab Chief Court in *Diwan Singh* v. *Amir Singh* (4) and held that the suit was not barred under the said section. With regard to the second part of the plea the Trial Court, however, came to the conclusion that the plaintiff was bound to sue for a consequential relief and without claiming a relief to that effect his suit was not entertainable according to the provisions of section 42 of the Specific Relief Act. Taking this view of the case the Trial Court returned the plaint to the plaintiff to enable him to amend the plaint and re-present it after the necessary amendment. The plaintiff having declined to carry out the order of the Court the suit was thrown out as being opposed to the rule contained in section 42 of the Specific Relief Act.

The plaintiff preferred an appeal against the decree of the Trial Court dismissing the suit, and the Appellate Court, relying on *Diwan Singh* v. *Amir Singh* (4), held that

(1) 20 A. 254; A. W. N. (1898) 57; 9 Ind. Dec. (N. S.) 524.
(2) 3 C. 480; 3 C. W. N. 395.
(3) 21 C. 437; 10 Ind. Dec. (N. S.) 922.
(4) 5 Ind. Cas. 814; 16 P. R. 1910; 18 P. W. R. 1910; 62 P. L. R. 1910.

he could only protect himself from execution proceedings being taken against him by the decree-holder by a prayer for injunction as a consequential relief and dismissed the appeal.

The plaintiff preferred a second appeal to this Court. It came up for decision before a Division Bench which disagreed with the two Courts below as to the view taken by them with regard to the applicability of section 42 of the Specific Relief Act, but the learned Judges constituting the Bench were of opinion that the suit was barred by section 47, Civil Procedure Code. This view, however, being contrary to the view taken by a Division Bench of the Chief Court in *Diwan Singh* v. *Amir Singh* (4), they referred the whole case to a Full Bench stating the question to be decided by the Full Bench in the following terms :—

"The question is whether a suit for a declaration that a decree has been fully satisfied and is incapable of execution is barred under section 47 of the Civil Procedure Code."

Clause (1) of section 47 provides that "all questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit." Now, it cannot be denied that the question involved in the present suit has arisen between the parties to the suit in which the decree was passed and relates to the execution, discharge or satisfaction of the decree. In fact the very terms of the relief are to the effect that the decree has been satisfied and is not executable. It has been held in numerous cases to which it is not necessary to refer that the section should receive a liberal construction. This has been further emphasized by the introduction of the word 'all' in the present Code. Where the decree itself is not impugned in any way and is validly susceptible of execution, all questions relating to the execution, discharge or satisfaction of the decree, according to the policy underlying the provisions contained in section 47, must be determined by the Court executing the decree and not by a separate suit. According to r. (1) of O. XXI, all money payable under a decree shall be paid as follows, namely, (*a*) into the Court whose duty it is to execute the decree; or (*b*) out of Court to the decree-holder; or (*c*) otherwise as the Court, which made the decree, directs. Sub-clause *b*) of the above rule suggested the contingency of a decree being satisfied out of Court and the Legislature in order to preserve the jurisdiction of the Court executing the decree enacted clause (1) of r. 2, O. XXI, in order to meet the contingency. This clause provides that "where any money payable under a decree of any kind is paid out of Court, or the decree is otherwise adjusted in whole or in part to the satisfaction of the decree holder, the decree holder shall certify such payment or adjustment to the Court whose duty it is to execute the decree, and *the Court shall record the same accordingly*." The policy of the Legislature is abundantly made clear by this clause, namely, that even in respect of payment or adjustment out of Court the Court executing the decree alone will have a right to decide. This policy is further emphasized by enacting clause (3) of r. 2 of O. XXI, which provides that "A payment or adjustment which has not been certified or recorded as aforesaid, shall not be recognized by any Court *executing the decree*." Consistently, therefore, with the policy underlying the provisions of section 47 we must hold that the question of the adjustment of a decree out of Court lies exclusively within the purview of the rule contained in that section. We are aware that the learned Judges of the Division Bench who decided the case reported as *Diwan Singh* v. *Amir Singh* (4) held that as section 258 of the old Code specifically enacted that an uncertified adjustment of the decree by *any Court executing the decree*, it was implied that it might be recognized as such by a Court trying the matter as a regular suit. We are not prepared to agree in this interpretation. This interpretation was not accepted by the majority of the Full Bench of the Calcutta High Court in *Asizan* v. *Matuk Lal Sahu* (3). In our opinion the opinion of the majority was correct. In a later case in *Deno Bundhu Nundy* v. *Hari Mati Dassee* (2), Maclean, C. J., and Hill and Stevens, JJ. accepted the view of the majority in *Asizan* v. *Matuk Lal Sahu* (3). This ruling was not brought to the notice of the learned Judges of the Chief Court who decided the case of *Diwan Singh* v. *Amir Singh* (4).

THAMMAN SINGH v. DALCHAND.

Mr. Mukand Lal Puri has relied upon two other cases decided by the Punjab Chief Court in support of his argument. They are reported as *Jamna* v. *Bel Ram* (5) and *Jamun Ram* v. *Kishen Ram* (6). The decisions in both these cases, however, were based upon the rule laid down in the earlier case referred to above, and we are not prepared to accept any of these decisions as laying down the correct view. The learned Counsel has also relied upon two earlier decisions of the Calcutta High Court reported as *Nubo Kishen Mookerjee* v. *Debnath Roy* (7) and *Nujeem Mullick* v. *Erfan Mollah* (8). Both these decisions were considered in the case of *Azizun* v. *Matuk Lal Sahu* (3) and it was pointed out by Mr. Justice Macpherson that in those decisions the prohibition contained in section 11 of Act XXIII of 1861 against separate suits was ignored. We cannot, therefore, regard these cases as laying down good law. Mr. Faqir Chand has called our attention to an old case decided by the Chief Court reported as *Karm Singh* v. *Amin Chand* (9), which appears to have laid down a rule contrary to the one expounded in *Diwan Singh* v. *Amir Singh* (4). The judgment is somewhat meagre, but the principle of section 47, Civil Procedure Code, is clearly deducible from it.

In the case of *Kanjunatha Chetty* v. *Appaya* (10), almost all the cases on the subject were reviewed and the learned Judges who decided the case held that "section 47, Civil Procedure Code, is a statutory prohibition against matters relating to the execution of a decree being agitated by a separate suit. A suit, therefore, for a declaration that a decree was satisfied and for an injunction restraining the defendant from executing his decree against the plaintiff is barred by section 47 ( ), Civil Procedure Code." The rule is laid down in the case of *Jaikaran Bharti* v. *Raghunath Singh* ( ). It has repeatedly been held that one of the objects of the Legislature in enacting section 47 was to avoid multiplicity of suits. If we were to accept the contention put forward on behalf of the plaintiff we should be giving effect to a rule which would defeat the policy of the Legislature.

We accordingly dissent from the view taken in *Diwan Singh* v. *Amir Singh* (4) and accepting the view of the Calcutta, Madras and Allahabad High Courts, hold that a suit for a declaration that a decree has been fully satisfied and is incapable of execution is barred under section 47, Civil Procedure Code.

We dismiss the appeal with costs.

Z. K.

Appeal dismissed.

(5) 21 Ind. Cas. 557; 190 P. W. R. 1913; 330 P. L. R. 1913.
(6) 25 Ind. Cas. 642; 79 P. W. R. 1914; 42 P. R. 1914; 234 P. L. R. 1914.
(7) 22 W. R. 194.
(8) 22 W. R. 208.
(9) 47 P. R. 1881.
(10) 36 Ind. Cas. 988; 31 M. L. J. 429.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 207 OF 1921.
August 22, 1921.

Present:—Mr. Dalal, A. J. C.

THAMMAN SINGH—DEFENDANT—APPELLANT

versus

DALCHAND, PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Arts. 97, 116—Mortgage, suit on—Property not subject to sale—Money-decree, suit for, barred—Art. 97, application of.

Plaintiff sued for sale of a property mortgaged to him: the property was a cultivatory holding and was not liable for sale, so in his replication the plaintiff desired a money-decree. The period, however, for suing for such a decree had elapsed, and the claim was dismissed under Article 116 of the Limitation Act. The lower Appellate Court being of opinion that it was a case of a consideration which had afterwards failed, decreed the claim under Article 97 of the Act holding that the date of the failure was the date of the proceedings in the First Court:

Held, restoring the decree of the First Court, that Article 97 had no application to the case as the property in suit being inalienable from the very inception of the mortgage, there never existed any consideration which could afterwards fail.

Appeal from a decree of the Subordinate Judge, Hardoi, dated the 7th April 1921, reversing that of the Munsif, Bilgram, dated 26th July 1920.

CHUNI LAL v. KALA KHAN.

Mr. *J. K. Banerji*, for the Appellant.

Mr. *Nizmat Ullah*, for the Respondent.

JUDGMENT.—The plaintiff sued for sale of a mortgaged property on foot of a mortgage dated the 1st of March 1895. The property being a cultivatory holding was not liable to sale, so in his replication the plaintiff desired a money decree The First Court of the Munsif of Bilgram held the suit to be time barred under Article 116 of the Limitation Act. There was a further plea of the plaintiff in that Court that the defendant had fraudulently represented the property to be alienable property and that, therefore, the period of limitation applicable would count under Article 95 of the Limitation Act from the date of the discovery of the fraud. This plea was repelled by the First Court on the ground that no fraud was proved.

The plaintiff appealed to the District Court and the learned Subordinate Judge of Hardoi, sitting as an Appellate Court, decreed the appeal and the suit in what appears to be a somewhat summary judgment. It is noticeable that the lower Court did not make use of Article 95 and so it apparently held that no fraud was practised on the plaintiff. He decreed the suit under colour of Article 97 of the Limitation Act which runs as follows:—"For money paid upon an existing consideration which afterwards fails: three years from the date of the failure." The Court pointed out that the date of the failure was the date of the proceedings in the First Court.

I find considerable difficulty in understanding this point of view. There was no existing consideration whatsoever because from the very inception of the mortgage the property in suit was not alienable. There has been no alteration of condition subsequent to the mortgage. The First Court viewed the case very clearly that it must either fall under Article 116 or under Article 95 in case of the alleged fraud of the defendant being proved. The learned Counsel for the respondent also quoted cases to bring the suit within Article 95. In both the cases of this Court quoted by the learned Counsel [*Udit Narain Singh* v. *Sohib Ali* (1) and *Lachman Prasad* v. *Ramphal* (2)] fraud was held to have been proved. In these cases the suit would be within time if brought within three years of the discovery of the fraud. In the present case I agree with the First Court that no fraud is proved.

The ruling reported as *Madan Lal* v. *Reoti Singh* (3) should be applied to this case. The suit was brought more than six years after failure of payment of instalments and was time-barred.

I set aside the decree of the lower Appellate Court and restore the decree of the First Court with costs of all the Courts.

N. H.

Appeal allowed.

(1) 6 Ind. Cas 1013; 13 O. C. 148

(2) 37 Ind. Cas. 351; 3 O. L. J. 593.

(3) A. W. N. (1907) 103; 4 A. L. J. 249.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No 1709 OF 1917.

March 22, 1922.

Present:—Mr. Justice Broadway and Mr. Justice Abdul Qadir.

CHUNI LAL AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

KALA KHAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXII, rr. 4, 9—Appeal—Death of respondent—Abatement—Application to set aside abatement—Sufficient cause—Ignorance of death.

An application, purporting to be made under O XXII, r 4 of the Civil Procedure Code, which is made after expiry of the period for making it, may be treated as having been made under r. 9 of the Order. [p. 597, col 1]

Mere ignorance of the death of a party is not a sufficient excuse to entitle an applicant to the benefit of r. 9 of O. XXII, Civil Procedure Code. [p. 597, col 1]

Inayat v *Ganga*, 32 Ind Cas 829; 3 P. R. 1916; 26 P. W R 1915 and *Diya Singh* v *Buta Singh*, 38 Ind Cas. 7; 115 P R 1916; 189 P. W R 1916, *Jamna* v. *Sarjit*, 52 Ind Cas 510; 67 P. R., 1919, followed.

Second appeal from a decree of the District Judge, Jhelum, dated the 30th March 1917, reversing that of the Subordinate Judge, Jhelum, dated the 19th December 1916.

Lala *Madan Gopal*, for the Appellants.

Mr. *Anant Ram* for Mr. *Brij Lal*, for the Respondents.

BHAGWATI KUER v. JAGDAM SAHAY.

JUDGMENT.—Mr. Anant Ram for respondents raises a preliminary objection to the hearing of this appeal on the ground that it has abated. Sharaf was the sole defendant in the case and the sole respondent in this appeal. He is said to have died on the 23rd of August 1921. On the 29th of November 1921 an application was made on behalf of the appellants under O. XXII, r. 4, Civil Procedure Code. This application was supported by an affidavit sworn by one of the appellants. In it it was stated that the appellants had only learnt of Sharaf's death on the 28th of November 1921. Under Article 177 of the Limitation Act, as amended in 1920, the period within which an application under O. XXII, r. 4, Civil Procedure Code, is to be made has been reduced from six months to ninety days. The application as made, therefore, was clearly bad, and the suit had abated ninety days after the death of Sharaf. It was, however, open to the appellants to move the Court under O. XXII, r. 9 (2) and apparently this fact was borne in mind by the learned Vakil for the appellants who carefully inserted in the application, and added in the affidavit, the allegation that the appellants had only come to know of the death of Sharaf on the 28th of November 1921. Although the present application is bad, we are prepared to treat it as having been made under r. 9 of O. XXII, Civil Procedure Code.

The question is, whether we are satisfied that there was sufficient cause for the appellant's delay in moving this Court. As to this the only reason given for the delay is that the appellants were ignorant of Sharaf's death. Now, it has been repeatedly held that mere ignorance of the factum of death is not sufficient excuse under this rule and Order: See *inter alia* *Jamna* v. *Sarjit* (1) and *Inayat* v. *Ganga* (2) *Daya Singh* v. *Buta Singh* (3) and the cases therein cited. After careful consideration of all the circumstances in this case we are not prepared to hold that the reason advanced for the delay is sufficient. The appellants come from the same village as Sharaf. Mr. Madan Gopal for the appellants admitted that the appellants had a large number of relatives living in the village where Sharaf lived and where Sharaf died. Milkhi Chand who has sworn the affidavit was admittedly working as a School Master, some 18 miles from the village and there can be little doubt that he was in constant communication with his relatives. In any event, we consider that it was incumbent on him to keep himself sufficiently in touch with Sharaf and that his failure to do so shows such negligence as disentitles him from the benefit of O. XXII, r. 9.

We, therefore, hold that the reason advanced in this case does not amount to sufficient cause and that the appeal must be dismissed as having abated. In the circumstances we allow the parties to bear their own costs in this Court.

S. D. *Appeal dismissed.*

(1) 52 Ind. Cas. 510; 67 P. R. 1919.
(2) 32 Ind. Cas. 829; 3 P. R. 1916; 230 P. W. R. 1915.
(3) 38 Ind. Cas. 7; 118 P. R. 1916; 189 P. W. R. 1916.

PATNA HIGH COURT.
CIVIL REVIEW No. 3 OF 1922.
January 2, 1922.
Present:—Mr. Justice Das and Mr. Justice Adami.

BHAGWATI KUER—PETITIONER
versus
JAGDAM SAHAY AND OTHERS—OPPOSITE PARTY.

Ejectment suit—Parties—Person in actual juridical possession as well as the person under whom he holds, both, whether necessary parties Both made parties but relief claimed only against the person in actual juridical possession—Jurisdiction of Court to give decree—Suit for proprietary possession Decree for mokarrari *interest, whether can be granted.*

If the plaintiff in an ejectment suit can make out a legal title to land, he is entitled to maintain a suit against the person in actual juridical possession of such land for its recovery without making the person

under whom the latter claims to hold, a party to the suit (*Kashi* v. *Sadashiva*, 7 B. 22), relied upon, and where both the person in actual juridical possession as well as the person under whom he holds the property are defendants in the suit but the plaintiff does not choose to claim any relief as against the latter, the Court is competent to give a decree to the plaintiff for possession only as against the former, *i.e.*, the person in actual juridical possession. [p. 548, col. 2]

Cannon v *Bissonath Adhicari*, 5 C. L. R. 154, *Durga Prashad Singh* v *Brojo Nath Bose*, 15 Ind. Cas. 219; 16 C. W. N. 482; (1912) M. W. N. 425; 11 M. L. T. 337; 9 A. L. J. 462; 15 C. L. J. 461; 14 Bom. L. R. 445; 23 M. L. J. 26; 39 C. 696; 39 I. A. 133 (P. C.), referred to.

Where in an ejectment suit the plaintiff claims possession of proprietary interest in the property in suit, a Court is competent to give him a decree in respect of the *mokarrari* interest, although he never claimed possession of that interest. [p. 548, col. 2.]

Application for review of judgment in First Appeal No. 164 of 1918, dated the 21st June 1921, and reported as 62 Ind. Cas. 933.

Messrs. *S. M. Mullick* and *Sita Nandan Roy*, for the Applicant.

Messrs. *P. N. Sinha* and *B. C. Sinha*, for the Opposite Party.

ORDER.

DAS, J.—This is an application for review of our judgment, dated the 21st June 1921. The principal ground urged by Mr. Sushil Madhab Mullick on behalf of the applicant is that we have given a decree to the plaintiffs which they did not ask for in the plaint.

The suit was a suit for possession of certain properties set out in the schedule. The plaintiff claimed to be the reversioner of one Girwar Narain and entitled to the properties on the death of his daughter, Fateh Kuer. The applicant claims to hold a *mokorrari* lease in her favour granted to her by Fateh Kuer. The plaintiff's case in the plaint was that Girwar Narain was separate from his brother, Sadhoo Narain, and that upon his death his estate devolved upon his daughter, Fateh Kuer, and that upon Fateh Kuer's death the plaintiff became entitled to the estate which belonged to Girwar Narain. It appears that upon Girwar's death, there was a contest between Fateh Kuer on the one hand and Ram Prasad and Sant Prasad, sons of Sadhoo Narain, on the other. There was a settlement between the parties by which the properties of Girwar Narain were divided between all the parties, who claimed to have an interest in the estate of Girwar Narain. The plaintiff became a party to that compromise through his father, but it appears that he was then an infant and never ratified the transaction into which his father entered on his behalf. He accordingly by his action claimed to recover possession of the properties and cited the applicant as one of the principal defendants in the suit. He alleged in the seventh paragraph of his plaint that the defendant No. 2, that is to say, the applicant, representing herself as the purchaser of perpetual *mokorrari* right created under a deed executed by *Musammat* Fateh Kuer, was in unlawful possession of the property described in Schedule 1 and that the defendant No. 1 was holding unlawful possession like a proprietor over the property mentioned in that schedule without having any right whatsoever. The applicant, who, as I have mentioned, was cited as defendant No. 2 in the action, entered appearance and claimed under the *mokorrari* deed executed in her favour by *Musammat* Fateh Kuer. That was the claim which she put forward in the action. Her case was that Girwar Narain was joint with his brother, Sadhoo, and that the compromise between the parties was binding upon the plaintiff. She accordingly contended in her written statement that Fateh Kuer took an absolute interest in the properties which were assigned to her and was competent to execute a *mokorrari* deed in her favour. By our judgment we came to the conclusion that Girwar Narain was separate from Sadhoo and that the compromise between the parties did not operate to give any absolute title to Fateh Kuer, and that the compromise was not binding upon the plaintiff. We gave the plaintiff a decree for possession as against all the defendants.

Mr. Sushil Madhab Mullick's argument is, that the plaintiff claimed possession of the proprietary interest in the properties and that there was no power in the Court to give him a decree in respect of the *mokorrari* interest which is in the applicant for the reason that the plaintiff never claimed possession of that interest. We are by no means prepared to accede to

BHAGWATI KUER v. JAGDAM SAHAY.

the argument of Mr. Mullick; but assuming that his contention is correct, the point becomes one of technicality without any substance to recommend it. The difficulty can be remedied at any time by amendment of the plaint, and if we are to grant a review we would be compelled to allow any application for amendment that might be made on behalf of the plaintiff if in justice the plaintiff is entitled to a decree as against the applicant.

Mr. Mullick then contended that in justice the plaintiff was not entitled to any decree as against his client, inasmuch as the question as between the plaintiff and Ram Prasad was left open. It appears that during the pendency of the case, the plaintiff and Ram Prasad entered into a settlement and by our judgment we did not, in any way, decide the question as between the plaintiff and Ram Prasad. Mr. Mullick's argument now is, that if any one dispossessed the plaintiff it was Ram Prasad and that as his client claims title under Ram Prasad, it is unfair to give a decree to the plaintiff as against his client, leaving the entire question open as between the plaintiff and Ram Prasad. In the first place, it may be pointed out that his client does not claim any title through Ram Prasad; she held under a *mokarrari* deed executed in her favour by Fateh Kuer, that is, the deed which she sets up in her written statement It is quite true that on Fateh Kuer's death, there was a contest in the Land Registration Department as between Ram Prasad on the one hand and Fateh Kuer's daughter on the other as to who was entitled to be registered in the Land Registration Department in the place of Fateh Kuer, and the Land Registration Department decided the question in favour of Ram Prasad; and we have no reason to doubt that since that decision the petitioner has been paying rent to Ram Prasad. Mr. Mullick's contention is that we must regard that decision subsequent to the death of Fateh Kuer as a new settlement by Ram Prasad in favour of his client. I cannot look upon the decision in that way at all. The petitioner claims under Fateh Kuer and though it is quite true she is now paying rent to Ram Prasad because the Land Registration Department has decided the question in favour of Ram Prasad, still she claims to be in possession of the property, not by virtue of any settlement made by Ram Prasad, but by virtue of the settlement made by Fateh Kuer. The question, therefore, in the form in which it has been raised by Mr. Mullick, does not arise; but assuming it does arise, I am not prepared to admit that we are incompetent to give a decree to the plaintiff for possession as against the person in juridical possession of the property, if for some reason the plaintiff does not choose to claim any relief as against the party who may put the other party in actual possession of the land. The decision of the Bombay High Court to which I referred in the course of my judgment* is conclusive on the point. Mr. Mullick relied upon the case of *Cannon* v. *Bisonath Adhicari* (1). It appears that that case was subsequently relied upon by the Calcutta High Court in a case which was reversed by the Judicial Committee in the case of *Durga Prashad Singh* v. *Brojo Nath Bose* (2). That case was also not followed by the Bombay High Court in the case to which I referred. It appears to me that the decision of Farran, C. J., correctly lays down the principle that ought to guide us in dealing with cases of this nature.

This application fails and must be refused with costs. Hearing fee two gold *mohurs*.

ADAMI, J.—I agree.

S. D. *Application rejected.*

(1) 5 C. L. R. 154.

(2) 15 Ind. Cas 219; 16 C. W. N. 482; (1912) M. W. N 425; 11 M. L. T. 337; 9 A. L. J. 462; 15 C. L. J. 461; 14 Bom. L. R. 445; 23 M. L. J. 26; 39 C. 696; 39 I. A. 13. (P. C.).

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* *See Kashi* v. *Sadashiv*, 21 B. 229; 11 Ind. Dec. (N. S.) 154—[*Ed.*].

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1582 OF 1920.

January 6, 1922.

Present :—Mr. Justice Kumaraswami Sastri and Mr. Justice Devadoss.

ANGATI PARAMBATH KANNIYALLI RATHA—PLAINTIFF—APPELLANT

versus

THEKKE ILLATH NEELAKHANDHAN *alias* PADMANABHAN NAMBOODRY—DEFENDANT—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 120—Application for registry as jenmi, *refusal of—Subsequent identical application by son after 14 years also refused—Declaratory suit—Cause of action—Limitation.* terminus a quo.

Where an application to be registered as *jenmi* of certain lands is refused by the Revenue Authorities, and a subsequent identical application, made some years afterwards, by his successor is also refused a suit to obtain a declaration that the plaintiff is the *jenmi* of the lands must be brought within the period of limitation prescribed by Article 120, Schedule I, Limitation Act, the *terminus a quo* of such period being the date of refusal of the first application by the Revenue Authorities The refusal to grant identical relief on the second application does not give a fresh cause of action [p 6 2, col 1]

Brojendra Kishore Roy v *Bharat Chandra Roy* [*Abdul Razac*], 31 Ind Cas. 4 ; 22 C. L. J. 283: 20 C. W. N. 48 , *Allah Jilai* v. *Umrao Husain* 24 Ind Cas 535: 36 A. 492 12 A L J. 810, *Kali Prasad Misir* v. *Harbans Misir*, 50 Ind Cas 767: 17 A. L J 388, *Anantarazu* v. *Narayanarazu*, 13 Ind. Cas. 96 36 M 383, (1911) 2 M. W N. 53 10 M L. T. 104; 22 M L. J. 10 , *Bhaiaji* [*Jalandhar Thakur*] v. *Jharula Das*, 24 Ind Cas 501; 42 C. 244; 1 L W. 549; 8 C. W. N. 1029; 27 M. L. J. 100; 16 M L T 210; (1914) M. W. N. 637; 12 A L. J. 1176; 20 C. L. J. 360; 16 Bom. L. R. 845 P. C.), distinguished.

Chowdhry Shamanund v *Rajnarain Das*, 11 C. W. N. 188; 4 C L. J 568 and *Akbar Khan* v. *Turaban*, 1 Ind. Cas. 557; 31 A 9: A. . N. (1908) 252; 5 A. L. J. 687; 4 M. L. T. 441, referred to.

Second appeal against a decree of the District Court, North Malabar, in Appeal Suit No. 70 of 1919, preferred against a decree of the Court of the District Munsif, Kuthuparamba, in Original Suit No. 767 of 1917.

FACTS appear from the judgment.

Mr. *K. P. Ramakrishna Aiyar*, for the Appellant.—The suit is not barred under Article 120 of the Limitation Act as a fresh cause of action accrued to the plaintiff in 1917. *Brojendra Kishore Roy* v *Bharat Chandra Roy* [*Abdul Razac*] (1), *Allah Jilai* v *Umrao Husain* (2), *Kali Prasad Misir* v. *Harbans Misir* (3). *Anantharazu* v. *Narayanarazu* (4), *Bhaioji* [*Jalandhar Thakur* v. *Jharula Das* (5).

The plaintiff was in continuous and undisturbed enjoyment for over the statutory period. He has a right to sue for declaration of his title.

The plaintiff has a recurring cause of action every time that his right is denied.

Mr. *R. Govinda Marar*, for the Respondent.—The claim by the son is in terms identical with that preferred by his father in 1903. There was no fresh cause of action in 1917. The cases cited are distinguishable. The mere refusal by the Revenue Authorities to register does not amount to dispossession There must be an act of obstruction by the defendant to give the plaintiff a fresh cause of action. The defendant did not collect the profits. Article 120 of the Limitation Act applies and the suit is barred.

JUDGMENT.

DEVADOSS, J.—The plaintiff alleges that he is the *jenmi* of the plaint property and that he applied to have the land registered in his name in 1907 and that, on the objection of the defendant, the Revenue Authorities refused to change the registry He, therefore, sues for a declaration that he is the *jenmi* of the plaint land. Both the Courts dismissed the suit as being barred by limitation under Article 120. The plaintiff has preferred this second appeal.

It is found that the plaintiff's father applied in 1903 for change of revenue registry to his name and the Settlement Officer ordered that the registry should stand as it did. It is contended on his behalf that the suit is not barred by limitation as there was a fresh cause of action in 1917. He relies upon *Brojendra Kishore Roy* v. *Bharat Chandra Roy* [*Abdul Razac*] (1). The facts in that case were the plaintiffs claimed title to some property by purchase at a sale in execution of a mortgage-decree. They took possession but were resisted by the defendants and the

(1) 31 Ind Cas. 242; 22 C. L. J. 283; 20 C. W. N. 431.

(2) 24 Ind. Cas. 535; 36 A. 492; 12 A. L. J. 810.

(3) 50 Ind Cas 767; 17 A. L. J 388.

(4) 13 Ind. Cas 96; 36 M. 383; (1911) 2 M. W. N. 53 ; 10 M. L T 104; 22 M. L. J. 108.

(5) 24 Ind Cas 50 ; 42 C. 244; 1 L. W. 549; 18 C. W. N. 1049 27 M. L. J. 100; 16 M. L. T. 210; (1914) M. W. N. 636; 12 A. L. J. 1176; 20 C. L. J. 360; 16 Bom. L. R. 845 (P. C.).

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property was attached under section 146, Criminal Procedure Code. The order of the Magistrate was made on 25th April 1902. On the 3rd July and 11th October 1909 two sets of plaintiffs instituted suits for a declaration of their title and for their shares of the property. The Courts found that plaintiffs had title to the property and that they were in possession, till the attachment of the property by the Magistrate on 25th April 1902. The lower Appellate Court dismissed the suits as barred by limitation under Article 120 of the Limitation Act. The learned Judges held that the attachment by the Magistrate on account of the interference of the defendants was a continuing wrong and that no question of limitation arose. In *Allah Jilai* v. *Unrao Husain* (2) the learned Judges held that the suit brought for profits of the share gave the plaintiffs a fresh cause of action. In *Bali Prasad Misr* v. *Harbans Misir* (3) Piggott, J observes: "My opinion is that the proceedings taken in the Partition Court whereby the plaintiffs found themselves, if their statements of facts are true, for the first time in danger of being actually dispossessed of their joint ownership over plot No. 655, give rise to a fresh cause of action altogether independent of any cause of action which may have been furnished to the plaintiffs by the Settlement entry made in 1877." If, in this case, the respondents had attempted to disturb the plaintiff's possession or claim any right over the property to the derogation of the plaintiff's right, such an act would give a fresh cause of action. The plaintiff herein asks for the same relief which was denied to him in 1903. As observed in *Chowdhry Shamanund* v. *Rajnarain Das* (6), "it cannot be successfully maintained that the plaintiffs should as a matter of law be regarded as dispossessed merely by virtue of the order of the Revenue Authorities dismissing their application for registration. The suit is in substance, as it is in form, a suit for declaration of title and the rule of limitation applicable is that provided in Article 120 and not that in Article 144."

The case in *Anantararu* v. *Narayanarazu* (4) has no application to the facts of the present case. There was an attachment of a person's land, as if it belonged to another, and on a later date the same was sold in Court auction. It was held that "the plaintiff, no doubt, might then have sued, but we do not think they were bound to sue.... The owner's title is affected by a sale in an altogether different and greater degree than it is by an attachment. We think this gives the owner of the property a fresh cause of action."

In the present case it cannot be contended that there was a fresh cause of action in 1917. The plaintiff's father was refused change of registry to his name in 1903. The plaintiff again applied in 1917 for the same relief which was refused. The suit brought after six years from the date of first refusal is barred under Article 120 of the Limitation Act, *vide Akbar Khan* v. *Turaban* (7).

It is next contended that the respondent did not deny the plaintiff's title in 1903 and that he denied plaintiff's title only in 1917. The facts in evidence do not support this contention. Operations under the Malabar Land Registration Act, 1896, went on in 1901 and 1902 and under sections 4 and 5 notices must have been issued, and such enquiry as was necessary must have been held under section 6.

The records of the operations seem to have been destroyed and it would be putting a premium upon perjury to allow the parties to adduce oral evidence as to what happened in 1903. It is clear from Exhibit VII that plaintiff's father must have been aware of what was going on then and after the entry was made in defendant's name he wanted a transfer to his name which was refused by the Settlement Officer; *vide* Exhibit VII.

It is next contended that the plaintiff has been in undisturbed possession for the last twelve years and that he is, therefore, entitled to bring a suit for declaration of his title against the defendant. In the first place there is no evidence as to the nature of his possession. Even if he is in possession as a *enmi* that would not by itself give a cause of action against the defendant.

It is further contended that every fresh denial of title gives a fresh cause of action

(6) 11 C. W. N. 186; 4 C. L. J. 568.

(7) 1 Ind. Cas. 557; 31 A. 9; A. W. N. (1908) 252; 5 A. L. J. 637; 4 M. L. T. 444.

and *Bhaiani* [*Jalandhar Thakur*] v. *Jharula Das* (5) in cited to support it. In that case their Lordships held "that on each occasion on which Jharula Das received and wrongfully appropriated to his own use a share of the income to which the *shebait* was entitled Jharula Das committed a fresh actionable wrong in respect of which a suit could be brought against him by the *shebait*." If, in the present case, the defendants attempted to collect or collected the income of the land, the plaintiff would have had a fresh cause of action. By asking for this identical relief in 1917, which was denied his father in 1903, the plaintiff does not acquire a fresh cause of action against the defendants. The second appeal fails and is dismissed with costs.

KUMARASWAMI SASTRI, J.—I agree.

M. C. P.

W. C. A. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 163 OF 1919.

January 31, 1922.

Present:—Mr. Justice Rafique and Mr. Justice Lindsay.

MR. MOHAMAD ISMAIL KHAN—PLAINTIFF—APPELLANT

versus

MR. HASAN ALI KHAN AND ANOTHER—DEFENDANTS—RESPONDENTS.

Contract, suit for, breach of—Contract involving mutual obligation—Plaintiff must prove his readiness to perform his obligation on date of performance.

Where a contract imposes mutual obligations upon the contracting parties and one of the parties sues for damages for a breach of the contract he must show that, on the date fixed for the performance of the contract, he was ready and willing to perform his part of the bargain. [p. 606, col. 1]

First appeal from the decision of the Subordinate Judge, Meerut, dated the 30th of January 1919.

Dr. *Tej Bahadur Sapru* and Dr. *Surendra Nath Sen* and Mr. *Iqbal Ahmad*, for the Appellant.

Dr. *S. M. Sulaiman*, for the Respondents.

JUDGMENT.—The plaintiff, Mohamad Ismail Khan, who has died since the institution of the suit and is now represented by his heirs, brought the suit, out of which this appeal has arisen, to recover Rs. 9 000 odd by way of damages for breach of contract.

There were two defendants in the case (1) Hasan Ali Khan, (2) Nasirulla Khan.

Briefly put, the case for the plaintiff was that, on or about the 14th September 1916, he entered into a contract with the first defendant for the purchase of a quantity of indigo at the rate of Rs. 2 0 per factory maund. The agreement between the parties was that the indigo should be delivered to the plaintiff about the end of October. The case for the plaintiff was that, on the 7th of November 1916, the defendant, Hasan Ali Khan, refused to give him delivery, thereby breaking the contract.

It may be mentioned here that the second defendant was more or less a nominal defendant in the case. He is the servant of the first defendant and is said to have been a partner in the indigo business to the extent of a one anna share.

The defence raises two main pleas, namely:—

(1) That there was no complete contract between the defendants and the plaintiff, and,

(2) that, if there was a complete contract between the parties, the defendants had not been guilty of breach of contract, but, on the other hand, the plaintiff himself had made default.

The learned Subordinate Judge seems to have been of opinion that there was no complete contract between the parties. He further held in the defendants' favour that, if there was contract, the party in default was the plaintiff himself who was, therefore, not entitled to recover.

In appeal here, the case which was raised by way of defence to the effect that there was no complete contract between the parties, has been abandoned and rightly so. There can be no doubt whatever on the evidence in the case that a contract was entered into between these parties on the 14th September 1916, for the sale and purchase of indigo.

The necessary facts are all admitted in the statement made by the first defendant when he was examined as a witness in Court and the letters which passed between the parties amply prove that there was a

contract made between them on the date above mentioned.

There can, indeed, be no doubt that the first defendant seems to have desired that the terms of the contract should be reduced to writing. He seems further to have desired that a substantial sum of money should be deposited with him as earnest-money, and it was because the plaintiff had refused to reduce the contract to writing and to supply the Rs 2,000 demanded by way of earnest-money, that the plea was put forward to the effect that the contract between the parties was not complete.

We need say nothing more about this part of the case. If the first defendant desired to have any special terms made after the date upon which the contract was entred into, that would not affect the contractual relations already established between the parties.

The only question, therefore, with which we have to deal is, whether the plaintiff himself was in fault or whether the defendant wrongfully refused to give the delivery and was thereby guilty of breach of contract.

If appears that, in the month of September, when the contract was made, the indigo which was the subject-matter of the bargain between the parties, had just been manufactured. It was not possible at that time to fix a definite date for delivery before the manufactured cakes had been dried. It was not possible at the time the parties entered into the contract to fix any definite time by which the drying process would be complete. Consequently, it must be taken that, under the arrangement come to between the parties, it was for the first defendant to fix the date of delivery. He was in charge of the indigo which was stored in his Factory and he was responsible for getting the indigo into marketable condition. He was further under an obligation to see that the indigo was properly packed.

There can, we think, be no doubt that at the time the contract was made, a sample of the indigo was given to the plaintiff. Consequently, when the time for delivery came, it was the plaintiff's right to have an inspection of the indigo which was being offered to him, so that he might compare it in bulk with the sample which was in his possession. Lastly, it is clear that, on the terms of the contract, the plaintiff was under an obligation to pay for this indigo at the time of delivery. The amount in question was about Rs. 11,000.

We have been referred to certain letters which passed between the parties from the middle of September till the beginning of November. We do not propose to discuss this correspondence. It is sufficient to say that it appears that the parties were not disposed to trust each other regarding the fulfilment of the contract. Each party seems to have regarded the other with suspicion and, in short, they seem to have been dealing with each other at arm's length.

On the 1st November 1916, the defendant wrote a letter, Exhibit 6, page 30 of the appellant's book) informing the plaintiff that the goods would be ready for delivery at the Factory at Chidauli on the 5th November, 1916. The plaintiff was asked to attend at the Factory on that date, either in person or through a *Karinda* and to bring with him a sum of Rs. 11,000, the approximate value of the goods. In this letter, the defendant, Hasan Ali Khan, wrote that, if the plaintiff did not appear on the date in question or sent an agent, he would hold the plaintiff liable for a breach of contract and would arrange otherwise for the disposal of his goods.

The plaintiff replied to this letter by a letter dated the 4th November 1916. He took up a controversial attitude over the matter and said that he did not understand what the first defendant meant by saying that the time for delivery had been fixed. He disputed this statement and said that no time had been fixed for delivery nor was it possible that any time could be fixed because the indigo could not be weighed until it was in a dry state. In this letter, moreover, the plaintiff wrote to the defendant that the latter's indigo was not yet dry and he suggested that nothing more should be done until the defendant himself had seen the indigo and was satisfied that it was in a dry condition. We may say here that it is not apparent how the plaintiff could possibly know whether the indigo which was lying in the Factory was or was not in a dry state. His statement that it was not fit for delivery seems to have been based on some inferences which he drew

from the state of indigo in some other factories of which he professed to have some knowledge.

The plaintiff admittedly did not attend at the Factory at Chidauli on the 5th November 1916. When he was cross-examined on this point and asked to explain, his answer was that he did not go to the Factory on the date in question because he had no time. He admitledly turned up in the village of Chidauli late in the evening, on the 6th and, on the 7th, he appears to have written a letter or two to the defendant.

The defendant admitted that he had received one of these letters and stated in Court that he had sent an answer to the plaintiff, a copy of which is on the record (Exhibit D). The plaintiff, in his turn, denied ever having received this letter.

In his cross-examination, the plaintiff admitted that when he went to Chidauli on the 6th November, he had no money with him. His statement in Court was that the defendant had asked him to send the money in notes after weighment of the goods had been made. This latter statement, it may be observed, does not appear to be true, for it is in direct conflict with what had been stated by the first defendant in his letter of the 1st November, in which he insisted that the purchase-money, namely, Rs. 11,000, should be brought to the Factory on the 5th November.

The plaintiff remained in Chidauli the night of the 6th, the whole of the 7th of November, and left there on the morning of the 8th of November. It is an admitted fact that all this time he never went near the first defendant's Factory although the evidence shows it is situated only a hundred yards from the house in which the plaintiff was staying.

The plaintiff was cross-examined on this point and said that he would have weighed the indigo if he had known that it was in a dry condition. He went on to say that the defendant did not show him the indigo, and he seems to have put forward this as an excuse for not taking delivery. With regard to this, it may well be asked how the defendant could have shown the plaintiff the indigo when the latter refused to go near the Factory. The plaintiff added by way of explanation that he did not care to come to the Factory because he and the defendant were not on good terms after the correspondence which had passed between them.

As opposed to this, we have the sworn statement of the first defendant whose story is to the effect that, after sending the letter of the 1st November 1916, he went to the Factory at Chidauli on the 5th and was ready to give delivery to the plaintiff whenever he came. The plaintiff failed to appear on the 5th or on the 6th, and the story is that, in these circumstances, the first defendant came to the conclusion that the plaintiff did not intend to take delivery. The defendant, therefore, began packing up the indigo in lines. He admits that he met the plaintiff at dinner on the evening of the 7th at the house of a common friend, one Raham Ali, and he deposed to a certain conversation which he had with the plaintiff—a conversation which the plaintiff denies.

We have on the record the statement of Raham Ali, the gentleman at whose house both the parties dined on the night of the 7th of November. We have no reason to doubt the truth of the statement made by Raham Ali in Court. He seems to have been a friend of both parties. Raham Ali knew about the indigo business which was being carried on at Chidauli and he states that when the first defendant came to Chidauli on the 5th of November, the indigo cakes were dry and ready for packing. The witness himself saw some of the packing done and he states definitely that he examined the goods and found that the cakes were in a dry condition. Speaking about the visit of the plaintiff, he deposes that the plaintiff wrote a letter which he sent to the first defendant by one Mahfuz Ali and he further swears that Mahfuz Ali brought a reply to his letter. In addition to this, the witness stated that, in consequence of a request made to him by the first defendant, he spoke to the plaintiff Mohamad Ismail about taking delivery of the indigo. The witness swears that when this message was given to the plaintiff, the latter said that he would have the indigo weighed and that the money would be paid on the date fixed for payment. The plaintiff further added that he had brought no money at that time and he concluded by saying that if the first

defendant refused to deliver the indigo, he would "see to it". In other words, he threatened to take proceedings against the first defendant.

We have no doubt at all, on the statement of this witness Raham, Ali, that, on the 5th of November, the indigo in the defedant's Factory was ready for delivery and in good marketable condition. There is no foundation whatever for the position taken up by the plaintiff, namely, that the indigo could not, on that date, have been in a fit condition for packing on account of its being wet. As we have said, the plaintiff had no personal knowledge whatever of the state of the indigo inside the Factory for he never went near it.

We have also mentioned a letter, Exhibit D, which was admitted in evidence in the Court below. This is an office copy of the letter which the first defendant says he sent to the plaintiff on the 7th November, 19 6. It has been objected before us that this document ought not to have been received in evidence as it was produced at a late stage of the case. The record shows that the other documents in the case were filed on the 16th April 19 7. This document, on the other hand, was not put into Court till the 19th December 1917, the date on which the witnesses began to be examined. It is apparent, however, that before this, *i. e.*, in the month of July, the defendant had called upon the plaintiff to produce the original letter of which Exhibit D was a copy. The record shows that this notice was served upon the plaintiff's Counsel and there is nothing to show that the document was brought to Court. In fact, from what the plaintiff himself afterwards stated in the evidence, the document could not have been brought to Court on the assumption that the plaintiff's statement is true, for his story is that he never got any such letter. We do not believe the story for the plaintiff on this point. We have the statement of Raham Ali that when a letter was sent to the defendant on the morning of the 7th of November, a reply to that letter was brought by Mahfuz Ali; the messenger Mahfuz Ali was examined and, when making his statement regarding this particular incident, he stated that he took the letter to the defendant in the morning and came back with a letter. He at once withdrew his latter statement and said that he got no letter from the defendant, saying that he had made a mistake in stating that an answer had been given to him by the defendant. We think we may safely take it that, as a matter of fact, the first defendant did reply to the letter sent by the plaintiff on the morning of the 7th November, and that Exhibit D represents the contents of the letter which was sent by defendant No. 1. If that letter is acted upon, it seems to us to be abundantly clear that the defendant offered delivery of the goods on the 7th of November. In this letter he says that he had been waiting for the plaintiff for two days and that he had lost all hopes of the plaintiff taking delivery and had, therefore, begun to pack the indigo up with the object of sending it to Khurja. He, however, offered the plaintiff another opportunity of taking delivery and said that he might examine the indigo which was already packed and inspect the indigo which had not been put into the boxes. He intimated that delivery would be on the spot but only on condition that the plaintiff brought the money with him.

We have to choose, therefore, between these conflicting stories told by the plaintiff on the one hand, and the first defendant, on the other; and, after a careful consideration of all the evidence, we hold that the story of the defendant ought to be accepted. It is, we think, supported in very material particulars by the testimony of the witness Raham Ali whose *bona fides* we have no reason to suspect.

It has been urged upon us with considerable force that the probabilities are all in favour of the defendant having refused delivery and for the plaintiff being desirous of taking it. There can, we think, be no doubt that, subsequent to the date of the contract, the market price of indigo had risen considerably. The plaintiff says that the first defendant wanted to back out of his bargain in order to profit by the rise in the price, and it is argued that, with this rise in price, the plaintiff stood to make a very substantial profit and would not, therefore, likely have declined the delivery if the goods were ready for him. There is, no doubt, considerable force in this argument but one thing has to be remembered and that is this, namely, that, under the terms of the contract, the plaintiff

was under an obligation to produce a sum of about Rs. 11,000 at the time the delivery was to be given and, after an examination of the evidence, we have come to the conclusion that the real reason why the contract was not completed was that the plaintiff could not find the money. His conduct on the 7th of November at Chidauli seems to us to have been altogether inconsistent with any notion of an intention on his part to take delivery. It is quite inexplicable to us why he failed to go over to the Factory, a few hundred yards away, and satisfy himself that the goods which were being offered to him were up to sample and in a fit condition to be put upon the market. He asks us to hold that the defendant really had no intention of offering delivery on that date and that, in fact, the goods were not in a fit condition to be delivered on that date. On this latter point, the plaintiff admittedly has no knowledge of his own and the other evidence in the case shows that the indigo was dry and fit for packing. Again, we are not satisfied with the plaintiff's explanation of his failure to go to Chidauli on the 5th of November, the date which was fixed by the first defendant. As we have pointed out, the only answer he could give regarding this failure was that, on the date in question, he could find no time.

In a case like this in which there were mutual obligations on the parties, it was for the plaintiff to show that, on the date fixed for performance of the contract, he was ready and willing to perform his part of the bargain. It may perhaps not have been necessary for him to prove that he made an actual tender of the money but it was, at any rate, incumbent on him to show that he had made arrangements for the purchase-money and was in a position to hand it over to the first defendant as soon as he was satisfied that bulk of the goods was in accordance with the sample and that everything was satisfactory. He admittedly made no attempt to compare the bulk of the goods with the sample or, in fact, to do any other thing which he was bound to do under the terms of the contract. As we have said, the impression which is left upon us after a perusal of the evidence in the case is that the plaintiff was in embarrassed circumstances and could not find the money Rs. 11,000 at the time when it was wanted. We are satisfied, therefore, that, though the judgment of the Court below is open to criticism on certain other grounds which we need not pause to consider, the learned Subordinate Judge was right in holding that the plaintiff had failed to prove his case that the defendant was guilty of breach of contract. In these circumstances, the suit was rightly dismissed and this appeal, therefore, fails and is dismissed with costs including in this Court fees on the higher scale.

W. C. A.

Appeal dismissed.

PATNA HIGH COURT.

APPEAL FROM ORIGINAL ORDER No. 62 OF 1921.

February 8, 1922.

Present:—Mr. Justice Jwala Prasad and Justice Sir John Buckland, Kt.

Malik MOKHTAR AHMAD—JUDGMENT-DEBTOR—APPELLANT

versus

Musammat BIBI RAHIMUNNISSA BEGUM—DECREE-HOLDER—RESPONDENT

Appropriation of payments—Contract Act (IX of 1872), ss. 59, 61—Appropriation towards principal or interest—Civil Procedure Code (Act V of 1908), s. 51, O. XL r. 1—Mortgage-decree—Decree-holder entitled to sell property—Receiver, whether can be appointed.

In the absence of an agreement to the contrary, payments made in satisfaction of a decree should be appropriated first towards the interest and the balance, if any, should be credited towards the principal [p. 601, col. 2].

Luchmeswar Sing Bahadur v. *Syad Lutf Ali Khan*, 8 B. L. R. 0. 2 Sar P. C. J. 700; 2 Suth. P. C. J. 461, (P. C.) *Gooroo Doss Dutt* v. *Ooma Churn Roy*, 22 W. R. 525, *Maharaja of Benares* v. *Har Narain Singh*, 28 A. 25 at p. 27; 2 A. L. J. 585; A. W. N. (1905) 167, referred to.

Where under a mortgage decree the mortgagee is entitled to sell the mortgage property, a Court should not, on the application of the judgment-debtor, appoint a Receiver under Order XL, rule 1, Civil Procedure Code [p. 608, col. 1].

Section 51 of the Civil Procedure Code merely prescribes the mode in which a decree-holder may seek execution of his decree and does not give the judgment-debtor a right to apply for the appointment of a Receiver. [p. 608, col. 1.]

Appeal from a decision of the Subordinate Judge, Patna.

MOKHTAR AHMAD v. BIBI RAHIMUNNISSA BEGUM.

Messrs. *Muhammad Hasan Jan* and *Yunus*, for the Appellant.

Mr. *A. K. Roy*, for the Respondent.

JUDGMENT.

JWALA PRASAD, J.—The judgment debtor is the appellant. He objects to the execution of the decree on two grounds, (1) that the accounts prepared by the office are wrong, and (2) that a Receiver may be appointed by the Court for the properties sought to be sold so that he may pay the balance of the decretal amount in due time. Both these grounds have been overruled by the Court below.

The first ground raises a question of appropriation of the sums paid by the judgment-debtor from time to time towards the satisfaction of the decree It is said that the payments should have been appropriated towards the principal and not towards the interest. Reference has been made by the learned Vakil on behalf of the appellant to the final decree passed in the case on the 19th February 1915, the petition of compromise filed in Execution Case No. 29 of 1915 on the 25th September 1915 and the petition dated the 5th April 1917 filed by the decree holder certifying payment of Rs. 23,000 and exempting a part of the mortgage properties. None of these documents are clear as to an agreement between the parties relating to the appropriation of payments made by the judgment-debtor, namely, as to whether they should be credited towards the principal or the interest There is no indication of any intention of the parties that the payments made should be credited towards the principal in the first instance. In the petition of the 25th September 1915 the judgment debtor accepted the figure mentioned in the sale proclamation, namely, Rs. 1,12,787 8-9 as the correct amount of the decree, presumably both principal and interest and costs. Referring to that petition the learned Subordinate Judge says: "So that the principal decretal money was considered by them to be Rs. 1,12,787-8-9 which includes costs and interest. Payments made were to be deducted out of that sum. Hence this objection fails. Interest was to run on the amount remaining due after the sum paid. There is no stipulation contrary to this. Therefore, I disallow the objection and hold that the account is correct."

In the absence of any agreement to the contrary, the payments have first to be appropriated towards the interest and the balance of the payment, if any, is then to be credited to the principal. Sections 59 to 61 of the Contract Act do not expressly deal with interest, but the principle underlying these sections can well apply to interest as well. In the case of *Luchmeswar Sing Bahadur* v. *Syad Luif Ali Khan* (1) their Lordships of the Privy Council affirmed the above principle in the following words:

"Where payment was made upon a bond, the amount paid being less than the interest due, *held* the payment ought to go to reduce the amount of interest due, and the creditor in a suit upon the bond was entitled to a decree for the principal and balance of interest up to date of decree." This principle of appropriation has been applied from the earliest time to payments made with respect to mortgage-debt: *vide* the case of *Gooroo Doss Dutt* v. *Oona Churn Roy* (2). The argument of the learned Vakil that the appropriation of payments towards the interest would practically amount to charging compound interest against the terms of the bond can be well met by referring to the following passage in the decision of the aforesaid case:

"The balance of interest is never added to the principal so as to produce compound interest; but the practice appears to us to be that the payment so made is to be appropriated to the interest that has accrued. We believe that to be the established practice in cases of mortgage, and we see no reason why that practice should not be followed in the execution of ordinary decrees."

See also the case of *Maharaja of Benares* v. *Har Narain Singh* (3). The view taken by the Subordinate Judge is, therefore, correct, and the contention urged on behalf of the judgment debtor is overruled.

Mr. Yunus also appearing on behalf of the judgment-debtor addressed us on the

(1) 8 B. L. R. 110; 2 Sar. P. C. J. 700; 2 Suth. P. C. J. 461 (P. C.).

(2) 22 W. R. 526.

(3) 28 A. 25 at p. 27; 2 A. L. J. 585; A. W. N. (1905) 167.

NANAK CHAND v. MUNSHI RAM.

second point urging that in the circumstances of the case, a Receiver should be appointed in the interest of the decree holder and the judgment-debtor. The decree-holder opposes the application of the judgment-debtor for the appointment of a Receiver, therefore, it cannot be said that the appointments of Receiver would be for the benefit of the decree-holder. Upon the merits of the case the Court below has held that no Receiver ought to be appointed. In its opinion the income of the property is too small to satisfy within a reasonable time the large mortgage still outstanding of about Rs. 60,000. Apart from there being no substance in the application of the judgment-debtor on merits, I think that it would be stretching too far the discretion of the Court under Order XL, rule 1 in the matter of the appointment of Receiver, if we were to deprive the decree-holder of the right accrued to him under the decree to sell the mortgaged property. To do that would be to do away with the solemn agreement between the parties set forth in the mortgage-bond expressly stipulating that the decree-holder shall be entitled to sell the property in order to realise the amount due thereunder. I do not think that the Court should step in and use the discretion, if any, vested by the aforesaid rule of the Code of Civil Procedure in order to rip up the contract entered into between the parties. The decree-holder knows his interest best and he has a right to stand upon the decree and to ask the Court to sell the property. I need hardly mention that section 51 of the Code has absolutely no application. That section prescribes the mode in which a decree-holder may seek an execution of his decree, one of the modes being by the appointment of a Receiver. The section does not give any right to the judgment-debtor to apply for the appointment of a Receiver. I, therefore, reject this contention also on behalf of the judgment debtor.

The result is that the appeal is dismissed with costs.

BUCKNILL, J.—I agree.

N. K. & S. D. *Appeal dismissed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 713 OF 1921.

January 23, 1922.

Present:—Mr. Justice LeRossignol.

NANAK CHAND—PLAINTIFF—APPELLANT

versus

MUNSHI RAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Succession—Pagwand *and* Chundawand *—Jaswal Rajputs of Mauza Deoli, Tahsil Una, Hoshiarpur District—Succession, rule of, test for determining.*

Jaswal Rajputs of Mauza Deoli, in the Una Tahsil of the Hoshiarpur District, observe the *Pagwand* rule of succession.

In determining which rule of succession applies to a particular family, the safest guide is the rule which is proved to have been observed in the family.

Second appeal from a decree of the District Judge, Hoshiarpur, dated the 7th June 192 , affirming that of the Subordinate Judge, First Class, Hoshiarpur, dated the 13th November 1920.

Lala *Amar Nath Chopra*, for the Appellant.

Mr. *Gullu Ram* for Mr. *Anant Ram*, for the Respondents.

JUDGMENT.—The parties are Jaswal Rajputs of Deoli village in Una Tahsil and the question for decision is whether they observe the *Pagwand* or the *Chundawand* rule.

There can be no gainsaying the fact that in the past the *Chundawand* rule was widely prevalent among the Rajputs of the lower hills of Hoshiarpur but for many years past feeling has veered round in favour of *Pagwand*.

The *riwaj-i-am* of 18 9 favoured *Chundawand*, but the more recent compilation of 1914 favours *Pagwand*, though exceptions in which the *Chundawand* rule has been observed are quoted.

In each case, however, the safest guide is the rule which is proved to have been observed in the family of the parties and in this very family we find a very clear case of the observance of *Pagwand*, so that I agree entirely with the Courts below that plaintiff has failed to prove the existence in his family of a custom of succession by the *Chundawand* rule.

The appeal is dismissed with costs.

Z. K. *Appeal dismissed.*

W. C. A.

GOVERNMENT ADVOCATE v. GOPABANDHU DAS.

PATNA HIGH COURT.
GOVERNMENT APPEAL No. 1 OF 1922.
March 1, 1922
Present:—Sir Dawson Miller, Kt., Chief Justice, and Mr. Justice Ross.
GOVERNMENT ADVOCATE, BEHAR AND ORISSA—APPELLANT
versus
GOPABANDHU DAS—ACCUSED—RESPONDENT.

Penal Code (Act XLV of 1860), s. 499—Defamation—Imputations against persons who cannot be identified—Printing unfounded rumours—Good faith—Journalistic duties

A defamatory statement to be actionable must contain an imputation concerning some particular person or persons whose identity can be established. An imputation against an Association or collection of persons jointly may amount to defamation within the meaning of section 499, Indian Penal Code, but it must be an imputation capable of being brought home to a particular individual or collection of individuals as such. [p. 611, col. 2; p. 612, col. 1.]

It is unnecessary that the person whose conduct is called in question should be described by name. It is sufficient if on the evidence it can be shown that the imputation was directed against a particular person or persons who can be identified The rule is that if the words used contain no reflection upon a particular individual or individuals but may equally well apply to others, although belonging to the same class, an action will not lie. [p. 612, cols. 1 & 2.]

To publish, without regard to the feelings of those against whom it is directed, every foul rumour that may be reported to him, cannot be justified by any recognised standard of editorial duty, specially in a case where the untruth of the rumour could easily have been established by a few simple enquiries on the spot. The Editor in such a case neither acts in "good faith" nor for the "public good." [p. 611, col. 2.]

Sir John Bourn's case, (1596) Cro. Eliz. 497; 78 E. R. 747 and *James* v. *Rutlech*, (1599) 4 Co. Rep 17*a*; 76 E. R. 900, relied upon.

Appeal by the Local Government, under section 417 of the Criminal Procedure Code, against an order of acquittal, dated the 21st November 1921, passed by the Magistrate, First Class, Khurdah, in the District of Puri.

Mr. *H. L. Nandheo'yar*, Assistant Government Advocate, for the Crown.

JUDGMENT.

MILLER, C. J.—This is an appeal under section 417 of the Criminal Procedure Code against the acquittal of Gopabandhu Das, who was tried before Mr. S. C. Bose, Magistrate of the First Class, stationed at Khurda Sub-Division in the Puri District. The charge upon which the respondent was tried was that of publishing a defamatory libel under sections 499 500 of the Indian Penal Code. The complainants are four constables stationed at the Begunia Police Station in the Puri District, who allege that they have been brought into contempt and hatred and their characters seriously defamed by the publication of the libel in question. The respondent is alleged to be the Editor, and is proved to be the Printer and Publisher of a weekly newspaper, named the "Samaj", printed in the Oriya language and published from Satyabadi in the Puri District. The article complained of appeared in the issue of the 13th August 1921. It is headed "Serious, if true" and after stating "we hear that last week a boy with a labourer was going through Begunia taking his young adult sister to her mother-in-law's house," it proceeds to describe how the boy just before evening left his sister by the road side some distance from the Begunia *hat* at the call of nature and, the labourer having also left her to purchase betel, two constables afterwards dragged the woman away and shut her up in a room not far off locking the door and sitting outside with the key in their possession. On his return the boy not finding his sister began to cry and made enquiries of various people. It then continues: "Some boys were playing near by. They had seen the two constables drag the woman away. Having got the information from them, the brother went to the constables. On asking the constables about his sister they replied in the negative. He entreated them in various ways to open the door. The constables in return gave him a good beating. While the boy was coming crying after being beaten, he saw Ajoy Babu, the Sub-Divisional Officer of Khurda, coming in a motor car. He ran to him, threw himself on the road and besought him. Ajoy Babu stopped the motor car and went to the place of occurrence. He asked the constables for the key to open the room. The constable

having refused, he broke open the door with kicks and entered into the room. He found the young woman naked and strangled to death by hanging herself with her wearing cloth. All this happened within an hour. He has sent up the dead body and the constables. We hear that certain higher Police Officers have been sent up. But we do not know the real facts of the case."

There can be no dispute that this artitcle contains very serious charges of misconduct against two constables which, if true, would show that they were totally unfitted to act as such and were guilty of gross impropriety. On the evidence it is abundantly proved that there is not a word of truth from beginning to end in the whole of this story. The complainants contend that the article in question is an imputation against their character, they being the only four constables stationed at Begunia Thara. It is also proved that the immediate effect of this article was to lead people to believe that the misconduct referred to in the article had been committed by some or other of the Police constables stationed at Begunia. The people at the *hat* treated them with contempt, and despite their disclaimer would not believe that the allegations were not true, having been published in the "Samaj." The constables in question also received numerous letters and postcards from their friends and relatives enquiring about the affair and asking if it were true It is also certain that the publication of an article of this sort must have caused considerable anguish of mind to the complainants, who undoubtedly were, for some time at all events, treated by many of the people in the neighbourhood with ridicule and contempt. If this was the object of the writer of the article, there can be no doubt that from his point of view it was successful as the complainants were insulted and abused by the villagers for having committed an act for which there was no shadow of foundation in truth. As soon as it was brought to their notice, the Police made searching enquiries but could elicit nothing as to how the rumour got about. Neither the Police nor any of the witnesses who were called at the trial ever heard of such a rumour before it appeared in the respondent's paper. The respondent, who states that he is a leader of what is known as the non-co operation movement in Orissa and that his paper "the Samaj" is considered an influential organ of the movement, has not deigned to give any evidence as to how he came to publish this unfounded rumour in his newspaper or to disclose the source from which he derived the information. He takes up the attitude that to enter upon any defence in this case would be contrary to his principles as a non-co-operator. The tenets of the political creed to which he subscribes, however, have not prevented him from putting in a long written statement, covering about three pages of closely printed matter, in which he admits printing and publishing the paragraph after reading it and seeks to justify his conduct on the ground that the discharge of journalistic duties requires that all cases of injustice and oppression should be published, with a view to drawing to them the attention of the Authorities and of the public to set matters right or to take such action as the situation may demand. It does not appear to have occurred to him that the publication of such an article was bound to have the effect of seriously injuring the reputation of the Police in the neighbourhood and more particularly those stationed at Begunia and to subject them to insult and annoyance, nor does it appear that he ever stopped to consider whether there was any foundation of truth for the rumour, which he alone and those connected with his newspaper appear to have heard. His attitude appears to be, judging from the argumentative matter disclosed in the written statement, that every rumour, however ill founded and however much pain it may give to those concerned, which comes to the ears of the Editor of a newspaper, should at once be published broadcast to the public, provided the paper states it does not vouch for the truth of the story. This he contends is acting in good faith and for the public good in the discharge of his journalistic duties, as the publication of the paragraph, made in the manner in which it was, would lead people to doubt the truth of the report and would go a great way in saving the reputation of those who had been damaged by the wide currency of the rumour. The matter was drawn to the attention of the respondent by a letter from Mr. Guise, the Superintendent of Police at

Puri, written on the 23rd August to the Editor of "the Samaj" in which he states that he would be obliged if the Editor could supply him with the name of the correspondent of the original report who brought the matter to his notice, this information being required for the purpose of a Departmental enquiry into this serious allegation. The reply to this, written by the Manager on the 1st September, was a regret that, owing to the absence of the Editor from the station, a reply could not be sent in time, but added that the paragraph referred to contained sufficient material for an enquiry, either judicial or Departmental, for the disclosure of the whole truth about the report, and that the letter was being sent to the Editor for a further reply. A further letter, dated the 3rd September, from Mr. Guise asking for further information in reply to the previous letter, was answered by the Manager on the 24th September referring Mr. Guise to an article appearing in the issue of the paper of that date. This article refers to an earlier paragraph in the issue of the 27th August which stated that, "the truth or otherwise of the rumour about the Begunia incident which appeared in the 'Samaj' of the 13th last has not yet been known. We are enquiring about it. On receipt of information we shall publish it in due time."

The article of the 24th September then proceeds in a manner which, if anything, aggravates the original offense. It says:—"We heard of the occurrence from various people. It was, of course, a rumour. But considering the form which this rumour assumed in various places in the Mofassil, we thought it our duty to publish it in the paper to ascertain the truth or otherwise thereof. Rumours are not always unfounded. Indeed, many hidden truths are often found in rumours. In publishing this rumour in the paper we expected that the real facts would be forthcoming from the Local Authorities and the public. In the meantime, we, too, were not idle. However, it appears from our inquiries that this rumour originated in the following manner. At the time when this occurrence took place, a Panjabi was found at Janti taking away a woman of Bagunia side and he went away leaving her there. A few days before this, a murder had been committed in Bolgarh side. Babu Ajoy Chandra Das, the Sub-Divisional Officer of Khurda, was then enquiring into it. To a combination of these two events may be traced the origin of the rumour." It apparently did not occur to the Editor or Publisher to ascertain the truth or otherwise of the rumour from the Police Station at Begunia or by making enquiries on the spot before jumping to the conclusion that it was their duty to publish it in order to find out the truth. The slightest enquiries on the spot and from the Police would have put the respondent in possession of the facts which would at once have shown him that his duty lay, certainly not in publishing the rumour, but in contradicting it, if any action at all on his part should appear necessary.

Having read the article complained of and the evidence in the case, one is driven to the conclusion that its publication was altogether unjustifiable and cannot be excused on any supposed ground of journalistic duty. A very little reflection, I feel sure, ought to convince the respondent that to publish, without regard to the feeling of those against whom it is directed, every foul rumour that may be reported to him cannot be justified by any recognised standard of editorial duty: and especially is this the case when, as here, the untruth of the rumour could easily have been established by a few simple enquiries on the spot. I cannot help regretting that, even after enquiries had been made and its untruth demonstrated, there is no expression of regret, either in the written statement or in the subsequent articles published in the newspaper, for the publication of this false rumour. It does not follow, however, that its publication necessarily amounts to an offence under section 499 of the Indian Penal Code. However reprehensible and morally unjustifiable the words complained of may be, they must, to be actionable, contain an imputation concerning some particular person or persons whose identity can be established. An imputation against an Association or collection of persons jointly may also amount to defamation within the meaning of the section, but at the same time it must be an imputation capable of being brought home to a particular individual or collection of individuals as such. The article in question is not directed against the constables of the Begunia Thana collectively so that they, as a

body, could assert that each and all of them had been libelled. Nor can it be said that any two ascertained individuals have been the object of the attack. It is unnecessary that the person whose conduct is called in question should be described by name. It is sufficient if, on the evidence, it can be shown that the imputation was directed towards a particular person or persons who can be identified. In the present case the imputation complained of was directed against two constables only, and it would be impossible, in my opinion, upon the facts disclosed to ascertain, with any degree of certitude, who these two constables were. They may have been and in fact were taken by the villagers to have been two constalles attached to the Begunia Thana, but there is nothing to indisate which were the two in question. Had the attack been directed towards all four of the constables at Begunia so that they could be identified, I think they would have had a collective cause of complaint which would have been sufficient to found a charge of criminal libel. It is not even certain that the persons aimed at were any of the constables stationed at Begunia, but even could a legitimate inference be drawn to this effect it would, in my opinion, afford no ground for a charge of publishing a defamatory libel.

Certain cases have been drawn to our attention by the learned Assistant Government Advocate in support of this appeal to show that, whatever the intention of a person charged, if the defamatory words can reasonably be considered as applying to a particular individual or individuals, an action will lie, but in each of those cases the individuality of the person or persons attacked has been proved; and I am not aware of any modern case which has decided that an action will lie for defamatory words written concerning one or other person out of a particular class unless his identity can be established. The respondent has not been represented in this appeal; we have, therefore, not had the assistance of any argument on his behalf and the old cases all seem to show that an action will not lie for defamatory words which might apply equally to any one or more persons out of a larger class. In *Sir John Bourn's case* (1) where a party in a cause said to three men who had just given evidence against him: "One of you three is a perjurer," it was held that no action lay. In *James* v. *Rutleck* (2) it was said if the defendant said to a master: "One of thy servants hath robbed me," in the absence of special circumstances no one could sue, for it is not apparent who is the person slandered and there are many other cases to the same effect. The rule is that if the words used contain no reflection upon a particular individual or individuals but may equally well apply to others, although belonging to the same class, an action will not lie.

"So if the words reflect impartially upon either *A* or *B* or upon some one of a certain number or class and there is nothing to show which one was meant, no one can sue. Where the words reflect on each and every member of a certain class, each or all can sue" (Odgers on Libel and Slander, 5th Edition, 148).

In the present case, I am reluctantly driven to the conclusion that it is impossible in the circumstances for any two of the complainants to show that they were the individuals aimed at by the article in question, and, however morally unjustifiable that article may be, I think this appeal must be dismissed.

Rose, J.—I agree.

N. H. & R. N.

Appeal dismissed.

(1) (1596) Cro. Eliz. 497; 78 E. R. 747.

(2) (1599) 4 Co. Rep. 17*a*; 76 E. R. 990.

EMPEROR v. SHWE HLA U.

LOWER BURMA CHIEF COURT.
CRIMINAL REVISION No. 4B OF 1922.
February 27, 1922.
Present:—Sir Sydney Robinson, KT., Chief Judge, and Mr. Justice Maegregor.
EMPEROR—PROSECUTOR
versus
SHWE HLA U—RESPONDENT.

Offences punishable with death—Murder—Death sentence normal sentence—Criminal Procedure Code (Act V of 1898), ss. 367 (5), 439—Mitigated sentence—Reasons—Enhancement of sentence after 9 months.

For an offence punishable with death, the extreme sentence is the normal sentence and the mitigated sentence is the exception. Therefore, if the Judge does not pass the death sentence, he must find that there are really extenuating circumstances and not merely an absence of aggravating circumstances. [p. 614, cols. 1 & 2.]

Crown v. *Tha Sin*, 1 L. B. R. 216, referred to.

The existence of some provocation is not enough to justify the passing of the mitigated sentence. [p. 614, col. 2.]

Where a capital sentence should have been passed by the Sessions Judge but a sentence of transportation for life was passed instead, after 9 months the Chief Court found itself unable to enhance the sentence. [p. 614, col. 2.]

Criminal revision of the order passed by the Additional Sessions Judge, Arakan.

Mr. *Mya Bu*, Assistant Government Advocate, for the Crown.

Mr. *Jordan*, for the Respondent.

JUDGMENT.—This is an application by the Crown to enhance the sentence of transportation for life passed upon Shwe Hla U for the murder of his uncle, to the extreme penalty.

The facts are simple and are hardly contested.

The accused had been working for his uncle, but left before the completion of the work. He had been paid 40 baskets of paddy, but some balance of wages was still due to him. On the day in question Kala Aung, a ten horse gaung, and an ex-*pongyi* were going to deceased's hut to get a bamboo. They met the accused who went with them. The accused demanded the balance of his wages, and was told that they would be paid in a few days' time. According to the deceased's widow, the balance was fixed at 60 baskets of paddy, and in the accused's statement to the Committing Magistrate he speaks of the balance of 60 baskets. Kala Aung says there was no quarrel between the two men at that time, and the widow of the deceased says that, when accused was told that the balance would be 60 baskets, he said it was too little. Her husband said it was not, and the accused replied: "All right, give the balance 60 baskets now." He was told that it would be given in four or five days' time. There is no suggestion that there was any serious quarrel or, indeed, any quarrel at all between the two men. Kala Aung says that he and the ex-*pongyi* left, leaving the accused behind them. The widow and the two other women eye-witnesses say that the accused followed Kala Aung. Shortly afterwards he returned, saying he left his pipe behind. In his statement in the Sessions Court accused admits that it was true that he went back to the hut to look for his pipe. According to the prosecution witnesses, after searching for his pipe all over the place, he went to a hut on the *tilin* where the deceased was seated and, when he got behind him, he struck him a violent blow on the left side of the neck which caused instantaneous death.

The evidence shows that he is a left-handed man, and there is no reason to doubt that he is so. According to the medical evidence, therefore, the blow would have been struck from behind, and according to the prosecution evidence, there was no assault or justification for the cowardly attack such as this beyond that he got disgusted for not getting more wages and not getting them at once.

The accused's statements are to the effect that, when he demanded the balance of his wages, deceased struck him with a stick and he fell down; that accused then picked up something, he did not know whether it was a stick or a *da*, and warded off the blow with it. He says he got one blow, which fell on his back. In the Sessions Court he said that, when he went back to look for his pipe, deceased came out and beat him, saying "Have you come to pick a quarrel with me." He warded off the blow.

Accused calls two witnesses who are nephews of the deceased. One says that he stopped at a hut about 30 bamboos' length away from deceased's hut. While there, he heard some one abusing and looking

round saw the deceased running to his hut. He did not see the accused at that time. When he got near the hut, he heard deceased's wife cry out "cutting, cutting," and then saw the accused run away. The cutting was inside a hut, but according to this witness, the cry he heard was raised when the deceased got near the hut. The other witness was seated about 40 bamboos' length from the deceased's hut. He heard deceased using abusive language and saw him go towards his hut. When he got near the hut, he heard people shouting out "cutting, cutting" and then saw the accused run away.

According to both these witnesses, therefore, they should have seen the cutting. We do not think any reliance can be placed on this evidence. The learned Additional Sessions Judge has apparently been influenced by the fact that they are nephews of the deceased, and he, therefore, holds that there is no reason to doubt their statements. This is a most inadequate reason. He further finds that the three women witnesses for the prosecution for obvious reasons tried their best to shield the deceased as much as possible. He argues that it is not likely that the accused would have assaulted his relation without provocation, and his final conclusion is that it may be safely presumed that there was some provocation. On that ground he considers the sentence of death should not be passed.

The Indian Penal Code allows one or other of two sentences for the offence of culpable homicide amounting to murder. Section 367 (5) of the Code of Criminal Procedure provides that if the accused is convicted of an offence punishable with death and the Court sentences him to any punishment other than death, the Court shall, in its judgment state the reason why sentence of death was not passed.

In *Crown* v. *Tha Sin* (1) a Full Bench of this Court held that "the extreme sentence is the normal sentence; the mitigated sentence is the exception. It is not for the Judge to ask himself whether there are reasons for imposing the penalty of death, but whether there are reasons for abstaining from doing so." With this view we entirely concur. If the presiding Judge does not pass the sentence of death, he is bound to record the reasons why death sentence was not passed, that is to say, he must find, in the language of the judgment of the case just cited, that there are really extenuating circumstances and not merely an absence of aggravating circumstances.

In the present case it is clear that, whatever discussion there might have been as to what the balance of the wages was to be, there was no serious quarrel between the two men, and it is clear and is, indeed, admitted that the accused left and shortly afterwards returned on the plea of searching for his lost pipe. There is no proof and no reason to suppose that there was any quarrel between the two men at that time. The story of an assault and the warding off of a blow with the *da* that he had in his hand is wholly unconvincing. We must, therefore, hold that he came back on the plea of searching for his pipe, and that even if he had lost his pipe there, he suddenly and without any cause attacked the deceased from behind, striking him a blow on a vital part with a *dahma* with great force and causing instantaneous death, and was, therefore, guilty of murder. Thus, it is hard to see what extenuating circumstances can be held to have existed. Even had he been disgusted at the amount of wages that it was proposed to give him, that could not justify the return and the cowardly assault which was made clearly with the intention to cause death.

The existence of some provocation is not enough to justify the passing of the mitigated sentence, and we are clearly of opinion that in this case the learned Additional Sessions Judge should have passed a capital sentence. However, the sentence he did pass was passed on the 1st of June 1921. Nine months have elapsed since that date, and under these circumstances we do not see our way to now enhancing the sentence.

S. D. *Order accordingly.*

(1) 1 L. B. R. 216.

LACHHMAN SINGH v. EMPEROR.

LAHORE HIGH COURT.

CRIMINAL REVISION PETITION No. 1214 OF 1921.
February 10, 1922.

Present:—Mr. Justice Abdul Raoof.

LACHHMAN SINGH AND OTHERS —CONVICTS—PETITIONERS

versus

EMPEROR RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 233 —Joint trial for perjury under section 193, Penal Code—Illegality.

The joint trial of several persons for perjury under section 193 of the Penal Code is illegal

Bagga Singh v. *Empress*, 39 P. R. 1888 Cr, *Kotha Subba Chetti* v. *Queen*, 6 M. 252; 7 Ind. Jur. 247; 1 Weir 116; 2 Ind. Dec. (N. S.) 454 and *Empress of India* v. *Niaz Ali*, 5 A. 17; A. W. N. (1882) 161; 3 Ind. Dec. (N. S.) 59, followed.

Petition, under section 439, Criminal Procedure Code, for revision of an order of the Sessions Judge, Amritsar, dated the 19th August 1921, affirming that of the Honorary Magistrate, First Class, Amritsar, dated the 16th July 1921.

Lala *Devi Das*, for the Petitioners.

JUDGMENT.—The petitioners in this case appeared as witnesses in a case in which Dalip Singh charged Ganda Singh under section 324, Indian Penal Code. The petitioners gave evidence in support of the charge. The case against Ganda Singh was found to be false and he was discharged. Thereupon Ganda Singh applied for sanction to prosecute Dalip Singh along with the three petitioners for offences under sections 211/193, Indian Penal Code. Sanction was granted. Thereupon Ganda Singh complainant brought a complaint against the petitioners and Dalip Singh. Apparently Dalip Singh had absconded. The complainant, therefore, elected to proceed against the petitioners, Lachhman Singh, Udham Singh and Thakar Singh. They were tried jointly and found guilty by the Magistrate and were sentenced to six months' rigorous imprisonment and a fine of Rs. 20 each. Their convictions have been upheld by the Sessions Judge, Amritsar, in appeal. They have accordingly come up on revision to this Court and one of the pleas taken on their behalf by their learned Counsel, Mr. Devi Das, is that the joint trial of the petitioners was illegal and that the petitioners had been prejudiced by the procedure adopted by the Magistrate. In support of his contention the learned Vakil has relied upon the case of *Bagga Singh* v. *Empress* (1). The learned Judges who decided the above case laid down the following rule which is embodied in the head-note:

"Held, that each of the accused, on the supposition that the evidence given by him was false, had committed a distinct offence, for which he ought to have been tried separately under the provisions of section 233, Criminal Procedure Code, and as the course adopted by the Magistrate had deprived each of the accused of the advantage of calling the other persons, who were now in the position of co accused, to give evidence for him, which evidence would have had to be considered by the Magistrate trying the case, the accused must be held to have been prejudiced."

There are other authorities also supporting this proposition—see, for example, *Kotha Subba Chetti* v. *Queen* (2) and *Empress of India* v. *Niaz Ali* (3). The convictions of the petitioners, therefore, must be set aside as being illegal and I accordingly set them aside.

The only question that remains for consideration is whether I should order a new trial of the petitioners or not. It appears that Ganda Singh made an application on the 15th of December 1920 to the Magistrate praying to be allowed to withdraw the complaint on the ground that sufficient evidence was not available. The Magistrate, however, was of opinion that the prosecution had been ordered by Mr. Puckle, the Magistrate, and the complainant could not be allowed to withdraw. It is, however, apparent from the record that the proceedings were instituted on the complaint made by Ganda Singh. Under these circumstances, I do not think it is necessary that I should order a fresh trial. It will, however, be open to Ganda Singh to file a fresh complaint if he choses. The petition is allowed and the petitioners are acquitted.

Z. K.

Petition allowed.

(1) 39 P. R. 1888 Cr.

(2) 6 M. 252; 7 Ind. Jur. 247; 1 Weir 116; 2 Ind. Dec. (N. S.) 454.

(3) 5 A. 17; A. W. N. (1882) 161; 3 Ind. Dec. (N. S.) 59.

PARMESHWAR LALL MITTER v. EMPEROR.

PATNA HIGH COURT.

CRIMINAL REVISION No. 79 OF 1921.

February 28, 1921.

Present:—Mr. Justice Jwala Prasad.

PARMESHWAR LALL MITTER—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 342, 364, 263, 264—Summons-case—Intricate case—Summary trial—Examination of accused, whether essential—Plea of accused, record of, under section 263, whether enough—Postponement of cross-examination of witness by direction of Magistrate—Cross-examination, effect of not allowing—Local inspection by Magistrate—Magistrate's duty to put inspection note on record—Penal Code (Act XLV of 1860), s. 447—Criminal trespass—Possession, finding as to.

Where the question in a case under section 447, Penal Code, is an intricate one dealing with the title and possession of the parties and the evidence led in the case by the parties is not convincing as to the exact location and the identity of the land, a summary trial is not proper and the case should be tried in the ordinary way. [p. 617, cols. 1 & 2.]

Even in the trial of summons-cases an examination of the accused under section 342 is essential and obligatory and an omission to do so would vitiate the whole trial Neither sections 263 and 264, nor any other provision in the Chapter for summary trials does away expressly with the requirement of sections 342 and 364 of the Code relating to the examination of the accused. [p 618, col. 1.]

Fernandez v. *Emperor*, 59 Ind. Cas. 129; 22 Bom. L. R. 1040; 22 Cr. L. J. 17; 45 B. 672, and *Raghu Bhumij* v. *Emperor*, 58 Ind. Cas. 49; 5 P. L. J. 480; 1 P. L. T. 241; 21 Cr. L. J. 705, referred to.

The plea of the accused under clause (*g*) of section 263 cannot possibly take the place of his examination under section 342, for the former occurs at the initial stage of the case and the latter after the termination of the prosecution evidence. [p. 618, col. 1.]

Under the procedure laid down for the trial of summons-cases, the accused has no right to postpone the cross-examination of any prosecution witness as in the case of the trial of a warrant case. But if the cross-examination is postponed in accordance with the direction of the Magistrate, the Magistrate is bound to give further opportunity to the accused to cross-examine the witness. Without such a cross-examination, the evidence of the witness is legally inadmissible [p 618, col. 2.]

There is nothing in law to prevent a Magistrate from making local inspection, but in order to give an opportunity to the accused to remove any wrong impression created on the mind of the Magistrate, it is fair that a note of the inspection should be placed on the record, and the Magistrate commits a grave irregularity particularly when without placing a note of the inspection on the record, he uses the information gathered locally as substantive evidence in the case. [p. 618, col. 2; p 619, col. 1.]

Section 447, Indian Penal Code, requires it to be affirmatively and positively held that the complainant was in possession of the land in dispute with respect to which the criminal trespass is said to have been committed. [p. 619, col. 1.]

Application against the conviction and order of sentence passed by the Honorary Magistrate, Bhagalpur.

Messrs. *J. N. Maitra*, *N. C. Roy* and *S. S. Bose*, for the Petitioners.

Mr. Khurshaid Husnain, for the Opposite Party.

JUDGMENT.—The petitioner has been convicted under section 447, Indian Penal Code, and sentenced to pay a fine of Rs. 51 by the Honorary Magistrate of Bhagalpur. The trial was held according to the procedure laid down in Chapter XXII of the Code of Criminal Procedure for summary trials.

As section 447 is a summons case, the procedure laid down under Chapter XX of the Code for the trial of summons cases would apply to the trial of the present case by virtue of section 262 of the Code. The trial is impugned as having been vitiated by the irregularities committed by the Magistrate. It is also urged that in the circumstances of the case the Magistrate ought to have tried the case not summarily but by the regular procedure as there were complicated questions of title and possession involved in the dispute between the parties. For this reliance is placed upon sub section 2 of section 260 of the Code. The irregularities complained of may be summarised as follows:—

(1) That the examination of the accused under section 342 was not taken or recorded;

(2) that no opportunity was given to the accused to cross-examine the complainant on the main question relating to the occurrence;

(3) that the Magistrate acted illegally and irregularly in not placing a note of his local inspection on the record;

(4) that the Magistrate imported into his judgment facts, the knowledge whereof he gained at the local investigation, and did not confine himself strictly to the evidence taken by him in Court; and

(5) that the findings of the Magistrate are not sufficient for a conviction under section 447, Indian Penal Code.

PARMESHWAR LALL MITTER v. EMPEROR.

In order to appreciate the first contention, namely, that the trial in the present case should not have been by the summary procedure, it is necessary to state very briefly the circumstances relating to the dispute between the parties.

In 1902 the complainant purchased about 12 *bighas* of *Brahmotter* land situate in village Jichuchuck. There was a dispute with regard to either the whole or a portion of this land between the complainant and the neighbouring village Shampur which resulted in favour of the complainant. Subsequently he acquired the *raiyati* interest also in respect of those 12 *bighas*. In 1905 the Record of Rights was prepared. Plots Nos. 83 to 86 have been shown in the Record of Rights as belonging to the complainant and plot No. 82 as belonging to Mr. Grant. In 1908 there was a civil litigation between the complainant and Mr. Grant which resulted in a decree in favour of the complainant with respect to two *bighas* odd. The complainant obtained *dakhaldehani* in 1911. The present dispute is in connection with plot No. 82, measuring 11 *kathas*. The accused obtained lease of *mustajiri* from Mr. Grant including the land in dispute, plot No. 82. The complainant's case is that the accused on the day of occurrence forcibly ploughed about 11 *kathas* of land in plot No. 82. The question before the Magistrate for determination was, therefore, whether the 11 *kathas* of land in dispute is a part and parcel of the two *bighas* odd decreed in favour of the complainant in the year 1908. The above statement will clearly show that the dispute between the parties is far from being simple. In the litigation in the Civil Court the plots of land were not specified and it is difficult to find out whether it corresponds with plot No. 82 of the survey or not. According to the survey the land in dispute is admittedly to the name of the accused's lessor and is covered by the lease granted to him. It was, therefore, for the complainant to prove conclusively that the particular plot was covered by the decree and the writ of delivery of possession obtained by him from the Civil Court. On the 11th August 1920 it appears from the order-sheet that the Magistrate admitted that the question involved in the present case was an intricate one dealing with title and possession of the parties and that upon that ground it was transferred from the file of one Honorary Magistrate to the present one, apparently because the Honorary Magistrate who had tried the case was an experienced retired officer. The evidence led in the case by the parties was far from convincing as to the exact location and the identity of the land in question. This necessitated a local inspection by the Magistrate. From the judgment of the Magistrate it is clear that he could not entirely depend upon the evidence before him, but had perforce to take assistance of the impression upon his mind created by the local inspection and upon the statements of the parties made before him while pointing out the land in dispute. Upon this sole question as to whether the land in dispute was identical with plot No. 82, the Magistrate has devoted about 11 typed pages. This could not possibly come within the scope of a summary trial wherein one point would require the Magistrate to write such a long judgment. It establishes beyond doubt that the case was one which on the face of it came under sub section (2) of section 260 of the Code of Criminal Procedure and the Magistrate would have done well if he had exercised discretion vested in him by that section and had tried the case by the ordinary procedure. The prejudice resulting from the summary procedure to the accused is obvious, for the question for determination depended upon the documentary evidence and a comparison of the survey map with the locality. The learned Magistrate himself says that he tried his best to draw up a sketch of the land in accordance with the survey map. I think that if the course adopted by the Magistrate were not summary, the best way to solve the difficulty would have been to depute a Commissioner to find out the exact position of the land in question. I, therefore, agree with the contention that the procedure adopted for the trial of the case was not proper and that the case should have been tried in an ordinary way.

The irregularities complained of appear to me to be substantial and fatal to the trial of the petitioner. There is no trace in the record of the examination of the accused under section 342 which, as has been settled by this Court in a number

of cases, is essential and obligatory. The Bombay High Court in the case of *Fernandes* v. *Emperor* (1), following the decision of this Court in the case of *Raghu Bhumij* v. *Emperor* (2), held that the principle of the decision of this Court extends to the trial of summons cases also and that the omission to examine the accused under section 342 would vitiate the whole trial. No doubt, under section 263 of the Code the Court is required to prepare a record of the summary trial giving the particulars enumerated in that section. True also that the Magistrate need not record the evidence of the witnesses or frame a formal charge, and that the judgment of the Court embodying the substance of the evidence and the particulars mentioned in section 263 shall only form the record of the case (section 264). But neither these sections 263 and 264, nor any other provision in the Chapter for summary trials does away expressly with the requirement of sections 342 and 364 of the Code relating to the examination of the accused. The Magistrate is not absolved from the responsibility of recording the examination of the accused simply because the trial was summary. The plea of the accused under clause (*g*) of section 263 cannot possibly take the place of the examination of the accused, for the former naturally occurs at the initial stage of the case and the latter after the termination of the prosecution evidence and before the accused is called on to enter into his defence. It appears from the record that the complainant was examined and cross-examined on the 23rd August and on the next date, the 30th August, two more witnesses were examined and cross-examined. The case was then fixed for the 13th September for the defence. On that date the accused made an application stating that the complainant was not cross-examined upon the occurrence as the Magistrate intimated to the Pleader for the accused that the cross-examination should at that stage be confined as to the title of the parties to the land in question. The petitioner accordingly desired that an opportunity should be given to him to cross-examine the complainant on the occurrence. The Magistrate rejected this petition on the ground that the complainant had been cross-examined at great length. There is no denial by the Magistrate of the facts set forth in the petition, namely, that the cross-examination of the complainant about the occurrence was postponed with his direction, nor has any explanation been submitted to this Court to contradict the statement made in the petition to this Court. It would appear that the complainant was, as a matter of fact, not cross-examined at all about the occurrence, whereas the two witnesses examined on the 30th August were cross-examined. There is no reason why the complainant should not have been cross-examined upon the occurrence, inasmuch as the accused denied that there was any occurrence such as was alleged by the prosecution. The Magistrate apparently was in doubt as to the question of title involved in the case and consequently wanted to have the evidence laid upon that point first. In the circumstances, the accused has been denied the opportunity of cross-examining the complainant upon the occurrence and the Magistrate would have exercised his discretion better if he had allowed the complainant to be re called for cross-examination. No doubt, under the procedure laid down for the trial of summons cases, the accused has no right to postpone the cross-examination of any prosecution witness as in the case of the trial of a warrant-case. But if the cross-examination was postponed in accordance with the direction of the Magistrate, the Magistrate was bound to give further opportunity to the accused to cross-examine the witness Without such a cross examination the complainant's evidence will not be legally admissible.

The aforesaid irregularity also, therefore, vitiates the trial.

The third and the fourth objection relate to the local investigation and may be disposed of together. There is nothing in law to prevent a Magistrate from making local inspection; but in order to give an opportunity to the accused to remove any wrong impression created on the mind of the Magistrate, it is fair that a note of the inspection should have been placed on the record, and the parties should have been given an opportunity of being heard with

(1) 59 Ind. Cas. 129; 22 Bom. L. R. 1040; 22 Cr. L. J. 17; 45 B. 612.
(2) 56 Ind. Cas. 49; 5 P. L. J. 430; 1 P. L. T. 241; 21 Cr. L. J. 705.

respect to it. The Magistrate, therefore, committed a grave irregularity in this case, particularly when he has used the information gathered at the locality as substantive evidence in the case.

The Civil Court *dakaldehani* took place in 1911 in favour of the complainant. The Magistrate no doubt has addressed himself at great length to find out whether the plot in dispute was covered by the Civil Court *dakhaldehani* or not, and he has also held that the accused dispossessed the complainant from the land. He has not come to a definite finding as to whether the complainant or the accused was in possession of the land in dispute at the time when the occurrence took place. This is apparently because he was misled by the issue laid down by him, namely, whether the accused dispossessed the complainant from the land. No issue was framed by him as to whether the complainant was or was not in possession of the land. Thus the finding of the Magistrate upon the issue laid down by him does not dispose of the case under section 447, Indian Penal Code, which requires it to be affirmatively and positively held that the complainant was in possession of the land in dispute with respect to which the criminal trespass is said to have been committed.

For all the aforesaid reasons I think the trial in this case has been illegal and I accordingly set aside the conviction of, and the sentence passed on the petitioner. The fine, if already realised, should be refunded.

In view of the aforesaid remarks I do not think any useful purpose will be served by ordering a re-trial. The parties are apparently disputing the possession of the land in question and in case of the dispute being of a serious nature the Magistrate has full power to deal with it under the law to prevent any breach of the peace.

S. D. & N. H. *Conviction set aside.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 15-B OF 1921.

May 23, 1921.

Present:—Mr. Dhobley, A. J. C.

LOCAL GOVERNMENT—APPELLANT

versus

GANGA RAM—ACCUSED—RESPONDENT.

Penal Code (*Act XLV of* 1860), *ss.* 415, 420—*Cheating — Fraudulent intention — "Property," meaning of—Certificate obtained by making false representations—Certificate, if "property."*

A practically conclusive test of the fraudulent character of a deception for criminal purposes is this: Did the author of the deceit derive any advantage from it which could not have been had if the truth had been known? [p 621, col. 2.]

Whether an article is or is not "property" within the meaning of section 420, Indian Penal Code does not depend upon its possessing a money or market value If it has some special value for the person or persons concerned, it is "property," even though its value cannot be measured in money. [p 622, col. 1.]

A certificate for having passed an examination is "property" within the meaning of section 415, Indian Penal Code. [p. 622, col. 1.]

Where a person by representing himself to be another obtains from an Inspector of Schools a certificate testifying to his having passed a certain examination, when, in fact, he had not passed that examination, he commits the offence of cheating punishable under section 420 of the Penal Code. [p. 622, col. 1.]

Criminal appeal against the order of the Sessions Judge, East Berar, Amraoti, dated the 17th February 1921.

Mr *G. P. Dick*, for the Crown.
Mr. *V. Pose*, for the Accused.

JUDGMENT.—This is an appeal directed by the Local Government under section 417, Code of Criminal Procedure, from an appellate order of acquittal passed by the Sessions Judge, East Berar, reversing the conviction and sentence passed upon the above named accused by a First Class Magistrate, Amraoti, for cheating punishable under section 420, Indian Penal Code.

2. The main facts of the case are not in dispute. One Tukaram Bapuji, who was the Revenue Patel of Walgaon in the Amraoti, District, died in the month of May of the last year and the question of the appointment of a successor to him arose. There were two possible claimants to the Patelki and they were the accused Gangaram Krishnaji Kunbi and his younger brother Pandurang Krishnaji. In the ordinary course, Gangaram being the elder brother should have been recommended, but the village Patwari recommended Pandurang instead, on the ground that he *could read and write well* and had read up to the fifth Mahratti standard. It has to be stated

LOCAL GOVERNMENT v. GANGA RAM.

that under the Berar Revenue Book Circular No. V-1, no person can be appointed a Patel, who has not passed an examination of the fourth vernacular standard of the Educational Department in Berar, or an equivalent test in another Province. Gangaram presented an application on 14th June 1920 to the Deputy Inspector of Schools, Amraoti, stating therein that he had passed the fourth Mahratti standard from the Walgaon School and requesting that a certificate to that effect be given to him. A student passing the fourth vernacular standard is granted what is called a Primary School Certificate on a printed form. The Deputy Inspector of Schools consulted the examination result sheets which are preserved in his office, and finding the name of Gangaram Krishnaji from the Walgaon School, amongst the successful pupils at the examination held in 1906, issued the necessary certificate to the accused. In the proceedings taken in the Revenue Court for the appointment of a successor to Tukaram Bapuji, the accused produced that certificate in support of his claim to the Patelki.

3. On his receiving certain information, the Deputy Inspector sent for and examined the admission registers of the Walgaon School and found that the accused was not at that school in the year 1906 and that he had never passed the fourth standard examination. Gangaram Krishnaji mentioned in the examination result sheets was a different person altogether, being a Mali by caste. It has to be stated that in the examination result sheets, there was no column for caste and hence the caste of the successful candidate Gangaram Krishnaji was not mentioned. On those facts the accused was prosecuted and tried on a charge that he had cheated the Deputy Inspector by dishonestly inducing him to deliver the certificate to him, an offence punishable under section 420, Indian Penal Code.

4. The defence of the accused was that he had, about 14 years ago, appeared at the fourth standard examination and that he did not know if he was or was not successful at it. He said that after the death of Tukaram Bapuji he made enquiries on the point and was told by one Mr. Gore, the agent of the Jagirdar at Walgaon, that a boy by name Gangaram Krishnaji had passed the examination in the year 1906. Acting on this information the accused said he applied to the Deputy Inspector of Schools for the necessary certificate. It is now admitted by the accused that the information received by him was incorrect and that Gangaram Krishnaji shown in the examination sheets of 1906 was a different person from him. The defence, in short, was that the accused had honestly, on the strength of the information received by him, believed that he had passed the examination and that in applying to the Deputy Inspector of Schools for the certificate and in filing it in the revenue proceedings he had acted in good faith.

5. Both the Magistrate and the learned Sessions Judge did not believe the explanation given by the accused and they were of opinion that the false representation was deliberately made by him to the Deputy Inspector for the purpose of obtaining the certificate. The learned Sessions Judge held it proved that the accused made a false statement to the Deputy Inspector and on its strength obtained the certificate. I have gone through the evidence and my conclusion is that the above finding is a correct one. I cannot believe that the accused honestly believed that he had passed the fourth standard in 1906, when he was not at school at all that year. The school registers were examined by me and these show that Gangaram Krishnaji Kunbi finally left the school in 1900 and no boy of the name of Gangaram Krishnaji Kunbi was in the school at all after that year. I have separately prepared a statement from the admission registers of the Walgaon School showing the dates and years when Gangaram Krishnaji Kunbi joined and left the school and the classes in which he was reading. From that statement, it will be apparent that no boy of the name of Gangaram Krishnaji Kunbi attended the school after 1900. The accused could not have, therefore, been at the school after 1900 and he could not have believed that he had in 1906 passed the fourth standard examination. It must be taken as established that the accused knowingly and deliberately made that false representation to the Deputy Inspector and that it was on the faith of that representation that the Deputy Inspector was induced to issue a certificate to him.

6. The learned Sessions Judge was of opinion that even on these facts, the accused could not be held guilty of cheating and

that his act could not come within the definition of cheating as given in section 415, Indian Penal Code. If we look to the definiton, we find that it contains two distinct parts, the opening words "whoever by deceiving any person" being common to the whole section. The necessary ingredients of the offence of cheating are :—

(1) Deception of any person ; and

2. (*a*) Fraudulently or dishonestly inducing that person to deliver any property to any person or to consent that any person shall retain any property; or

(*b*) Intentionally inducing that person to do or omit to do anything which he would not do or omit, if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property.

Thus the offence of cheating is made up of the ingredients 1 and 2 (*a*) or 1 and 2 (*b*). The first ingredient is common and in all cases of cheating there must be a deception practised by the accused upon some person. Let us now see if the first ingredient mentioned above is present in the case before us. The facts found in the case will show that the accused did deceive the Deputy Inspector of Schools, by causing him to believe what was not true. The first requisite is, therefore, fulfilled in the present case. It was a wilful misrepresentation of facts by the accused.

7. We will now consider if the act of the accused satisfies the condition 2 (*b*). He no doubt by making the false representation intentionally induced the Deputy Inspector of Schools to deliver to him the certificate, which he would not have done had he not been so deceived. The question, however, is : Did the preparation of the certficate and its delivery to the accused cause or was it likely to cause damage or harm to the Deputy Inspector in body, mind, reputation or property? The Deputy Inspector did not certainly suffer any harm or damage in body or in property. It could not be said that he had suffered in reputation because he had been deceived by an ordinary person like the accused. He could not have suffered any mental pain by the deception practised upon him. The harm or injury contemplated by the section must be tangible, and reasonable and not remote or imaginary. In the present case I do not find that any damage or harm was caused or was likely to be caused to the Deputy Inspector by the deception practised upon him by the accused. The ingredient 2 (*b*) is, therefore, wanting in the case.

8. We must next come to the question whether the act of the accused falls under the above-mentioned clause 2 (*a*). The two conditions are that the accused must have done the act fraudulently or dishonestly and there must have been a delivery of property. The learned Sessions Judge was of opinion that the certificate in question could not be called "property" and the learned Counsel appearing for the accused here supports him. A number of cases were cited for both the sides during the argument, but many of these were not exactly applicable to the facts of the case. That the act of the accused was fraudulent admits of no doubt. In the case of *Kotamraju Venkatrayadu* v. *Emperor* (1), the meaning of the term 'fraudulently' was fully explained and it was observed that, where there was an intention to secure an advantage or benefit on one hand or to cause loss or detriment on the other, there was an intent to defraud. The following observations of Sir James Stephen from his History of Criminal Law of England were quoted with approval:

"A practically conclusive test of the fraudulent character of a deception for criminal purposes is this: Did the author of the deceit derive any advantage from it which could not have been had if the truth had been known?"

In this case the accused, by means of the deception practised by him upon the Deputy Inspector, wanted to secure for himself an advantage, as against his younger brother, to which advantage he was not entitled. The first condition is thus fulfilled in the present case.

9. Even if a fraudulent intention is proved, the offence of cheating is not complete, unless there is also a delivery of property. The question, therefore, is whether the certificate secured by the accused can be called 'property'. It is contended for the accused that the certificate cannot be called 'property'

(1) 28 M. 90 at p. 96; 1 Weir 538-A.

as it has no value whatsoever, it being merely a piece of paper. Whether a certain article is or is not 'property' does not depend upon its possessing a money or market value. An article may not fetch any value in the market and still it may have a value to certain persons. In my opinion the certificate which the accused obtained from the Deputy Inspector had a special value to both of them, though that value could not be computed in money. A University diploma of a graduate or a license of a licentiate has a peculiar value to its holder and a person stealing it from his possession would not be acquitted on the ground that it has no value and is, therefore, not 'property.' In *Queen-Empress* v. *Appasami* (2), a ticket entitling its holder to enter an examination room was held to be 'property' under section 415, Indian Penal Code. A similar view was taken in *Queen-Empress* v. *Soshi Bhushan* (3), where a written certificate very similar to the one obtained by the accused in the present case was held to be 'property' and it was observed as follows:

"If the prisoner had obtained the certificate which he tried to obtain, and some one had stolen it from him, no one, we imagine, would suggest that the thief could not legally be convicted, under section 379 of the Indian Penal Code, of the theft of the certificate, but if the certificate was not moveable 'property' the person who dishonestly took the certificate out of the possession of the prisoner, without the prisoner's consent, could not be convicted of a theft in respect of it."

My view, therefore, is that the certificate secured by the accused from the Deputy Inspector was 'property,' within the meaning of section 415. The accused is, therefore, guilty of cheating as defined in the first portion of that section. It is unnecessary to refer to cases cited by the Sessions Court, and I have already found that the act of the accused did not fall under the last portion of section 415, Indian Penal Code.

10. The result is that the appeal is allowed and the order of acquittal is set aside. The accused is convicted for the offence of cheating punishable under section 420, Indian Penal Code. As regards the sentence, the Magistrate had awarded him rigorous imprisonment for one year. The sentence was somewhat severe. The case has been going on practically for the last six months and the accused has been in suspense so long. In my opinion rigorous imprisonment for four months would meet the requirements of the case and I sentence the accused accordingly.

N. K. & W. C. A. *Appeal allowed.*

(2) 12 M. 151; 13 Ind. Jur. 53; 1 Weir 480; 4 Ind. Dec. (N. S.) 454.

(3) 15 A. 210 at p. 218; A. W. N. (1893) 96; 7 Ind. Dec. (N. S.) 853.

LAHORE HIGH COURT.

CRIMINAL REVISION PETITION No. 1407 OF 1921.
February 11, 1922.
Present:—Mr. Justice Campbell.
MAMOON—CONVICT—PETITIONER
versus
EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 556—Provincial Insolvency Act (V of 1920), s. 69—Complaint preferred by District Judge against insolvent—Appeal, whether should be heard by him—Jurisdiction—Consent.

The words "try any case" in section 556 of the Criminal Procedure Code are comprehensive enough to include the hearing of an appeal.

Nistarini Debi v. *A. C. Ghose*, 23 C. 44 at p. 45; 12 Ind. Dec. (N. S.) 30, relied upon.

Where upon the allegations of an Official Receiver, a District Judge presents a complaint against an insolvent under section 69 (5 of the Provincial Insolvency Act, he is a party to the case, although he has little or nothing to do with the prosecution. Consequently, in the event of the insolvent being convicted, the District Judge would be disqualified, under section 556 of the Criminal Procedure Code, from hearing an appeal against the conviction as Sessions Judge.

Emperor v. *Banka Behari*, 7 C. W. N. 708, distinguished.

The consent of a party concerned cannot affect the absolute disqualification imposed by section 556 of the Criminal Procedure Code.

Bisheshar Bhattacharya v. *Emperor*, 7 Ind. Cas. 291; 32 A. 635; 7 A. L. J. 749; 11 Cr. L. J. 447, relied upon.

Petition, under section 439, Criminal Procedure Code, for revision of an order of the Sessions Judge, Karnal, dated the 4th October 1921, affirming that of the Magis-

trate, First Class, Karnal, dated the 17th August 1921.

Mr. *Shamair Chand*, for the Petitioner.

Mr. *Sundar Das*, for the Respondent.

JUDGMENT.—The petitioner in this case is an insolvent, who has been convicted under section 69 of the Provincial Insolvency Act V of 1920. Proceedings were instituted on a complaint by Mr. Skemp, District Judge, in accordance with section 69 (5) of the Act. The petitioner appealed against his conviction by the Magistrate to Mr. Skemp as Sessions Judge. The appeal was rejected on the merits and Mr. Skemp noted in his judgment that when the appeal was first presented he had asked the appellant's Counsel if there was any objection to his hearing the appeal by reason of his having lodged the complaint, and was told that the appellant had no objection.

In revision now it is pleaded that Mr. Skemp, notwithstanding the consent of the appellant or his Counsel, had no jurisdiction to hear the appeal, and this objection is pressed in argument. It appears to me that it must prevail. Section 556, Criminal Procedure Code, lays down that no Judge or Magistrate shall, except with the permission of the Court to which an appeal lies from his Court, try any case to or in which he is a party. In the present instance, although Mr. Skemp had, from a practical point of view, little or nothing to do with the prosecution since he was not the presiding officer of the Court when the allegations which were the basis for the prosecution were made by the Official Receiver, nevertheless he was unmistakably a party to the case. The Magistrate could not have taken cognizance without a complaint by the District Judge under section 69 (5) of Act V of 1920, and that complaint was drawn up, signed and presented by Mr. Skemp. It has been ruled in *Nistarini Debi* v. *A. C. Ghose* (1) that in section 555 of the then Criminal Procedure Code, (which is re-produced in section 556 of the present Code) the words "try any case" are comprehensive enough to include the hearing of an appeal, and Counsel for the petitioner cites *Bisheshar Bhattacharya* v. *Emperor* (2) according to which the consent of a party concerned cannot affect the absolute disqualification imposed by section 556. Counsel for the respondent has put forward no authority to the contrary. He might have relied upon *Emperor* v. *Banka Behari* (3) but did not quote it, and that ruling, I think, is not exactly in point.

Accordingly, I set aside Mr. Skemp's order on appeal dated the 4th October 1921 as having been made without jurisdiction and I direct that the appeal be heard by the Sessions Judge, Ambala. The appellant may be released on bail of Rs. 1,000 to the satisfaction of the District Magistrate.

Z. K.

W. C. A. *Revision allowed.*

(1) 23 C. 44 at p. 45; 12 Ind. Dec. (N. S.) 30.

(2) 7 Ind. Cas. 291; 32 A. 635; 7 A. L. J. 749; 11 Cr. L. J. 447.

(3) 7 C. W. N. 708.

LAHORE HIGH COURT.

CRIMINAL REVISION PETITION No. 1217 OF 1921.

January 31, 1922.

Present:—Mr. Justice Campbell.

RAGHBIR SARAN—ACCUSED—PETITIONER

versus

THE KURAKSHETAR MOTOR SERVICE COMPANY, THANESAR, DISTRICT KARNAL—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 177, 179—Penal Code (Act XLV of 1860), s. 417—Cheating—Offence committed at one place—Loss caused at another place—Jurisdiction.

Loss is not a necessary element of the offence of cheating. There must be intention to cause wrongful loss or wrongful gain, but it is not essential that loss should be caused. Therefore, it is the Court within whose jurisdiction the offence is committed, and not the one within whose jurisdiction loss in caused, that is competent to try a case under section 417, Indian Penal Code.

Prag Das v. *Daulat Ram*, 31 Ind. Cas. 1001; 13 A. L. J. 1067; 16 Cr. L. J. 825, approved of.

Queen-Empress v. *O'Brien*, 19 A. 111; A. W. N. (1896) 191; 9 Ind. Dec. (N. S.) 72, *Chint Singh* v. *Crown*, 67 P. L. R. 1901, referred to.

RAGHBIR SARAN v. THE KURAKSHETAR MOTOR SERVICE COMPANY, THANESAR.

Petition, under section 439, Criminal Procedure Code, for revision of an order of the District Magistrate, Karnal, dated the 29th July 1921, affirming that of the Honorary Magistrate, Second Class, Kunjpura, District Karnal, dated the 16th July 1921.

Lala *Sardha Ram*, for the Petitioner.

Lala *Anant Ram Khosla*, for the Respondents.

JUDGMENT.—Three persons *viz.*, Harparshad, Gainda Ram and Joti Parshad, describing themselves as partners in the Kurakshetar Motor Service Company, Thanesar, District Karnal, filed a complaint under section 420, Indian Penal Code, in the Karnal District against Raghbir Saran, proprietor of the firm Pyare Lal and Sons, Kashmiri Gate, Delhi. The complaint was taken up by an Honorary Magistrate of the Second Class who recorded the statements of the complainants, and summoned the accused. The accused, when he appeared, objected to the jurisdiction of the Court, and contended that the case was triable exclusively in Delhi. The Magistrate ruled with reference to section 179, Criminal Procedure Code, that consequences of the alleged offence had taken place in the Karnal District and that such offence could be enquired into in that district. The District Magistrate refused to interfere on revision and an application has been made to this Court.

According to the complaint and the statements of the complainants, the latter purchased two motor lorries from the accused through Parshotam Das, another partner in the Company. Rs. 400 were paid at Delhi by Parshotam Das to the accused. On the 2nd of June, the accused telegraphed to the complainants at Kurakshetar that the lorries had arrived at Delhi. The three complainants went to Delhi, paid Rs. 10,000 to the accused there and brought back one lorry, and on the 25th of June they went again, paid the accused Rs. 4,000 and brought back the second lorry. In the beginning of July, the vehicles were examined and it was found that certain parts were missing. The accused was asked to send them but did not do so, and so the complaint was lodged.

Counsel for the petitioner, Raghbir Saran, has quoted a case very similar to the present, *Prag Das* v. *Daulat Ram* (1) which supports his contention that the complaint cannot be enquired into in the Karnal District. On behalf of the complainants-respondents a number of authorities have been cited, most of them based on *Queen Empress* v. *O'Brien*(2) which was disapproved by this Court in *Chint Singh* v. *Crown* (3). In any case all these rulings deal with the offence of criminal misappropriation which is essentially different from that of cheating. Assuming that loss was sustained by the complainants in the Karnal District this would not have the effect of bringing the present case under section 179, Criminal Procedure Code. In the offence of criminal misappropriation loss to the rightful owner must be caused, and the action of the person who causes it, is an offence by reason of that consequence. Loss, however, is not a necessary element of the offence of cheating. There must be an intention to cause wrongful loss or wrongful gain, but it is not essential that loss should be caused. In the present case the allegation in the complaint is that deceit, inducement and delivery all took place at Delhi. The inducement is alleged to have been dishonest, but it would not be necessary in order to establish the offence of cheating to prove that the dishonest intention matured into actual loss. Therefore, loss at Karnal would not render section 179 applicable.

Moreover, it is quite plain that the loss, if any, took place at Delhi where the money was paid and delivery was taken by the complainants of the motor lorries.

Counsel for the complainants has stated that there was inducement at Karnal in the shape of telegrams sent from Delhi, but the complaint and the statements do not refer to, and Counsel has not shown me, any such documents.

I accept the petition and direct that the complaint in question be transferred to the District Magistrate, Delhi.

N. H. *Petition accepted.*

(1) 31 Ind. Cas. 1001; 18 A. L. J. 1067; 16 Cr. L. J. 825.

(2) 19 A. 111; A. W. N. (1896) 191; 9 Ind. Dec. (N. s.) 72.

(3) 67 P. L. R. 1901.

MOHINDER SINGH v. ARUR SINGH.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No 3031 OF 1918.
February 21, 1922.
Present :—Mr. Justice Abdul Raoof and Mr. Justice Campbell.
Sardar MOHINDAR SINGH—PLAINTIFF—APPELLANT
versus
ARUR SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Punjab Pre-emption Act (I of 1913), s. 8 (2), Notification under—Retrospective effect—Pending suits.

A Notification under section 8 (2) of the Punjab Pre-emption Act cannot have retrospective effect and does not affect suits pending at the date on which it is issued. [p 627, col. 2.]

Bishen Singh v. *Ganda Singh*, 16 Ind. Cas. 959; 10 P. R 1913; 5 P. L. R. 1913; 264 P. W. R. 1912, dissented from.

Kaju Mal v. *Salig Ram*, 52 Ind. Cas. 563; 91 P. R. 1919, approved.

Sanwal Das v. *Gur Parshad*, 4 Ind. Cas 179: 90 P. R. 1909; 159 P W R. 1909: 147 P. L. R. 1909 (F. B.), *Dhanna Singh* v. *Gurbakhsh Singh*, 4 Ind. Cas. 337; 91 P. R. 1909; 161 P. W. R. 1909; 148 P. L. R. 1909, (F. B. *Niaz Ali* v. *Muhammad Ramzan*, 37 Ind. Cas 227; 130 P. R. 1916; 193 P. W. R 1916, referred to.

Ram Gopal v. *Piari Lal*, 21 A. 441; A. W. N. (1899) 163; 9 Ind. Dec (N s) 988, *Atma Ram* v. *Devi Dyal*, 49 P. R. 1901; 157 P. L R 1901 distinguished.

General principles deducible from the statutory provisions relating to pre-emption in the Punjab are in favour of the pre-emptor's cause of action, after it has accrued, not being affected by any contingencies arising after the date of sale. [p. 627, col. 2.]

Second appeal from the decree of the District Judge, Amritsar, dated the 8th August 1918, affirming that of the Munsif, First Class, Amritsar, dated the 21st June 1918.

Bakhshi *Tek Chand*, for the Appellant.

Dr *Gokal Chand Narang*, for the Respondents.

JUDGMENT.—The plaintiff sued separately to pre-empt two contiguous plots of land, each measuring 9 *marlas*, in the estate of Amritsar. The vendor was the same in each case, but the vendees were different. The sales took place on the 11th October 1916 and the two suits were filed on the 10th October 1917. On the 6th May 1918 the Punjab Government declared by Notification No. 10473 under section 8 (2) of the Punjab Pre-emption Act, 1913, "that from the date of this Notification no right of pre-emption shall exist in respect of agricultural land and village immoveable property" within an area in which the plots in suit admittedly are comprised. The suits were pending in the Trial Court at the date of this Notification and for that reason the Munsif dismissed them both holding that the Notification took away from the pre-emptor before decree the right of pre-emption which he appeared to hold at the dates both of the sale and of the institution of the suits. Appeals preferred to the District Judge were dismissed, the District Judge referring to *Bishen Singh* v. *Ganda Singh* (1). The result has been two second appeals to this Court, Nos. 3031 and 3035 of 1918, both of which will be disposed of by this order.

The judgment reported as *Bishen Singh* v. *Ganda Singh* (1) was delivered on facts precisely similar to those now under consideration. It held that the right of pre emption in suit ceased to exist immediately on the publication of the Notification, although it was in existence when the suit was instituted and that the Court below had no alternative to dismissing the suit, having no power to pass a decree establishing a right which had ceased to exist. It is not disputed that the present appeals must fail if *Bishen Singh* v. *Ganda Singh* (1) be followed, but Bakhshi Tek Chand for the appellants contends that the case was not correctly decided.

Reference to it is to be found in two later published judgments, *Niaz Ali* v. *Muhammad Ramzan* (2) and *Kaju Mal* v. *Salig Ram* (3). In both of these cases the pre-emptor had obtained a decree, his right to pre-emot had been declared not to exist by a Notification published subsequent to decree and during the pendency of the vendee's appeal and the Notification was pleaded in support of the appeal unsuccessfully. In *Niaz Ali* v. *Muhammad Ramzan* (2) the Judges expressed no disapproval of what was ruled in *Bishen Singh* v. *Ganda Singh* (1) but distinguished the position of a decree-holder defending his decree from that of a mere plaintiff seeking to enforce a claim to pre-empt. They held that the decree gave the decree holder the status of full owner immediately he paid in the decree money, that unless fault could be found with the decree it should be upheld, and that if it was right on the day it was passed the subsequent Government Notification could

(1) 16 Ind. Cas. 959; 10 P. R. 1913; 5 P. L. R. 1913; 264 P. W. R. 1912.
(2) 37 Ind. Cas. 227; 120 P.R. 1916; 193 P. W. R. 1916.
(3) 52 Ind. Cas. 563; 91 P. R. 1919.

not make it wrong. They remarked that had the plaintiff's suit been dismissed, and had he been the appellant, a Government Notification issued while the appeal was pending and taking away the right to pre-empt, would probably have been fatal to his chance of success.

In *Raju Mal* v. *Salig Ram* (3) no mention was made of *Nias Ali* v. *Muhammad Ramzan* (2) and *Bishen Singh* v. *Ganda Singh* (1) was definitely dissented from in the following terms :—

"With all deference we are unable to follow that ruling, which not only attributes to a Notification greater force than to a repealing Act, but proceeds upon the principle that, in the absence of a provision to the contrary, a Notification has retroactivity."

Bakhshi Tek Chand relies strongly upon this passage in support of his argument that in the present cases the Government Notification cannot deprive the plaintiff-appellant of a right which he possessed at the date of the sales and at the date of the institution of his suits and which has not been deteriorated by any voluntary act, either of the plaintiff or of the vendor. He points to section 4 of the Punjab General Clauses Act of 1898 which provides that, unless a different intention appears, repeal of an Act shall not affect any right acquired under the enactment repealed, and to section 2 (3) of the Punjab Pre-emption Act, 1913, which, while altering the procedure of pending suits and appeals from the date of the Act, left untouched rights acquired under the former Act. He claims that it is absurd that the present vendees should be placed by an order of the Executive Government under powers conferred by the Act in a better position than they would hold if the Legislature were to repeal the whole Act after suit and before decree.

Dr. Gokal Chand for the respondents replies that the language of section 8 (2) of the Act and of the Notification is plain and unambiguous that the Legislature has given the Executive Government power to declare that in any local area the right of pre-emption shall not exist, that the plaintiff's right to a decree has been perfectly legally and quite explicitly destroyed by the Notification of 6th May 1918 from that date and that Government must be taken to mean what it states. He has also referred us to the dicta of various learned Judges in the Full Bench cases of *Sanwal Das* v. *Gur Parshad* (4) and *Dhanna Singh* v. *Gurbakhsh Singh* (5) (*e. g.*, Chatterji, J., page 344, Clark, C. J., page 362, and page 439 and Rattigan, J., page 442, Punjab Record 1909) to the effect that the statutory qualifications of a pre-emptor must be retained until decree. These, however, were *obiter* in the particular cases where they were made and remarks indicating opinions to the contrary were recorded by Kensington J., (page 447) and Shah Din, J., (pages 453 and 457) two of the majority Judges in *Dhanna Singh* v. *Gurbakhsh Singh* (5).

We find it difficult to believe that Government intended by the Notification under discussion to declare anything more than that in respect of sales transacted after the date of Notification there should be no right of pre-emption Although Dr. Gokal Chand's demand is perfectly reasonable that the words used in the Notification should be allowed to speak for themselves; we feel ourselves unable to follow *Bishen Singh* v. *Ganda Singh* (1) and to uphold the orders of the lower Courts. The plaintiff claimed a right conferred by Statute to acquire the land in suit by sale in preference to the vendees which right arose when the land was sold to the vendees (sections 4, 14 and 15, Punjab Act I of 1913) and he also was permitted by Statute (section 2.) to bring a suit to enforce that right. He brought a suit. The Trial Court held that he possessed the right at the time of the sale and at the moment when he filed his suit. In consequence of the vendee's denial of his right the plaintiff was not given a decree immediately, and on a date nearly seven months subsequent to the institution of the suit the Local Government under powers conferred by the Act declared that his right did not exist from that date. The Statute did not require him to preserve his right free from interference beyond his control up to the date of decree in his suit, and we do not think that the Court trying the suit was obliged to insist upon such preservation of the right.

(4) 4 Ind Cas. 179; 90 P. R. 1909; 159 P. W. R. 1909; 147 P. L. R. 1909 (F. B.).

(5) 4 Ind. Cas. 337; 91 P. R. 1909; 161 P. W. R. 1909; 148 P. L. R. 1909 (F. B.).

It was held in *Ram Gopal* v. *Piari Lal* (6) that where a plaintiff has lost, during the pendency of a suit for pre emption, his right to pre-empt, the suit shou'd be dismissed, and that ruling was followed in *Atma Ram* v. *Devi Dyal* (7). In the United Provinces, however, the right of pre-emption is not defined and secured by Statute and in *Atma Ram* v. *Devi Dyal* (7) the pre-emptor divested himself by gift, before obtaining a decree, of the proprietary right in the house from which he derived his title to sue, a situation differing conspicuously from that which we are considering.

The right in suit in *Ram Gopal* v. *Piari Lal* (6) was one restricted to co sharers in the *mahal* and was based upon a provision in the *wajib ul arz*. During the pendency of the suit the original *mahal* was sub-divided into four other *mahals*, and the plaintiff ceased to be a co sharer in the *mahal* comprising the land in suit. The learned Judges found that there was no authority on the question whether in a suit for pre emption based on an agreement giving pre-emptive rights to co-sharers, the plaintiff must maintain his status as co-sharer up till the date of the decree, and they proceeded to decide the question upon principle. They held that there was no general principle of law or procedure which compelled them to look exclusively to the state of things which existed at the date of institution of the suit, and reversed the decree for pre-emption on the ground that the custom was one in favour of the co-sharers of the undivided *mahal* and no others and that the plaintiff had before decree become as mush a stranger in the sense of the *wajib-ul arz* as the defendant vendee. Sir Arthur Strachey, C. J., remarked in the course of his judgment:—

"In the absence of authority on the subject and in dealing with claims for pre-emption arising under the *wajib-ul arz*, it seems to me that the only safe course is to see what mode of deciding the question would be most in furtherance of the contract or custom of pre-emption, and the principles upon which such a contract or custom is based."

(6) 21 A. 441; A. W. N. (1899) 163; 9 Ind Dec. (N. S.) 985.

(7) 44 P. R. 1901; 157 P. L. R. 1901.

Ram Gopal v. *Piari Lal* (6) was referred to in *Dhanna Singh* v. *Gurbakhsh Singh* (5) by Shah Din, J., who dissented from its conclusions emphatically and considered that the decision was in disregard of the principles which underlie a customary right of pre emption. He further gave it as his opinion (and we agree) that general principles deducible from the statutory provisions relating to pre-emption in the Punjab are in favour of the pre-emptor's cause of action, after it has accrued, not being affected by any contingencies arising after the date of sale, certainly a right conferred by Statute is not quite the same thing as a right derived from contract or based upon custom.

No doubt there may be cases where, having regard to all the circumstances and to the nature and origin of the particular right of pre emption claimed, a Court may be justified in refusing to enforce a right unless it is maintained intact throughout the progress of the suit, but the usual method of dealing with a suit is what the learned Judges of the Allahabad Court have found it necessary to explain as not obligatory, namely, to decide the questions at issue according to the state of affairs existing when the plaintiff's cause of action arose.

In the present case we concede that the meaning of the Government Notification must be taken to be what is stated in plain words. But as indicated already we do not believe that it was framed with the intention that it should have greater effect than a repealing Act or for the purpose of causing the dismissal of all pending suits to enforce pre-existing rights of pre-emption and of rendering futile the expenditure of time and money incurred by plaintiffs who started with a sound cause of action. We hold that it was not necessary for the Courts below to dismiss the suits under appeal in consequence of the Notification of the 6th of May 1918, and that they should not have done so. In this conclusion we must be taken to differ, with all respect, from the learned Judges who, in *Bishen Singh* v. *Ganda Singh* ( ) held in similar circumstances that the Trial Court had no alternative to dismissing the suit. We think that the Bench which decided *Kaju Mal* v. *Balgi Ram* (3) was correct in thinking that the practical effect of such a decision was to make

the Notification retroactive in a manner not contemplated by its authors.

We accept both appeals, set aside the orders of the lower Appellate Court and remand the appeals under Order XLI, rule 23, for decision of the other points at issue. Stamp on appeal will be refunded and costs will be costs in the cause.

S. D. & Z. K.

Appeals accepted.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 1128 OF 1920.

April 27, 1922.

Present:—Mr. Justice Coutts and Mr. Justice Das.

RAMLOCHAN MISSRA AND ANOTHER—DEFENDANTS—APPELLANTS

versus

Pundit HARINATH MISSRA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Appellate Court—Admission of document, objection to—Objection not raised before Trial Court—Evidence Act (I of 1872), s 63—Document admitted as secondary evidence by Trial Court—Appellate Court, whether may question its admissibility.

When a copy of a document has been admitted in the Court of first instance without any objection, the Appellate Court is not entitled to allow any objection to be taken to its admissibility at the appellate stage. [p. 629, col. 1.]

Where a document is admitted as secondary evidence by the Trial Court, that is to say, it is admitted as being a true copy, it is not open to an Appellate Court to consider whether in fact the provisions of section 63 of the Evidence Act were complied with or not when it was admitted and the Court is not entitled to take evidence offered to prove that the document is not a true copy of the original [p. 629, col. 1.]

Chimnaji Govind Godbole v. *Dinkar Dhondev Godbole*, 11 B. 320; 1 Ind. Jur 342; 6 Ind. Dec. (N. S.) 209, *Lakshman Govind* v. *Amrit Gopal*, 24 B. 591; 2 Bom L. R. 386; 12 Ind. Dec. (N. S.) 924, *Kishori Lal Goswami* v. *Rakhal Das Banerjee*, 31 C. 155, followed.

Appeal against the decision of the District Judge, Patna, dated the 16th April 1920, reversing that of the Sub-Judge, Third Court, Patna dated the 4th June 1919.

Messrs. *Kuwant Sahay* and *Shiveshwar Dayal*, for the Appellants.

Messrs. *Ram Prasad*, *Janak Kishore* and *Bhagwati Kumar Sinha*, for the Respondents.

JUDGMENT.

COUTTS, J.—This is an appeal by the defendants against the decision of the District Judge of Patna. The plaintiffs and the defendants are admittedly agnates of one Nathuni Missir. The plaintiffs brought a suit for a declaration that the defendant No. 1 had renounced the world and had become a *Sadhu* and that thereby the plaintiffs had become entitled to a half share of the heritage, or in the alternative if it was found that the defendant No. 1 had not renounced the world the plaintiffs claimed one-third of the property. The suit was dismissed in the Court of first instance but on appeal to the District Judge the plaintiffs were declared to be entitled to joint possession of Nathuni's heritage along with the defendant No. 1. Against this decision the defendants have appealed.

The sole question for decision in the suit was whether the plaintiffs and the defendants were in fact agnates of Nathuni Missir, and the first question argued in appeal before us is whether a certain document on which the defendants relied was admissible in evidence or not. This document, which is Exhibit D, is a genealogy. It is admittedly a copy and part of it is probably a copy of a copy. The document was admitted without objection by the plaintiffs in the Court of first instance and it was relied on by the learned Subordinate Judge, who decreed the suit in favour of the defendants. On appeal to the District Judge he has held that, although this document was admitted without objection, still the plaintiffs were not estopped from contesting the document subsequently. In this view I am unable to agree. It has been held in a number of cases, *Chimnaji Govind Godbole* v. *Dinkar Dhondev Godbole* (1), *Lakshman Govind* v. *Amrit Gopal* (2) and

(1) 11 B. 320; 11 Ind. Jur. 342; 6 Ind. Dec. (N. S.) 209.

(2) 24 B. 591; 2 Bom. L. R. 386; 12 Ind. Dec. (N. S.) 924.

Kishori Lal Goswami v. *Rakhal Das Banerjee* (3) that when a copy of a document has been admitted in the Court of first instance without any objection, the Appellate Court is not entitled to allow any objection to be taken to its admissibility at the appellate stage. This is undoubtedly the correct view of the law. It is, however, contended that the learned District Judge has considered the question from another point of view and has held that, even if the document is admissible, it is not entitled to any value because the comparison of the copy with the original has been found by him to be unsatisfactory. Here, again, the learned District Judge appears to have fallen into an error. The document was admitted as secondary evidence, that is to say, it was admitted as being a true copy, and, in view of the decisions to which I have already referred, it was not open to the learned District Judge at the appellate stage to consider whether in fact the provisions of the section had been complied with or not when it was admitted without objection. The learned District Judge was, therefore, not entitled to consider the evidence which was offered subsequent to the admission of the document in regard to comparison with the original.

There are other points in this appeal but we have not heard arguments on them, because on this ground alone it is necessary to set aside the decree of the learned District Judge and to remand this appeal for re-hearing. The whole appeal is to be re-heard. Costs will abide the result.

DAS, J.—I agree.

N. H.

Appeal allowed;
Case remanded.

(3) 31 C. 155.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 920 OF 1917.
December 9, 1921.

Present:—Mr. Justice Scott Smith and Mr. Justice Harrison.

AHMAD—DEFENDANT—APPELLANT

versus

Musammat BANO AND OTHERS—PLAINTIFFS—RESPONDENTS.

*Custom—Alienation—Succession—Sisters, when heirs—Burden of proving that sisters are not heirs—Sisters heirs among Tarar Jats of Chakwal, District Jhelum—*Riwaj-i-am *not opposed to general custom but not supported by instances, evidentiary, value of.*

The *onus* of proving that sisters are not heirs in the absence of all agnates is on the person who asserts this. [p 630. col. 2.]

An entry in a *riwaj-i-am*, when not opposed to general custom, is a strong piece of evidence in support of a custom, even if it is not supported by instances. [p 630, col. 2.]

Chhuttan v. *Hazari Lal*, 30 Ind Cas. 22; 7 P. R. 1916; 129 P. W. R. 1915; 46 P. L. R. 1916, *Beg* v. *Allah Ditta*, 38 Ind Cas 354; 45 P. R. 1917; 12 P. W R. 1917; 21 M. L. T. 310; 32 M. L. J. 615; 19 Bom. L. R 388; 15 A. L. J. 525; 21 C. W. N. 842; 44 C. 749; 26 C L. J. 175; 44 I. A. 89 P. C.), *Wazira* v. *Maryan*, 42 Ind Cas. 358; 84 P R. 1917; 151 P. W. R. 1917; 3 P. L R 1918, referred to.

Among the Muhammadan Tarar Jats of the Chakwal Tahsil, Jhelum District, sisters are heirs in the absence of all agnates and can, as such, contest the validity of an alienation—in this case a Will—by a widow. [p. 630, col. 2.]

Second appeal from a decree of the District Judge, Jhelum, dated the 23rd December 1916, affirming that of the Subordinate Judge, Second Class, Jhelum, dated the 20th October 1916.

Dr. *Nand Lal*, for the Appellant.

Mr. *Jai Gopal Sethi*, for the Respondents.

JUDGMENT.—At first we dismissed this appeal in default, but shortly after we passed our order, Counsel for the appellant appeared and explained why he was late, and upon his application, to which the other side raised no objection, we re-admitted the appeal and heard arguments.

The appeal is from an order of the District Judge of Jhelum decreeing the plaintiffs' claim for possession of land alienated by the widow of Karam Tarar to her sister's son. The plaintiffs are sisters of Karam, deceased. The appeal is brought upon a certificate granted by the District Judge under section 41 (3) of the Punjab Courts Act. The question of custom involved is whether

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amongst Tarar Jats of Chakwal sisters of a deceased proprietor can contest the validity of a Will executed by his widow in favour of her sister's son. Karam left no collateral and the lower Appellate Court was of opinion that the sisters were heirs in the absence of collaterals and that, therefore, they could contest the validity of the Will executed by Karam's widow who had only a life-interest.

A preliminary objection was raised by Mr. Sethi to the effect that the appeal was filed without a certificate on the 27th of March 1917 and that when the certificate was filed in this Court on the 2nd April the period of limitation for the filing of an appeal had expired. We find, however, that the application for the certificate was made on the 26th of March 1917 and that the certificate was granted on the following day.

A further objection was raised that the application for the certificate was made more than 30 days after the date of the decree of the lower Appellate Court In his application Ahmad explained his reasons for not applying sooner and it was upon a translation of this application that the District Judge recorded his order granting the certificate, and we may, therefore, presume that he exercised his discretion in granting it beyond the period specified in the proviso to section 41. We accordingly overruled the preliminary objection.

Dr. Nand Lal admits that if the sisters are heirs they can contest the alienation and the only question, therefore, which we have to decide is whether they are heirs or not. The rulings cited in the judgment of the lower Appellate Court, which Dr. Nand Lal has again cited in his argument before us, are not directly in point and do not in any way assist us There is a passing remark in *Jannat* v. *Abdulla* (1) that sisters generally are not heirs, but we are not aware of any ruling of this Court or the Chief Court in which it has been definitely laid down that sisters are not heirs in the absence of all agnates. In Article 24 of Rattigan's Digest of Customary Law it is stated that sisters are usually excluded as well as their issue, but we understand this to mean that they are usually excluded by agnates however distant. Counsel has not been able to cite to us any ruling in which it was held that sisters are not heirs in the absence of all agnates. Article 28 of the Digest is to the effect that, subject to the exception thereunder mentioned, in the event of a deceased proprietor dying without heirs his estate ordinarily escheats to Government. In the exception certain instances are given in which it was held that a sister's son excluded the village proprietary body. In our opinion the *onus* is upon the person asserting it to prove that a sister is not an heir in the absence of any agnate. Karam belonged to a Muhammadan tribe of the Chakwal Tahsil and the answer to question No. 68 of Mr. Talbot's Customary Law is to the effect that sisters and their sons can inherit if there are no daughters and no agnates within the fourth degree. If this be correct then much more do sisters inherit if their are no agnates at all. In *Beg* v. *Allah Ditta* (2) their Lordships of the Privy Council held that an entry in a *riwaj i-am* was a strong piece of evidence in support of a custom. This ruling was considered by a Division Bench of the Chief Court in *Wazira* v. *Maryan* (3) where it was held, following *Chhuttan* v. *Hazari Lal* (4), that statements in the *riwaj-i-am* when opposed to general custom can carry very little weight unless supported by instances. The answer to question No. 68 in Talbot's Customary Law of the Jhelum District is not supported by instances, but, in our opinion, it is not opposed to general custom, especially in a case when there are no agnates at all and, therefore, we follow the ruling of the Privy Council in *Beg* v. *Allah Ditta* (2) and hold that this entry in the *riwaj i-am* is a strong piece of evidence in support of the plaintiffs' claim. It is not rebutted.

The appeal fails and is dismissed with costs.

S D.

Appeal dismissed.

(1) 32 Ind. Cas 817; 4 P. R 1916; 25 P. W. R. 1916.

(2) 38 Ind. Cas. 354; 45 P. R. 1917; 12 P. W. R. 1917; 2 M. L T. 310; 32 M. L. J. 615; 19 Bom. L. R. 388; 15 A. L. J. 525; 21 C W. N. 842; 44 C. 749; 24 C. L. J. 17 ; 44 I A 89 P. C.).

(3) 42 Ind Cas. 358; 84 P. R 1917; 151 P. W. R. 1917; 3 P L R 1918.

(4) 30 Ind Cas 22; 7 P. R. 1916; 129 P. W. R. 1915; 46 P. L. R. 1916

TIAN SAHU v. MULCHAND SAHU.

PATNA HIGH COURT.

LETTERS PATENT APPEAL No. 77 OF 1921.
May 18, 1922.

Present :—Sir Dawson Miller, Kt., Chief Justice, and Justice Sir B. K. Mullick, Kt.

TIAN SAHU—APPELLANT

versus

MULCHAND SAHU AND OTHERS—RESPONDENTS.

Possession, suit for, on ground of dispossession—Oral evidence given by both parties unsatisfactory—Court, whether competent to look into other circumstances, probabilities and presumptions as to title and possession—Limitation Act (IX of 1908), Sch. I, Arts. 42, 144.

In a suit for possession of immoveable property on the allegation that the plaintiff, while in possession of the property was dispossessed by the defendant, if oral evidence of possession is given on both sides but the Court finds some difficulty in arriving at a conclusion upon that evidence, or does not consider the evidence altogether satisfactory, it is not precluded from taking into account the other circumstances, probabilities and presumptions that may arise in the case in regard to possession and title. Such a case is not one in which there is no evidence, or where the evidence is valueless. [p. 63, col 1]

Shiva Prasad Singh v. *Hira Singh*, 62 Ind Cas. 1; 6 P. L. J. 478 (1920) Pat. 305; 2 P. L T 457; 3 U. P. L. R. (Pat.) 81 F. B.), distinguished

Runjeet Ram Pandey v. *Goburdhun Ram Pandey*, 20 W. R. 25 (P. C.), relied upon.

Letters Patent Appeal against the judgment of Mr. Justice Ross.

Mr. *B. Prasad*, for the Appellant.

Mr. *H. Prasad*, for the Respondents.

JUDGMENT.

MILLER, C. J.—In this case the plaintiff who is the appellant before us purchased the land in suit from one Mulchand Sahu in June 1917 and, according to his case, came into possession and was a few months later dispossessed by the defendant Matuk. He thereupon instituted the present suit claiming a declaration of his title and possession after ejectment of the defendant Matuk.

The learned Munsif before whom the case came for trial found upon the facts that neither the plaintiff nor his predecessor Mulchand had in fact been in possession of the land at any period within 12 years antecedent to the suit and he dismissed the claim. The case put forward by the defendant Matuk and supported to some extent by Mulchand was that in the year 1903 Mulchand had transferred this very land in exchange for another piece of land to the defendant Matuk and that Matuk had been in possession of the land ever since. The plaintiff questioned the genuineness of that transaction and the defendant questioned the genuineness of the *kabala* executed in favour of the plaintiff in 1917. On the finding come to by the Munsif it did not become necessary for him in his opinion to decide any question about the genuineness of the title of either party.

The case then went on appeal to the District Judge and he considered that the oral evidence of the parties as to possession was not satisfactory on either side and he referred to certain discrepancies in the evidence which had been pointed out by the Munsif and apparently the view which the learned District Judge arrived at was that, in so far as the oral evidence went, although he nowhere says that it was of no value, nevertheless, was not such as without reference to probabilities and other circumstances arising in the case would be sufficient in itself to enable him to come to a satisfactory decision on the question of possession. He had no doubt, however, that the exchange transaction set up by the defendant in 1903 was not genuine, and in dealing with that part of the case he says "the land which is said to have been given in exchange is also said to have been the abandoned holding of Budhu Kurmi and others," that is, that the land which Matuk is said to have given in exchange for the land in suit did not belong to Matuk at all. He then goes on "but action under section 97 of the Bengal Tenancy Act was not taken till 1917. Moreover, the date of the *Ohithi*" that is, the *Ohithi* which evidenced this transaction of 1903, "has certainly been altered, and though it is not possible to say that the real date was the inference to be drawn from the alteration must be hostile to the defendants-respondents." Now, that seems to me to be a distinct finding that upon the evidence before him which was put forward in support of the defendant's possession and title (I mean the defendant Matuk) the natural inference must be drawn that Matuk's possession was in fact not as long as he alleged and as it was necessary

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for him to allege in order to obtain a title by adverse possession. The inference drawn from this by the learned Judge seems to me to be that it was certainly not more than 12 years ago and must have been within 12 years that Matuk ever had anything to do with the land. Then he deals with certain huts and structures upon the land which had been dealt with by the Munsif as evidence in support of the defendant Matuk's possession and comes to the conclusion that no satisfactory inference could be drawn from their appearance as to how long they had been upon the land and, therefore, that part of the evidence was treated by him as being of really no assistance. He then further says: "the story of the exchange having failed" that is, the exchange by which Matuk claimed his title, "the possession of Matuk is probably much later than he asserts." The learned Judge then finds that in his opinion Matuk had entirely failed to prove possession for 12 years before the suit. Then on the question of the plaintiff's title he came to the conclusion that as Mulchand's previous title and possession were admitted by Matuk and as Mulchand admitted the execution of the *kabala* in favour of the plaintiff and as Mulchand had failed to prove that the *kabala* was void for any reason and as Matuk had failed to prove adverse possession for 12 years he, therefore, held that the appellant's claim should be decreed and he allowed the appeal.

From that decision the defendant appealed to this Court and the appeal was heard before a Single Judge. The learned Judge before whom the case came was of opinion that the findings arrived at by the learned District Judge in first appeal were not sufficient to entitle the plaintiff to a decree and he considered that the decision of the Full Bench of this Court in *Shiva Prasad Singh* v. *Bira Singh* (1) governed the case. He, therefore, allowed the appeal and dismissed the plaintiff's suit.

The reason why the learned Judge of this Court came to that conclusion was because the District Judge had held that the oral evidence of possession was not satisfactory on either side and he appears to have thought that in such a case it was not open to the learned District Judge who was the ultimate judge of fact to take into account either the probabilities of the case or any presumption that might arise in favour of possession remaining in the person who had proved his title. The Full Bench case to which I have referred did not lay down the proposition that in no case could the probabilities and presumptions be taken into account. The rule there laid down was that it is only in cases where there is no evidence of the plaintiff as to dispossession or, what amounted in the opinion of the Full Bench to the same thing, where the evidence is valueless, that the plaintiff fails to make out his case by merely proving that he had an antecedent title and possession, and it must not be considered that merely because where evidence was given by both sides and the learned Judge who had to determine the case had a difficulty upon that evidence or even considered that evidence not altogether satisfactory that in such circumstances he was not entitled to give weight to the probabilities of the case or to any presumption which might properly arise from the fact that the plaintiff had previously been in possession and had title. I think it would be extending the doctrine laid down in that case too far if we were to say that merely because the Judge had some difficulty in arriving at a conclusion upon the evidence or that he did not consider the evidence altogether satisfactory he was thereby precluded from looking either at the probabilities of the case as disclosed by other parts of the evidence or from the presumptions which might arise from the plaintiff's title.

What happened in the present case was that the learned Judge considered that although there was evidence on both sides it was not altogether satisfactory. He then dealt with the probabilities. He pointed out that from the defendant's own evidence an adverse inference must be drawn against him as to the actual date when this exchange transaction set up by him took place. The date had been altered and that I think was a very important point in assisting the learned Judge to come to a conclusion upon this vital matter in the case, namely,

(1) 62 Ind. Cas. 1; 6 P. L. J. 478; (1921) Pat. 305; 2 P. L. T. 487; 3 U. P. L. R. (Pat.) 81 (F. B.).

when did the defendant, Matuk, first have anything to do with this property. If you find him putting in a document in support of his claim intending thereby to shew that he had in fact been in possession of the property for over 12 years and you then find that the date of that document has been deliberately altered, I think a very strong presumption must arise against him. This is not a case where no evidence has been given. It is a case where both parties have spoken to their possession, although the actual oral evidence is such that the Judge had great difficulty in coming to a conclusion upon it. There were, however, as I said, the other circumstances in the case and there was the fact that the plaintiff's title was proved and the plaintiff's predecessor's prossession was admitted, at all events, up to the period when Matuk first had anything to do with the property. There was the further point that the Judge entirely failed to believe the evidence put forward by Matuk and that was a matter which he was entitled to take into consideration just as their Lordships of the Privy Council did in the case of *Runjeet Ram Pandey* v. *Goburdhun Ram Pandey* (2) where they observed: "It may also be observed that their Lordships are not disposed to give great credit to the evidence brought forward by the appellant, inasmuch as his case which rested upon the theory that he had acquired this property for himself, has been found to be wholly untrue." That was a case where their Lordships had difficulty in coming to a conclusion upon the facts of the case. In that case there was undoubtedly evidence and strong evidence upon both sides but in the contradictory state of the evidence they said that it was difficult to come to a conclusion which was satisfactory to the mind where the evidence was so conflicting and in that case they regarded the probabilities of the case and they further regarded the fact that the appellant's evidence upon another part of the story had been entirely disproved. This is not, in my opinion, a case in which there is no evidence or where, what amounts to the same thing, the evidence is absolutely valueless. There was evidence on both sides and I think the learned Judge was entitled to arrive at the conclusion he did by taking into consideration and weighing that evidence and the probabilities of the case coupled with the fact that the plaintiff original y or rather his predecessor was undoubtedly proved to have been in possession of the land. The result is that the appeal is allowed, and the plaintiff's suit is decreed with costs here and in the Courts below.

MULLICK, J.—I agree. The only point is whether the findings in this case bring it under the rule propounded in the Full Bench decision of *Shiva Prasad Singh* v. *Hira Singh* (1). In my opinion the findings are not sufficient to attract the operation of that rule.

S. D.

Appeal allowed.

(2) 20 W. R. 25 (P. C.).

LOWER BURMA CHIEF COURT.
FULL BENCH.
CIVIL REFERENCE No. 9 OF 1921.
January 11, 1922.
Present :—Sir Sydney Robinson, KT., Chief Judge, Mr. Justice Maung Kin and Mr. Justice Pratt.
AHLONE LAND CO., LTD.—APPLICANTS
versus
THE SECRETARY OF STATE FOR INDIA—RESPONDENT.

Income Tax Act (VII of 1918), s. 51 (1)—Business of Company—Buying and selling land—Question of fact—Decision of Revenue Authorities final—Reference—Jurisdiction of High Court.

The question whether, for purposes of the Income Tax, the main object of a Company is the purchase and sale of land, or whether the real object is the development of land and the sale of land is only a subsidiary object; in short, the question, whether the business of a Company is the buying and selling of land, is a simple question of fact, on which the decision of the Revenue Authorities is final, and the High Court has no power to decide whether their findings of fact are incorrect, since they do not involve any question regarding the interpretation of any of the provisions of the Income Tax Act.

Currie v. *Inland Revenue Commissioners*, (1920) 36 T. L. R. 185; 89 L. J. K. B. 360; 122 L. T. 621; 1 K. B. 801 and *Cape Brandy Syndicate* v. *Inland Revenue Commissioners*, (1921) 37 T. L. R. 33; 1 K. B. 64; 90 L. J. K. B. 113, referred to.

AHLONE LAND CO. LTD, v. SECRETARY OF STATE FOR INDIA.

Case referred by the Financial Commissioner, Burma, under section 51 (1) of the Indian Income Tax Act, 1918.

Mr. *McDonnell*, for the Applicants.

Mr. *Higinbotham*, for the Respondent.

JUDGMENT.

ROBINSON, C. J.—This is a Reference by the Chief Controlling Revenue Authority under section 51 (1) of the Income Tax Act of 1918. Under that section power is given to this Court to decide questions which have arisen with reference to the interpretation of any of the provisions of this Act or of any rule thereunder. No power is given to this Court to deal with questions of fact by way of an appeal against decisions of the Revenue Authorities.

The learned Financial Commissioner begins his Order of Reference by saying that he entirely agrees with the Commissioner's order in considering that the real point for consideration is whether the purchase and sale of the property was the main object with which the Company was formed or whether the development of the property in order to earn a continuing profit year by year for the Company was the real object and the sale of land was only a subsidiary one to be considered in case of a particularly favourable offer. He was asked by Counsel for the Company to refer to this Court the question whether on the facts set out in the order of the Commissioner of Pegu and on the facts which appear on the documents placed before him the Income Tax Authorities are justified in interpreting the Act so that income shall include the profit made in this case on the re-sale of the property, or to put it in another way, whether the Commissioner was justified in treating it as a conclusion of law which appears from the documents filed with his order that the Company were carrying on a trade of selling land and that the profits made therein were taxable as income. He was clearly of opinion that any reference was unnecessary and that it should have been refused under the last part of section 51 (1), but because of some charge in the new Bill the matter is referred.

On opening the case Mr. McDonnell for the Company stated that the whole question turned on what was the business of the Company and that, if it was the buying and selling of land, they would be liable to be taxed.

The question of what was the business of the Company is apparently a pure question of fact, and the matter is one which is for the decision of the Revenue Authorities and the Revenue Authorities alone. The learned Government Advocate thereupon raised the preliminary objection that this Court has no jurisdiction to hear the reference as it was solely made on a question of fact on which the decision of the Revenue Authorities was final.

We have been referred to certain recent decisions in England on this very point.

In the first case, *Currie* v. *Inland Revenue Commissioners* (1), Rowlatt, J. went into the question whether on certain facts Currie was carrying on a profession. He said: "I do not think that that is a question of fact in this case. I think I have all the facts before me, and it is a question of law. It is not a question of degree or anything of that sort, as was the case in the *Photographer's case* (*Cecil* v. *Inland Revenue Commissioners* (2))." That decision went up on appeal*, and Master of the Rolls said: "The first point to be considered was whether the question whether Mr. Currie was or was not carrying on a profession was a question of law or fact." He held that it was a question of fact and that, if the Commissioners came to a decision on fact without applying any wrong principle, then their decision was final. "Mr. Justice Rowlatt had thought that the facts were clear, and that it was, therefore, a question of law. He did not agree that that was so, and that did not appear to agree with Mr. Justice Rowlatt's own judgment in *Cecil* v. *Inland Revenue Commissioners* (2)." Lord Justice Scrutton said that "he must consider the appeal from the point of view that if there were evidence from which the Commissioners could have found that the two gentlemen concerned were not carrying on professions, that was final. The Commissioners were the Judges of fact, and he was not."

Again in *Cape Brandy Syndicate* v. *Inland Revenue Commissioners* (3) Mr. Justice

(1) (1920) 36 T. L. R. 185; 89 L. J. K. B. 260; 122 L. T. 621; 1 K. B 801.

(2) (1920) 36 T. L. R. 164.

(3) (1921) 37 T. L. R. 33; 1 K. B. 64; 90 L. J. K. B. 113.

*See (1921) 37 T. L. R. 371; 90 L. J. K. B. 499; 2 K. B. 332; 125 L. T. 33.—[*Ed.*]

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Rowlatt said: "Now in those circumstances the Special Commissioners have held that they carried on a trade, and I think it is a question of fact, and I do not think that by giving me all the evidence the Commissioners can make me determine the question of fact. Nor, indeed, can they give me authority to do so because they cannot give me authority if I do not possess it by law. I think it is a question of fact and a question of degree, which generally is a question of fact. I need not say anything more than that. I am not prepared to say that there was no evidence before the Commissioners. I think it is just one of those cases where there was evidence. I can conceive people deciding the other way. I do not say which way I should decide myself. But I certainly think there were materials on which they could find as they did." On appeal* Lord Sterndale, M. R., said: "Two points were raised, the first a question of fact, *viz.*, whether the appellants were carrying on a business," and later he says: "The first question was one simply of fact."

The circumstances of these two cases are very similar to the case of the Albore Land Company, and I think there can be no doubt that the Revenue Authorities having considered the facts stated orally and in documents came to a decision as to what was the business of this Company. That was a simple question of fact, and on that, as it appears to me, their decision was final. It is not necessary for us, and we have not, in my opinion, power to decide whether their findings of fact were correct since they do not involve any question regarding the interpretation of any of the provisions of this Act.

We had been referred to three cases decided in the Court of Exchequer, Scotland, wherein apparently the learned Judges did consider matters such as those involved in this reference. Two of those cases were considered by Mr. Justice Rowlatt in *Currie's case* (1), and, if they do support the argument that this is a question of law and not a question of fact, we must take it that they have not been followed by the Court of Appeal and that they should not be followed by us.

Mr. McDonnell urged that the question was whether the profits made by this Company were income within the meaning of the Act. That is an entirely different matter, and one that has not been referred

It is admitted that the sole point for decision is what was the business of the Company. Was it buying and selling land? There is no difference between this question and the question whether on certain facts established Mr. Currie was carrying on a business.

The decision is a decision on a question of fact. I am unable to see any reason for supposing that the Revenue Authorities have applied any wrong principles in deciding this question, and, therefore, I would hold that this Court has no jurisdiction to decide the question referred, and that the Reference must be returned to the Chief Controlling Revenue Authority as incompetent.

MACLEAN, J.—I concur.

FRATT, J.—I concur.

S. D.

Reference returned.

*See (1921) 37 T. L. R. 404; 90 L. J. K. B. 461; 2 K. B. 433; 125 L. T. 108; 65 S. J. 377.—[Ed.]

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 317 OF 1920.

June 15, 1922.

Present:—Mr. Justice Coutts and Mr Justice Das.

Sheikh NABIJAN—DEFENDANT—APPELLANT

versus

Musammat SAHIFAN AND OTHERS—PLAINTIFFS AND *Musammat* BIBI LATIFAN—DEFENDANT—RESPONDENTS.

Muhammadan Law—Dower—Widow in possession of her husband's property "in lieu of dower"—Right of widow to alienate—Transferee, rights of.

Where a Muhammadan widow is in possession of property belonging to her deceased husband "in lieu of dower" it is competent to her to sell it without necessarily selling her right to receive her dower Such a transfer conveys to the transferee the right to remain in possession during the

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widow's lifetime or until her dower or the proportionate part thereof corresponding to the property transferred is satisfied.

Abdulla v. *Shamsul Haq*, 58 Ind. Cas. 833; 43 A. 127; 18 A. L. J 969; 2 U. P. L R. (A.) 329, followed.

Ali Bakhsh v. *Allahdad Khan*, 6 Ind. Cas. 376; 32 A. 551; 7 A. L. J. 567, relied upon.

Appeal from a decision of the District Judge, Bhagalpur.

Mr. *B. B. Saran* for Mr. *Parmeshwar Dayal*, for the Appellant.

Mr. *S. A. Sami*, for the Respondents.

JUDGMENT.

COUTTS, J.—The plaintiffs in this case are the heirs of one Shaikh Wahid. The defendant No. 2 is his widow. The plaintiffs brought the suit for recovery of possession of their share of the land after ejectment of the defendants first party to whom the widow had sold the land. The suit was dismissed in the Court of first instance but on appeal to the District Judge this decision has been set aside and the suit has been decreed. The reason why the learned District Judge has decreed the suit is that the widow was holding the land in lieu of dower, that as she had no right to transfer the entire property to the defendants first party they have no title, and, consequently, the plaintiffs are entitled to a decree for ejectment.

This decision is undoubtedly wrong. The position is, as has been laid down by their Lordships of the Privy Council in the case of *Ali Bakhsh* v. *Allahadad Khan* (1), where they observed in a similar case that "the right is one which the widow secures as a creditor for her dower and it is one to continue holding until her debt is satisfied. Such a right is property and *prima facie* in the absence of any law or contract to the contrary it is property which is both heritable and transferable." The present case is on all fours with the case of *Abdulla* v. *Shams-ul-Haq* (2), in which it was held "where a Muhammadan widow is in possession of property belonging to her deceased husband 'in lieu of dower' it is competent to her to sell it without necessarily selling her right to receive her dower. Such a transfer conveys to the transferees the right to remain in possession during the widow's lifetime or until the widow's dower or the proportionate part thereof corresponding to the property transferred is satisfied." This is clearly the correct view of the law. I would accordingly set aside the decision of the learned District Judge and would decree this appeal with costs. The plaintiffs' suit will stand dismissed.

DAS, J.—I agree.

R. N.

Appeal accepted.

(1) 6 Ind. Cas. 376; 32 A. 551; 7 A. L. J. 567.

(2) 58 Ind. Cas. 833; 43 A. 127; 18 A. L. J. 969; 2 U. P. L. R. (A.) 329.

LOWER BURMA CHIEF COURT.

SPECIAL SECOND CIVIL APPEAL No. 298 OF 1920.

December 19, 1921.

Present:—Mr. Justice Pratt.

MA ZA AND OTHERS—APPELLANTS

versus

MA MI AND OTHERS—RESPONDENTS.

Lower Burma Land and Revenue Act (II of 1876), s. 56 (a)—Sale in arrears of land revenue—Fraudulent sale—Sale caused by one co-owner—Remaining co-owner's rights, whether lost—Declaratory suit—Jurisdiction of Civil and Revenue Courts.

A sale for arrears of land revenue obtained fraudulently must be considered a private sale, inasmuch as it has the appearance of a sale for arrears of revenue but is, in its essence, a private alienation. [p 638, col. 2.]

Nawab Sidhee Nuzur Ally Khan v *Rajah Ojoodhyaram Khan*, 10 M. I. A 540; 5 W. R. P. C. 84; 1 Suth. P. C. J. 635; 2 Sar. P. C. J. 198 19 E. R. 1076, relied upon.

A co-owner of land cannot be allowed to use the machinery of the Revenue Sale Law to defraud other co-owners, and if he does so the Civil Courts are competent to declare that the result of his conduct is not to place a fraudulent purchaser in a better position than a buyer at a private sale. [p 638, col. 2.]

Where one of the co-owners of land causes it to be sold fraudulently for arrears of land revenue and buys it himself in the name of his son at a nominal price, the remaining co-owners are entitled to have it declared by a Civil Court that they have not lost their rights in consequence of the sale, but that all that has been actually sold is the interest of the defaulting co-owner In such a case the Civil Court is not asked to determine the validity of the revenue sale or to set it aside and, therefore, its jurisdiction to grant the declaration sought for is not ousted. [p. 638, col. 1.]

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Deonandan Prasad v. *Janki Singh*, 39 Ind. Cas. 346; 44 C. 573; 15 A. L. J. 154; 32 M. L. J. 203; 21 C. W. N. 473; 1 P. L. W. 294; (1917) M. W. N. 254; 25 C. L. J. 259; 21 M. L. T. 240; 5 L. W. 526; 19 Bom. L. R. 410; 44 I. A. 80 (P. C.) and *Harendra Lal Roy Chowdhury* v. *Salimullah*, 7 Ind. Cas. 21; 12 C. L. J. 336, referred to.

Second appeal from the decision of the Divisional Judge, Tenasserim, reversing a decree of the Additional Judge of the Sub-Divisional Court, Amherst.

Mr. *Dontra*, for the Appellants.

Mr. *Kyaw Htoon*, for the Respondents.

JUDGMENT.—Plaintiffs were co owners with first defendant of certain undivided ancestral land. They sued for a declaration of co ownership and other relief alleging that the first defendant Ma Za had fraudulently caused the land to be sold for arrears of land revenue and had bought it herself in the name of her son, the second defendant, for the revenue due and costs. The Trial Court dismissed the suit holding that under section 56 (*a*) of the Lower Burma Land and Revenue Act the Civil Court had no jurisdiction. On appeal the Divisional Court relying on the principle enunciated in *Deonandan Prasad* v. *Janki Singh* (1) and *Harendra Lal Roy Chowdhury* v. *Salimullah* (2) held that, as it was not sought to set aside the revenue sale, and the interests of Government were in no way affected, the Civil Courts had jurisdiction to grant the declaration sought.

Under section 56 (*a*) of the Land and Revenue Act read with the preceding section no Civil Court may exercise jurisdiction as to questions as to the validity of a sale under section 47 of the Act. The land in suit was sold under section 47. The sole point for decision, therefore, is whether in view of the provisions of section 56 (*a*) the Civil Court has jurisdiction to grant the declaration sought. In both the cases cited by the Divisional Court the sales, it was sought to impugn, were under the Bengal Land Revenue Sales Act (XI of 1859).

The case of *Deo Nandan Prasad* v. *Janki Singh* (1) is not quite on all fours with the present but is a valuable authority, as it is throughout assumed by their Lordships of the Privy Council that a Civil Court has power to set aside a revenue sale on the ground that it has been obtained by fraud entirely irrespective of the provisions of section 33 of the Land Revenue Sales Act.

The facts in *Harendra Lal Roy Chowdhury* v. *Salimullah* (2) are similar to those of the suit under appeal.

The proprietors of a revenue paying estate deliberately made default in the payment of Government land revenue with the object that the land might be sold free of the interests of the tenure-holders under them and that they might realise the full value of the property undiminished by the incumbrances of the holders of the subordinate interests, and fixed the purchase and the price before the sale took place.

The plaintiff, a tenure holder, endeavoured to prevent the sale by deposit of the arrears of land revenue, but without success.

The tenure-holders appeal to the Commissioner to reverse the sale but were again unsuccessful.

They then filed a suit in Court for a decree to set aside the sale or in the alternative for a declaration that, as the sale had been brought about by a conspiracy between the proprietor and the purchaser the latter had not acquired the rights and privileges of a purchaser at a sale for arrears of revenue.

It was not alleged in the appeal before the High Court that the sale was invalid by reason of any irregularity in its conduct.

The provisions of the Bengal Land Revenue Sales Act regarding the jurisdiction of the Civil Court are not quite identical with section 56 (*a*) of the Lower Burma Land and Revenue Act. Section 33 provides that no sale for arrears of revenue shall be annulled by a Court of Justice, *except on the ground of its having been made contrary to the provision of the Act*, and then only on proof that the plaintiff had sustained substantial injury by reason of the Act and specifies a time within which a suit must be filed.

In the Burma Act there is no provision for annulment by a Civil Court. The wording "no Civil Court shall exercise

(1) 39 Ind. Cas. 346; 44 C. 573; 15 A. L. J. 154; 32 M. L. J. 206; 21 C. W. N. 473; 1 P. L. W. 294; (1917) M. W. N. 254; 25 C. L. J. 259; 21 M. L. T. 240; 5 L. W. 526; 19 Bom. L. R. 410; 44 I. A. 80 (P. C.).

(2) 7 Ind. Cas. 21; 12 C. L. J. 336.

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jurisdiction as to questions as to the validity of a sale," is wider than that of the corresponding section of the Bengal Act.

In the case of *Harendra Lal Roy Chowdhury* v. *Salimullah* (2) a suit to annul the sale would apparently not have lain under section 33 of the Land Revenue Sales Act. The Calcutta High Court nevertheless granted a decree declaring that the purchaser at the revenue sale acquired merely the status of a private purchaser, because the sale had been obtained by fraud. It does not seem to have been suggested that the Court had no jurisdiction to pass such a decree.

The Privy Council decision in *Nawab Sidhee Nuzur Ally Khan* v. *Rajah Oodhyaram Khan* (3) referred to in *Harendra Lal Roy Chowdhury* v. *Salimullah* (2) is to my mind ample authority for the view taken by the learned Divisional Judge in the present appeal.

Their Lordships held that, where a sale under the Revenue Law had been fraudulently obtained, the sale must be considered as a private sale.

Here plaintiff's case was that the first defendant had taken advantage of the provisions of the Revenue Law to have land, of which she was only a part owner, fraudulently sold to her representative at a nominal price.

It is not alleged that the actual conduct of the sale was irregular.

The Court is not asked to determine the validity of the revenue sale or to set it aside.

What it is asked to do is to declare that the co-owners have not lost their rights in consequence of the sale, but that all that has been actually sold is the interest of the defaulting co-owner.

In other words that the purchaser is placed in the same position as a private purchaser.

In view of the authorities to which reference has been made I do not think there is any reason to doubt that a Civil Court has jurisdiction to make such a declaration, where a revenue sale has been obtained by fraud. The sale has the appearance of a sale for arrears of revenue but is, in its essence, a private alienation.

A co-owner of land cannot be allowed to use the machinery of the Revenue Sale Law to defraud other co-owners, and if he does so the Civil Courts are competent to declare that the result of his conduct is not to place a fraudulent purchaser in a better position than a buyer at a private sale.

The appeal will be dismissed with costs.

S. D.

Appeal dismissed.

(3) 10 M. I. A. 540; 5 W. R. P. C. 83; 1 Suth. P. C. J. 635; 2 Sar. P. C. J. 198; 19 E. R. 1076.

LAHORE HIGH COURT.

CIVIL REVISION No 124 OF 1921.

April 20, 1921.

Present:—Sir Shadi Lal, Kt., Chief Justice.

AHMAD JAN—DEFENDANT—PETITIONER

versus

THE SINGER SEWING MACHINE COMPANY OF RAWALPINDI—PLAINTIFF—RESPONDENTS

Contract Act (IX of 1872), s. 108, Excep. 1—Hirer of goods with option of purchase—Option not exercised—Sale—Purchaser, liability of.

Where the hirer of goods with the option of purchasing the same, sells the goods without exercising that option, the purchaser is liable in trover to the owner, and cannot invoke in aid the provisions of Exception (1) to section 108 of the Contract Act even though he acted in perfect good faith.

Greenwood & Co v. *Holquette*, 12 B. L. R. 42; 20 W. R 467, *Singer Manufacturing Company of Lahore* v. *Niaz Ali*, 48 Ind. Cas. 888; 54 P. R. 1919; 144 P. W. R. 1918, *Helby* v. *Matthews*, (1895) A. C. 471 at p. 475; 64 L. J. Q B. 465; 11 R. 232; 72 L. T. 841; 43 W. R. 561; 60 J. P. 20, followed.

Framjee v. *Mcgregor*, 27 P. R. 1902; 81 P. L. R. 1902, distinguished.

Petition, under section 25 of Act IX of 1887, for revision of a decree of the Munsif, First Class, with powers of a Judge, Small Cause Court, Rawalpindi, dated the 29th July 1920.

Mr. *S. A. Razaq*, for the Petitioner.

Mr. *M. Obedulla*, for the Respondents.

JUDGMENT.—One Mrs. Fage hired from the plaintiff a sewing machine with an option to purchase it, but before exercising that option she sold the machine by public auction to the defendant. It is perfectly clear that the defendant cannot invoke the provisions of Exception 1 to section 108 of the Indian Contract Act, and that he is liable in trover to the plaintiff although he acted in perfect good

faith. If any authority on the subject is required, I would refer to *Greenwood & Co.* v. *Holquette* (1) and *Singer Manufacturing Company of Lahore* v. *Niaz Ali* (2). See also *Helby* v. *Matthews* (3). The judgment in *Framjee* v. *Mcgregor* (4) cited on behalf of the defendant is not on all fours with the present case, and the correctness of the rule laid down therein is open to question.

The decree passed by the lower Court in favour of the plaintiff is, therefore, correct, and the fact that Mrs. Fuge has not been impleaded as a defendant does not absolve the petitioner from his liability to the plaintiff. Accordingly I dismiss the application for revision with costs.

W. C. A.

Application dismissed.

(1) 12 B. L. R. 42; 20 W. R. 467.

(2) 46 Ind. Cas. 888; 54 P. R. 1919; 144 P. W. R. 1918.

(3) (1895) A. C. 471 at p. 475; 64 L. J. Q. B. 465; 11 R. 232; 72 L. T. 841; 43 W. R. 561; 60 J. P. 20.

(4) 27 P. R. 1902; 81 P. L. R. 1902.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 39 OF 1919.

July 19, 1921.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Panton.

ABDUL HOSSAIN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

AFSARUDDIN AND OTHERS—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Kabuliyat, *construction of*—*Stipulation making tenant liable for rent in case of encroachments*—*Landlord, whether precluded from suing for ejectment.*

Where a *kabuliyat* contains a clause that if upon a survey made by the landlord it is discovered that the tenant is in possession of an area of land in addition to that comprised in the *kabuliyat*, the tenant shall be liable to pay additional rent, the intention is not that the tenant is at liberty to annex adjoining land of the landlord, and thereby to create a tenancy in his favour in respect of such land even against the wish of the landlord, the object of the clause is to make the tenant liable to pay additional rent for the additional area if the landlord so desires The landlord can still elect to treat him as a trespasser and sue him in ejectment. [p. 640, col.1.]

Letters Patent Appeal against the judgment of Mr. Justice Walmsley, dated the 10th February 1919, in Appeal from Appellate Decree No. 811 of 1917, reported as 50 Ind. Cas. 314, reversing that of the District Judge, Tipperah, dated the 31st March 1917, reversing that of the Munsif, Comilla, dated the 24th July 1916.

Babu *Upendra Kumar Ray*, for the Appellants.

Babus *D. L. Khastgir* and *Biraj Mohan Mojumdar*, for the Respondents.

JUDGMENT.—This is an appeal under clause 15 of the Letters Patent from the judgment of Mr. Justice Walmsley in a suit for ejectment. The disputed land is claimed both by the plaintiffs and the defendants as tenants under the same landlord. On the 10th October 1912, the defendants executed a *kabuliyat* in favour of the landlord in respect of a defined area. On the 12th January 1914 the plaintiffs executed a *kabuliyat* in favour of the same landlord, also in respect of a defined area. The case for the plaintiffs was that the land in dispute was comprised within the boundaries of their tenancy and that the defendants had unlawfully kept them out of possession thereof. The defendants resisted the claim on the ground that the land was comprised within the ambit of their tenancy and that as their tenancy was earlier in point of time the plaintiffs had acquired no valid title thereto. The Court of first instance came to the conclusion that the land was comprised within the tenancy of the defendants and dismissed the suit. Upon appeal the District Judge came to the conclusion that the land was comprised not within the tenancy of the defendants but within the tenancy of the plaintiffs and accordingly decreed the suit. On second appeal to this Court it was contended that by virtue of the terms of the *kabuliyat* of the defendants they had acquired a good title to the disputed land as tenants even though it was situated beyond the ambit of their tenancy. In support of this position reliance was placed upon the following clause in the *kabuliyat*: "If the lands in my possession be surveyed at the instance of the landlord I shall abide by the same and I shall take settlement at the rate then prevailing of all excess lands of whatever kind, found to be in my possession as a result of that Survey, whether lying inside or outside the boundaries mentioned in the *kabuliyat* and shall also pay the rent at the aforesaid rate for the period during which lands in excess of the lands mentioned in the *kabuliyat* have been enjoyed secretly,"

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The contention of the defendants-respondents is that the effect of this clause is to entitle them to encroach upon the adjoining waste of the landlords and thereby to create a tenancy in their own favour in respect of such lands, even against the wish of the landlord. In our opinion, this contention cannot possibly be sustained. It was pointed out by this Court in the case of *Ishan Chandra Mitter* v. *Raja Ramranjan* (1), that if a tenant encroaches upon the adjoining waste of his landlord, the landlord is entitled to treat him either as a trespasser or as a tenant. If the landlord treats him as a trespasser, the landlord is entitled to sue him in ejectment within 12 years from the date when he becomes aware of the encroachment. If the landlord treats him as a tenant, then he becomes liable to pay additional rent. The object of the clause in question was to make the tenant liable to pay additional rent for additional area, should it be discovered upon measurement that he had secretly taken possession of such land as was not comprised within the ambit of his tenancy. The clause did not entitle him to annex the adjoining land and retain possession thereof against the wishes of the landlord. We are unable to hold that anything had happened between the 10th October 1912 and 12th January 1914 which made it impossible for the landlord to grant a tenancy in respect of the disputed land to the plaintiffs.

The result is that this appeal is allowed, the judgment and decree of Mr. Justice Walmsley set aside and those of the District Judge restored. This order will carry costs both here and before Mr. Justice Walmsley.

W. C. A.

Appeal allowed : Suit decreed.

(1) 2 C. L. J. 125.

LOWER BURMA CHIEF COURT.

CIVIL MISCELLANEOUS APPLICATION No. 45 OF 1921.

December 12, 1921.

Present:—Mr. Justice Pratt.

THE COLLECTOR OF RANGOON—APPLICANT

versus

ABDUL RAHMAN SIRCAR BY HIS AGENT ABDUL HAKIM—RESPONDENT.

Stamp Act (II of 1899), s. 35—Document bearing one anna stamp held to be bond—Deficiency in stamp duty Document, whether to be taken as unstamped or insufficiently stamped—Fiscal act—Interpretation.

For revenue purposes a document should not be considered as wholly unstamped, when as a matter of fact it bears a stamp, though of a wrong kind. [p. 641, col. 1.]

So long as the Government has received the value for its stamp, it is immaterial for the purpose of calculating the stamp duty due under the proviso to section 35 of the Stamp Act what is the nature of the stamp that has been used on the document. [p. 641, col. 1.]

The law ought to be interpreted as simply as possible, and when a document is stamped though wrongly and inadequately it is to the ordinary person insufficiently stamped, but not unstamped. [p. 641, col. 2.]

Where a document, intended to be a promissory-note, and bearing a one anna stamp, is held to be a bond, for the purpose of calculating the deficiency in stamp the document should not be considered as wholly unstamped but only as insufficiently stamped. [p 641, cols 1 & 2.]

Reference under Stamp Act, section 50, 15 M. 259; 5 Ind. Dec (N s.) 532 and *Reference under Stamp Act, section* 46, 8 M. 87; 3 Ind. Dec, (N. s.) 61, not followed.

The Government Advocate, for the Applicant.

JUDGMENT.—This is an application under section 61 of the Indian Stamp Act by the Collector of Rangoon to record a declaration that a document stamped with a one anna stamp which was in reality a bond was liable to a duty of Rs. 2-8-0 and a penalty of Rs. 25. The document was intended apparently to be a promissory-note but was attested and not payable to bearer or order.

The Additional Judge of the Small Cause Court rightly held that the document was a bond and impounded it.

The Judge also correctly assessed the duty to which it was liable as Rs. 2-8 0.

Making allowance for the value of the adhesive one anna stamp already on the note the Judge proceeded to levy Rs. 2-7 0 as deficient duty and five times its value as a penalty under section 35.

Under that section as the deficiency multiplied by ten was above Rs. 5 the Judge was bound to levy a penalty of ten times the deficient duty.

The wording of the first proviso to section 35 is "any such instrument not being an instrument chargeable with a duty of one anna or half an anna only, or a bill of

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exchange or a promissory-note, shall, subject to all just exceptions, be admitted in evidence on payment of the duty with which the same is chargeable, or, *in the case of an instrument insufficiently stamped*, of the amount required to make up such duty, together with a penalty of five rupees, or, when ten times the amount of the proper duty or deficient portion thereof exceeds five rupees, of a sum equal to ten times such duty or portion."

The Judge, who levied the penalty, was obviously of opinion that credit must be given for the value of the one anna stamp improperly affixed and that the instrument must be treated as improperly stamped and not one as unstamped.

I am asked by the Government Advocate to hold on the authority of the Madras case reported as *Reference under Stamp Act, section* 50 (1) to hold that in calculating the stamp duty the one anna stamp ought not to be taken into calculation.

The case follows the previous decision of the same Court in "*Reference under Stamp Act, section* 46, (2)." In the former case a promissory note (which, as in this case, was held to be a bond) was written on *hundi* paper with an impressed label of two annas affixed.

A Full Bench of the High Court held that the stamp the document bore was not a stamp which was proper for such an instrument, and that the instrument should have been treated as unstamped.

No reason whatever was given for this decision and I do not feel bound to follow it in a reference under section 61 of the present Act.

I confess I do not see why for revenue purposes a document should be considered to be wholly unstamped, when, as a matter of fact, it bears a stamp, merely because that stamp happens to be of the wrong kind.

The proviso to section 35 already quoted makes allowance for the value of the stamp in the case of insufficiently stamped documents.

So long as the Government has received the value for its stamp, it is to my mind immaterial for the purpose of calculating the stamp duty due under the proviso what is the nature of the stamp that has been used on the document.

From a common sense point of view a duty of one anna has been paid, and the total stamp duty leviable being Rs. 2-8-0, there is a deficiency of Rs. 2-7-0.

The law ought to be interpreted as simply as possible, and when a document is stamped, though wrongly and inadequately, it is to the ordinary person insufficiently stamped, but not unstamped.

The amount at issue is not large but in view of the wording of section 35 proviso (*a*) I am not prepared to record a declaration that the whole duty of Rs. 2-8-0 and penalty of ten times that amount must be levied, when the document bears a one anna stamp and there is no reason to suppose it was not stamped *bona fide* under the belief that it was a promissory-note

I declare that the document in question ought not to have been admitted in evidence without the payment of a penalty of Rs. 24-6-0.

A copy of this declaration together with the instrument impounded will be sent to the Collector under section 61 (3).

S. P.

Order accordingly.

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 136 OF 1921.

May 5, 1922.

Present :—Mr. Justice Piggott and Mr. Justice Walsh.

KANDHAIA SINGH—DEFENDANT—APPELLANT

versus

Musammat KUNDAN—PLAINTIFF—RESPONDENT.

Revision—Order granting leave to sue as pauper.

An order admitting an application for leave to sue *in forma pauperis* in not open to revision.

Civil revision from an order of the Subordinate Judge, Benares.

(1) 15 M. 259; 5 Ind. Dec. (N. S.) 532.
(2) 8 M. 87; 3 Ind. Dec. (N. S.) 61.

KHUBI MAHTON v. LACHMI DAS.

Mr. *Durga Charan Banerji*, for the Applicant.

Mr. *Kailas Nath Katju*, for the Opposite Party.

JUDGMENT.—We are agreed that no application in revision lies against an order admitting an application for leave to sue *in forma pauperis*.

We dismiss this application with costs.

W. C. A.

Application dismissed.

PATNA HIGH COURT.
FULL BENCH.

SECOND CIVIL APPEALS NOS. 433 TO 437 AND 509 OF 1919.

June 19, 1922.

Present:—Sir Dawson Miller, Kt., Chief Justice, Justice Sir B. K. Mullick, Kt., and Justice Sir Jwala Prasad, Kt.

KHUBI MAHTON AND ANOTHER—APPELLANTS IN No. 433.

SOUKHI MAHTON AND ANOTHER—APPELLANTS IN No. 434.

Lala SHAM LAL AND OTHERS—APPELLANTS IN No. 435.

Musammat DEBATI KUMRI AND ANOTHER—APPELLANTS IN No. 436.

Musammat BOHARI AND OTHERS—APPELLANTS IN No. 437.

SHAH FARZAND—APPELLANT IN No. 509

versus

Mohanth LACHMI DAS AND OTHERS

AND

BHADAI SAO AND OTHERS—RESPONDENTS IN No. 433

AND

Mahanth LACHMI DAS AND OTHERS

AND

Musammat BIBI ANIZ BANO AND OTHERS—RESPONDENTS IN NOS. 434, 435 436, 437 AND 509.

Bengal Alluvion and Diluvion Regulation (XI of 1825), s. 4, interpretation and application of—River-bed property of, landlord—Accretion—Landlord and tenant, rights of.

Held, by the Full Bench :—Clause 1 of section 4 of Bengal Regulation XI of 1825 applies whether the river, out of the bed of which accretions have been formed, is the private property of an individual or the property of the Crown.

Per *Dawson Miller, C. J.*—The section applies in all cases where the tenant claims, as an increment to his tenure, lands gained by gradual accession from the recess of the river, the property of his landlord, and, except in the case of a claim by the superior landlord, the section is not confined to lands which are the property of the State. [p. 647, col. 2.]

Clause 1 of section 4 applies both to the case of a superior landlord, who holds from the Crown, and to the case of the holder of a subordinate estate or tenure holding from a landlord intermediate between himself and the Crown, and to be limited in each case to accretions from the lands of the person from whom he holds and to whom revenue in the one case and rent in the other is payable. In the case of a superior landlord the person from whom he holds is the Crown and no one else. In such a case it is only where the Crown is the proprietor of the accreted lands that the section comes into operation. To permit a landlord to acquire in this manner a proprietary right in the land of his neighbour, with whom he has no relationship such as that of a tenant to his landlord, would be going outside the scope and intention of the section and permitting what, in effect, would be confiscation of another man's land. This consideration, however, does not apply where the claim is by a tenant against the land of his landlord, a claim which by the proviso to the first clause of the section is limited to a right of property similar to that possessed by the tenant in the tenure to which the land may become annexed, and which, by the same proviso, carries with it the liability to pay an increase of rent. [p. 646, cols. 1 & 2.]

Per *Mullick, J.*—The Regulation does not provide for islands in a large and navigable river the bed of which is the property of an individual or those in a small and shallow river the bed of which is not the property of an individual. [p. 648, col. 1.]

As for proprietary rights in accretions, clause 4 read with clause 1 provides for a small and shallow river the bed of which belongs to an individual and clause 1 for a large and navigable river the bed of which does not belong to an individual. There is no provision for a large and navigable river of which the bed is private property. [p. 648, cols. 1 & 2.]

With regard to the rights of tenure-holders and *raiyats*, clause 1 deals with rivers of all classes and is subject to no words of limitation or restriction. Therefore, an accretion thrown up along the frontage of a *raiyati* holding on the bank of any river the bed of which belongs to his landlord would be an increase to the holding and would be held as such [p. 648, col. 2.]

The Regulation is not exhaustive. It is subject to the rules of equity and justice. [p. 648, col. 2.]

In India the presumption is that the bed of a large and navigable river belongs to Government, which occupies here a position which is funda-

mentally different to that which it occupies in England. Here Government is the owner of the soil of the country and has all the rights of a proprietor. The bed of a navigable river is not the public domain in the same full sense as in a country where all land which is not private property vests in the public and is held by Government as a mere trustee. If in these circumstances it is not inequitable to give the adjacent proprietor and *raiyat* land which has accreted out of the river-bed and is the property of another, why should it be inequitable to give a *raiyat* an interest in a river-bed belonging to his landlord which has accreted to his holding and for which he will pay rent. In both class of rivers the proprietor will pay Government revenue for the accretion, and compensate himself by taking rent from his tenants. There is no question of any confiscation or taking away. [p 649, col. 2]

The ordinary rule of conveyancing is that a grant or lease of land abutting on a river by a person who is in a position to part with the soil is presumed to pass half the adjacent bed of the river, without any reference to the instrument of grant; even where there is no grant the lessee or tenant is entitled to claim the benefit of the presumption. In the absence of contract or proof of a re-formation *in situ*, an occupancy *raiyat* in India would also be entitled to claim the benefit of this presumption. [p. 649, col. 1; p. 650, col. 1.]

Per *Jwala Prasad, J.*—Clause 1 of section 4 is a general one and applies to all kinds of rivers, and lays down the principle upon which the rights to the lands thus gained should be determined. [p. 650, col. 2.]

Though the primary object of the Regulation was to provide rules for determining disputes between the riparian proprietors, yet it has, as a matter of fact, dealt with the rights not only of proprietors but also of subordinate tenures. In fact, the Regulation seems to deal with disputes of all kinds, as is expressly declared by clause fifth of section 4. It applies not only to disputes between the riparian proprietors but also to cases where no riparian proprietor is concerned and the dispute is between the proprietor and his tenant on the same side of the river. [p. 651, col. 2.]

Lopez v. *Muddun Mohun Thakoor*, 13 M. I. A. 467; 14 W. R. P. C. 11; 5 B. L. R. 521; 2 Suth. P. C. J. 336; 2 Sar. P. C. J. 594; 20 E. R. 625, *Brahmanand Singh* v. *Dund Bahadur Singh*, 56 Ind. Cas. 344; 1 P. L. T. 229; (1920) Pat. 245; 2 U. P. L. R. (Pat.) 111 and *Puri Dass* v. *Kanhu Behera*, 38 Ind. Cas. 135; 1 P. L. J. 536, explained.

Ramanath Thakoor v. *Chundernarain Chowdhry*, 14 W R. P. C. 12, *Mohini Mohun Dose* v. *Juggobundoo Bose*, 9 W. R. 312, *Dwarkanath Roy Chowdhry* v. *Dinobundhoo Singh*, 15 W. R. 461, *Jugdish Chunder Biswas* v. *Chowdhry Zuhoor-ul-Huq*, 24 W. R. 317, *Attimoollah* v. *Shaikh Saheboollah*, 15 W. R. 149, *Bhuggobut Pershad Singh* v. *Doorg Bijoy Singh*, 16 W. R 95; 8 B. L. R. 73, *Gourhari Kaiburto* v. *Bhola Kaiburto*, 21 C. 233; 10 Ind. Dec. (N. S.) 787 (F. B.), *Mahadeo Pershad* v. *Mathura Tanti*, 5 Ind. Cas. 723; 11 C. L. J. 148, *Gobinda Hota* v. *Kristapada Singha Babu*, 45 Ind. Cas. 929, discussed.

Srinath Roy v. *Dinabandhu Sen*, 25 Ind. Cas. 467 42 C. 489; 18 C. W. N. 1217; (1914) M. W. N. 654, 1 L. W. 733; 16 M. L. T. 319; 12 A. L. J. 1193; 20 C. L. J. 385; 16 Bom. L. R. 90; 41 I. A 221 (P C.), *Lachmi Narayan Lal* v. *Maharaja Kesho Prasad Singh*, 52 Ind. Cas. 147; 5 P. L. J. 1; (1920) Pat. 10, *Attorney General* v. *Chambers*, (1859) 4 De G. & J. 55 at p. 71; 5 Jur. (N. S) 745; 7 W. R. 404; 124 R. R. 149; 45 E. R. 22, *Foster* v. *Wright*, (1878) 4 C. P. D. 438; 49 L J. C. P. 97; 44 J. P. 7, *Thakurain Ritraj Koer* v. *Thakurain Sarfaraz Koer*, 2 C. L J. 185; 9 C. W. N. 889; 27 A. 655; 2 A. L. J. 623; 8 O. C. 293; 7 Bom. L. R. 872; 15 M. L. J. 349; 32 I. A 165; 8 Sar. P. C. J. 873 (P. C.), *Dataram Nath* v. *Eshun Chunder Law*, 11 W. R. 116, *Bhageerattee Dabea* v *Greesh Chunder Chowdhry*, 2 Hay 541; *Sheogoolam Teewaree* v. *Faqeera Misser*, 8 Agra H. C. Rep. 400, *Nogender Chunder Ghose* v. *Mahomed Esoff*, 18 W. R. 113; 10 B. L. R. 406; 3 Sar. P. C. J. 151 (P. C.), referred to.

Appeal against the decision of the Sub-Judge, First Court, Monghyr, dated the 29th January 1919, confirming that of the First Munsif, Begusarai, dated the 13th May 1918.

FACTS appear from the following Order of Reference made by Mr. Justice Jwala Prasad and Mr. Justice Das on the 22nd March 1922.

DAS, J.—The plaintiffs, who are the respondents before us, are the landlords and the defendants the tenants. The suits out of which these appeals arise were suits for recovery of possession of certain lands. These lands formed the bed of the river Gandak and came out of the water only recently. The plaintiffs' case is, that the lands which are the subject-matter of the dispute belong to them and that, though they could not exercise any proprietary title over them while they were covered with water, they are now entitled to them as the water has receded. The defendants did not dispute the proprietary title of the plaintiffs, but they based their claim upon section 4 of Regulation XI of 1825. Their case is that they are entitled to hold these lands as an accession to their holdings.

The lower Appellate Court pointed out that the defendants did not dispute the case of the plaintiffs that the bed of the river belonged to them and, being of opinion that the lands were not formed by slow and gradual accretion of the river within the meaning of clause 1, section 4, of Regulation XI of 1825, decreed the plaintiffs' claim. On appeal to this Court, it was argued that the lower Appellate Court was under the impression that, in order to bring a case with-

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in clause 1 of section 4 of the Regulation, it was necessary to establish that the accretion was imperceptible, and that, as that view can no longer be maintained in view of the decision of the Judicial Committee in the case of *Srinath Roy* v. *Dinabandhu Sen* (1), the decree passed by the lower Appellate Court could not be sustained. We acceded to the argument urged on behalf of the appellants and we remanded the case to the lower Appellate Court to return its finding to this Court on the issue, "Have the lands in suit been gained to the holdings of the defendants by gradual accession from the recess of the river Gandak as contemplated by Regulation XI of 1825?" The lower Appellate Court has answered the question in the affirmative. On the finding arrived at by the lower Appellate Court which, it may be pointed out, is a finding of fact and, therefore, binding on us in second appeal, the appellants are entitled to succeed.

It was, however, argued by Mr. Hasan Imam that, it being admitted that the bed of the river belongs to the respondents there is in fact no case to be tried under clause 1, section 4 of the Regulation. He relies upon the decision of the Judicial Committee in *Lopez* v. *Muddun Mohun Thakoor* (2) and on the decision of the this Court in *Brahmanand Singh* v. *Dund Bahadur Singh* (3). The appellants, on the other hand, rely upon the decision of this Court in *Puri Dass* v *Kanhu Behera* (4). There is clearly a conflict between the decisions of this Court. It was laid down in *Puri Dass* v. *Kanhu Behera* (4) that section 4 of the Regulation was not limited in its application to a river the bed of which is the property of the Crown. That was a case where the plaintiffs claimed to be in possession of the land in dispute as an accretion to their *raiyati* holdings. The landlords who were the defendants maintained that the river out of the bed of which the accretions were alleged to have formed being their private property, section 4 of the Regulation did not apply. Their argument was, that section 4 of the Regulation applied only to a case where the bed of the river was the property of the Crown. The learned Judges took the view that there was no authority in support of the contention put forward on behalf of the landlord and they came to the conclusion that, notwithstanding the fact that the bed of the river was the property of the landlord, the tenants could still claim title to the lands which formed the bed of the river as an accretion to their *raiyati* holdings. This view was not accepted in *Brahmanand Singh* v. *Dund Bahadur Singh* (3). It was pointed out in the latter case that the decision of the Judicial Committee in *Lopez's case* (2) was an authority for the proposition that section 4, clause (1) of the Regulation applied to cases of gradual accession from public domain or territory, *e. g.*, river or sea belonging to the State, and did not refer to land confiscated from another's private property, and that section 4 had no application where the accreted land in dispute was shown to have re-formed on its identifiable site. It was, however, not necessary to decide the exact point in *Brahmanand Singh* v. *Dund Bahadur Singh* (3). I was a party to the decision in *Brahmanand Singh* v. *Dund Bahadur Singh* (3) and I adhere to the view which I expressed in the case. There being a clear conflict between the two decisions to which I have referred, it seems to me that the matter must be referred to the Full Bench for its decision. The point which I desire to refer to the Full Bench is this; Does clause 1, section 4 of Regulation XI of 1825 apply to a case where the river out of the bed of which the accretions have formed is the private property of an individual and not the property of the Crown?

JWALA PRASAD, J.—I agree.

Messrs. *S. Ahmad* and *S. M. Tahir*, for the Appellants.

Messrs. *H. Imam* and *O. C. Das*, for the Respondents.

JUDGMENT OF THE FULL BENCH.

MILLER, C. J.—The only question for determination in these appeals is, whether the appellants, who are the tenants of *raiyati* holdings abutting on the river Gandak, are entitled to possession, as an increment to their holdings, of certain lands adjacent

(1) 25 Ind. Cas 467; 42 C. 489; 18 C. W. N. 1217; (1914) M. W. N. 654; 1 L. W. 733; 16 M. L. T. 319; 12 A. L. J. 1193; 20 C. L. J. 385; 16 Bom. L. R. 901; 41 I. A. 221 (P. C.).

(2) 13 M. I. A. 467; 14 W. R. P. C. 11; 5 B. L. R. 521; 2 Suth. P. C. J. 326; 2 Sar. P. C. J. 594; 20 E. R. 625.

(3) 56 Ind. Cas 344; 1 P. L. T. 229; (1920) Pat. 245; 2 U. P. L. R. (Pat.) 111.

(4) 83 Ind. Cas. 185; 1 P. L. J. 556.

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thereto, which have been gained by gradual accession from the bed of the river, or whether the respondents, their landlords, who have the proprietary interest in the bed of the river as well as in the appellants' holdings, are entitled to *khas* possession.

The determination of the question must depend upon the construction to be placed upon the first clause of section 4 of Bengal Regulation XI of 1825, known as the Bengal Alluvion and Diluvion Regulation. It is the appellants' case that the Regulation entitles them to a *raiyati* interest in the lands of their landlords, acquired in the manner stated upon payment of additional rent. The respondents, on the other hand, contend that the Regulation has no application except in cases where the bed of the river out of which the lands have emerged is the property of the State.

The first clause of section 4 of the Regulation reads as follows:—

"4. *First.* When land may be gained by gradual accession, whether from the recess of the river or of the sea, it shall be considered an increment to the tenure of the person to whose land or estate it is thus annexed, whether such land or estate be held immediately from Government by a Zamindar or other superior land-holder or as a subordinate tenure by any description of under-tenant whatever."

There is a proviso to the clause to the effect that the interest so acquired in the accreted land shall not be greater than that held by the person in possession of the estate or tenure to which it may become annexed, and that the holder shall not be exempt in respect of the accreted land from assessment of revenue payable to Government, nor, in the case of a subordinate tenure under a superior landlord, shall the under-tenant of whatever description be exempt from payment of any increase of rent to which he may be justly liable.

The suits out of which the appeals arise were instituted by the respondents, as landlords, claiming to recover possession from their tenants of the lands in question. The tenants relied upon the Regulation and claimed to retain possession, subject to the payment of an additional rent.

The Munsif before whom the suits were tried passed a decree in favour of the landlords on the ground that there had been no gradual accession within the meaning of the Regulation. He was of opinion that to bring it within the section the accession must be by gradual, slow and imperceptible means, and, further, that to permit the tenants to acquire an interest in the lands of their landlords would be destructive of the rights of private property and contrary to the decision of the Judicial Committee in *Lopez* v. *Muddun Mohun Thakoor* (2).

On appeal to the Subordinate Judge the Munsif's decision was affirmed and the appeal dismissed.

On second appeal to this Court the learned Judges before whom it was heard held that the view that the accretion should be imperceptible in order to bring it within the Regulation could no longer be maintained in face of the decision of the Judicial Committee in *Srinath Roy* v. *Dinabandhu Sen* (1), a ruling which has been followed by this Court in *Lachmi Narayan Lal* v. *Maharaja Kesho Prasad Singh* (5). They accordingly remanded the case to the lower Appellate Court, with certain directions as to the principle to be applied, for a finding on the issue, "Have the lands in suit been gained to the holdings of the defendants by gradual accession from the recess of the river Gandak as contemplated by Regulation XI of 1825". That issue was answered by the lower Appellate Court in the affirmative and when the case came back to this Court for final disposal the only question which remained for decision in the appeal was that which I have stated at the beginning of this judgment. The learned Judges who heard the appeal considered that there was a conflict of opinion on the point in the decisions of this Court in *Puri Dass* v. *Kanhu Behera* (4) and the more recent case of *Brahmanand Singh* v. *Dund Bahadur Singh* (3).

In my opinion both those cases were rightly decided. In the former the dispute was between *raiyats*, who claimed the land as an accretion to their holdings, and the transferees of their landlords in whom the bed of the river was vested, and it was

(5) 52 Ind. Cas. 147; 5 P. L. J. 1; (1920) Pat. 102.

held that, in such a case, section 4 clause first of the Regulation was not limited in its application to a river the bed of which is the property of the Crown. In the latter case the dispute was between neighbouring proprietors. The lands which originally belonged to the plaintiffs had become diluviated, and had, subsequently, by a further change in the river's course, re-formed *in situ* on the boundary of the defendants' land. It was there held, following the decision in *Lopez's case* (2), that the defendants could acquire no interest under the Regulation to lands belonging to a private individual and not to the Crown. There are, however, certain observations in the judgment of Mr. Justice Das in that case which might lead to the inference that in no case could the section have any application unless the bed of the river was Crown property. The proposition thus broadly stated was not necessary for the determination of the question then before the Court. The dispute there was not between a landlord and his tenant as in the earlier case of *Furi Dass* v. *Kanhu Behera* (4), and as here, but between neighbouring proprietors, one of whom claimed the accreted land as an increment to his Zemindary although the proprietary rights in the bed of the river from which the land emerged belong to the other. The facts in that case were similar to those in *Lopez* v. *Muddun Mohun Thakoor* (2) and the principle laid down in *Lopez's case* (2) applied with equal force to the facts in that case. In both cases the dispute was between neighbouring proprietors neither of whom held his interest through or under the other, and in both cases it was found that the ownership of the accreted lands had all along been, not in the party to whose land the accretions had become attached, nor in the Crown from whom he held, but in the other proprietor.

On a perusal of the first clause of the fourth section of the Regulation it appears to me to apply clearly both to the case of a superior landlord who holds from the Crown, and to the case of the holder of a subordinate estate or tenure holding from a landlord intermediate between himself and the Crown, and to be limited in each case to accretions from the lands of the person from whom he holds and to whom revenue in the one case and rent in the other is payable. In the case of a superior landlord the person from whom he holds is the Crown and no one else. In such a case it is only where the Crown is the proprietor of the accreted lands that the section comes into operation. To hold otherwise, and permit a landlord to acquire in this manner a proprietary right in the land of his neighbour, with whom he has no relationship such as that of a tenant to his landlord, would be going outside the scope and intention of the section and permitting what, in effect, would be confiscation of another man's land. This consideration, however, does not apply where the claim is by a tenant against the land of his landlord, a claim which by the proviso to the first clause of the section is limited to a right of property similar to that possessed by the tenant in the tenure to which the land may become annexed, and which, by the same proviso, carries with it the liability to pay an increase of rent. In *Lopez* v. *Muddun Mohun Thakoor* (2), as already indicated, the claim was by a superior landlord holding immediately under the Crown and claiming as an increment to his estate a portion of the former bed of the river which belonged not to the Government from whom he held, but to a neighbouring Zemindar from whom he held nothing. We, therefore, find in the judgment in that case an emphatic repudiation of the suggestion that the Regulation authorised the confiscation or destruction of any private person's property, and a declaration that the gain which an individual proprietor might acquire under the Regulation could only occur in "that which was part of the public territory, the public domain not useable in the ordinary sense, that is to say, the sea belonging to the State, a public river belonging to the State." It must be borne in mind that in thus limiting the operation of the Regulation their Lordships were considering only the claim of a superior landlord to the lands of his neighbour through whom his title was not derived, and not the case of a subordinate tenure-holder claiming against his immediate landlord.

It is contended, however, on behalf of the respondents that the interpretation placed upon the Regulation in *Lopez's case* (2) clearly lays down the broad proposition that it applies only to the sea or public rivers belonging to the State. I agree that this is so in cases where the claimant is a superior landlord holding under the Crown, but I cannot believe that it was the intention of their

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Lordships in that case to lay down a broad general proposition applying to a state of affairs which was not then under consideration, nor can I find anything in the section itself which would limit the rights of subordinate tenure-holders, or under-tenants, to cases in which the accreted lands formed part of the public domain. Other cases were referred to on behalf of the respondents in support of their contention, and in which language similar to that used in *Lopez's case* (2) appears, and where it is stated that the right by accretion is limited to gains from that which was not previously private property. See *Ramanath Thakoor* v. *Chundernarain Chowdhry* (6), *Mohini Mohun Doss* v. *Juggobundoo Bose* (7), *Dwarkanath Roy Chowdhry* v. *Dinobundhoo Singh* (8), *Jugdish Chunder Biswas* v. *Chowdhry Zuhoor-ul-Huq* (9). It is sufficient to say that in each of those cases the dispute was between rival proprietors and in none of them was the right of a tenant against his landlord under consideration.

On the other hand, in *Attimoollah* v. *Shaikh Sabeboollah* (10) it was held that a *mourusee jotedar*, with a right of occupancy has a right to lands which accrete to his *jote* and the Zamindar cannot take them away and settle them with other parties. In *Bhuggobut Pershad Singh* v. *Doorg Bijoy Singh* (11) it was held that as between himself and the Zamindar a *raiyat* is entitled to any accretion to his holding formed by the recession of the river, and the fact of his being a mere tenant-at-will does not entitle the Zamindar to turn him out of the accretion whilst he retains, as tenant, the original holding. In *Gourhari Kaiburto* v. *Bhola Kaiburto* (12) decided in 1894, by a Full Bench of the Calcutta High Court, it was also held that a *raiyat* who had a right of occupancy was entitled to the benefit of section 4, clause (1) of the Regulation as against the defendant who claimed to be in possession by virtue of a settlement from the landlord; and in *Mahadeo Pershad* v. *Mathura Tanti* (13), decided in 1909, it was again held that the fourth section of the Regulation applied in favour of a tenant against his landlord. In none of those cases does it appear that the ownership in the bed of the river was in the Crown. Certainly, no argument was urged in any of them based upon a distinction between public and private rivers. Finally, in 1918 in *Gobinda Bota* v. *Kristapada Singha Babu* (14) it was held by a Bench of the Calcutta High Court that the lands which have gradually accreted to a *mukarari* holding forming a *chur* in a small shallow river cannot be claimed by a Zamindar, the proprietor of the bed of the river, as a portion of his *khas patti* but belong to the tenant subject to the payment of additional rent in respect thereof. The proprietary right to the *chur* no doubt existed, and by clause (4) of the section continued in the Zamindar but the tenant's right also accrued under the first clause of the section to which the fourth clause is subject.

It is contended by the learned Counsel for the respondents that where the superior landlord acquires by gradual accession a proprietary interest, as against the Government, in a portion of the bed of the river as an increment to his estate, his tenant, to whose tenure or holding the land is annexed, also acquires, as against his landlord, the same interest in the accreted lands as he possessed in his tenure or holding. The landlord acquires against the Crown; the tenant acquires against his landlord and the under-tenant, if there be one, also acquires against the intermediate proprietor from whom he holds. If there is no confiscation by the tenant of his landlord's property in such a case, it is difficult to appreciate how there can be confiscation or destruction of his property merely because at some earlier period the landlord had acquired from the Crown a proprietary interest in the river bed from which the land subsequently emerged.

In my opinion the section applies in all cases where the tenant claims, as an increment to his tenure, lands gained by gradual accession from the recess of the river the property of his landlord, and, except in the case of a claim by the superior landlord, the section is not confined to lands which are the property of

(6) 14 W. R. P. C. 12.
(7) 9 W. R. 312.
(8) 15 W. R. 461.
(9) 24 W. R. 317.
(10) 15 W. R. 149.
(11) 16 W. R. 95; 8 B. L. R. 73.
(12) 21 C. 238; 10 Ind. Dec. (N. S.) 787.
(13) 5 Ind. Cas. 728; 11 C. L. J. 148.

(14) 45 Ind. Cas. 929.

the State. I would allow the appeals in each case with costs to the appellants here and in the Courts below.

MULLICK, J.—In my opinion the appellants are entitled to hold the lands in suit as accretions to their ancient occupancy holdings and I am still of opinion that the case of *Puri Dass* v. *Kanhu Behera* (4) was correctly decided. Indeed, nothing was decided in that case which could possibly have affected the decision in *Brahmanand Singh* v. *Dund Bahadur Singh* (3), and I have been unable to discover why it was at all cited, for in this latter case, the contest was between two rival proprietors and the judgment proceeded on the ground of re-formation *in situ*, though, if the river was small and shallow, the same result might have been arrived at by an application of clause (4), section 4 of Regulation XI of 1825.

But in the present case the question of the correctness of the decision in *Puri Dass' case* (4) does arise directly and it is necessary to determine whether clause (1) of section 4 enables an occupancy *raiyat* to claim a *raiyati* interest in an accretion formed out of a river-bed which is the property of his landlord.

Now, the law of increments gained by the formation of islands is contained in clause (3) of section 4 as regards a large and navigable river the bed of which is not the property of an individual and in clause (4) as regards a small and shallow river (as distinguished from a large and navigable river) the bed of which is the property of an individual.

It will be observed that the Regulation does not provide for islands in a large and navigable river the bed of which is the property of an individual or those in a small and shallow river the bed of which is not the property of an individual.

It will also be observed that while clauses (3) and (4) determine the right of proprietorship, they are subject to the provisions of clause (1) in respect of the assessment of revenue and the rights of tenants.

As for proprietary rights in accretions, clause (4), read with clause 1, provides for a small and shallow river the bed of which belongs to an individual and clause 1 for a large and navigable river the bed of which does not belong to an individual. There is no provision for a large and navigable river of which the bed is private property.

With regard to the rights of tenure-holders and *raiyats*, clause (1) deals with rivers of all classes and is subject to no words of limitation or restriction. Therefore, in my view, an accretion thrown up along the frontage of a *raiyati* holding on the bank of any river the bed of which belongs to his landlord would be an increase to the holding and would be held as such. Under the concluding proviso of clause (1) of the Regulation as originally enacted the *raiyat* was liable to pay increased rent but since its repeal that liability has been re-imposed by section 52 of the Bagal Tenancy Act.

It is necessary to add that the Regulation is not exhaustive. It is subject to the rules of equity and justice. Therefore, land gained from the river-bed by re-formation *in situ* or otherwise will, if it can be identified, belong to the owner of the bed, except when otherwise expressly prescribed by the Regulation. This rule will preclude a tenant from acquiring a right of tenancy in an accretion from a river-bed which was not the property of his landlord before emergence.

In the present case it is not known whether the land is re-formation of land which was formely in the direct possession of the landlord. All that is known is that the bed was the property of the landlord before it emerged, and the question is whether the appellants can claim a right of tenancy in the accretions either under clause 1 or under some general principle of equity and good conscience.

Now, the main argument against the appellants is that there are certain observations in *Lopez* v. *Muddun Mohun Thakoor* (2) which indicate that in the opinion of their Lordships of the Privy Council clause (1) of section 4 of Regulation XI of 1825 applies to rivers the beds of which are the public domain and to no other.

I am altogether unable to accept this argument. Their Lordships in that case were dealing with a dispute between two rival proprietors of estates, one claiming

a sand bank as an accretion to his permanently settled estate and the other as a re-formation *in situ*; there was no question of the rights of the *raiyats*; the river was the Ganges; and it is clear that the observations of their Lordships were intended to apply only to the special facts before them. The judgment pointed out with emphasis that the Statute was subject to the general principles of alluvion and diluvion and it settled the law in one important point, upon which there was at that time great conflict of opinion, by ruling that Regulation XI of 1825 could not be used to confiscate the land of another who could show by means of signs or boundaries that it was the re-formation of his land. And although, in observing that there were no judicial decisions determining what would be the rule in England if there were existing certain means of identifying the original boundaries of the property, their Lordships seem to have overlooked the decision of Lord Chelmsford, L. C., in *Attorney-General* v. *Chambers* (15) which had been passed 11 years earlier, it seems to me that their Lordships assumed that the law of accretion was the same then in India as in England. The decision in *Foster* v. *Wright* (16) did not come till 1878 and though it dissented from *Attorney-General* v. *Chambers* (15) and rejected the doctrine of re-formation *in situ*, subsequent decisions seem to show a tendency to support the earlier view.

But whatever may be the position in England at the present day, it seems to me that in 1870 their Lordships intended to hold that the law was the same in both countries and if that was so it follows that their observations were applicable to every class of river. Their Lordships made no reservations or restrictions in respect of rivers the beds of which were not the public domain and they, in my opinion, accepted the undisputed proposition that the law of accretion in England was the same for all rivers, namely, the tidal and the non-tidal, and the navigable and the non-navigable. The judgment of the Privy Council in *Thakurain Ritraj Koer* v. *Thakurain Sarfaraz Koer* (17) and of the Calcutta High Court in *Dataram Nath* v. *Eshan Chunder Law* (18) seem to show that no difference has been effected in this respect by the Statute Law of India.

I do not think, therefore, that in this case *Lopez* v. *Muddun Mohun Thakoor* (2) is an authority which assists the proprietor.

Moreover, on general principles, that is to say, the principles of equity and justice, assuming that clause 1 of Regulation XI does not apply to the case, I think the appellants are entitled to a decree. In India the presumption is that the bed of a large and navigable river belongs to Government, which occupies here a position which is fundamentally different to that which it occupies in England. Here, Government is the owner of the soil of the country and has all the rights of a proprietor. The bed of a navigable river is not the public domain in the same full sense as in a country where all land which is not private property vests in the public and is held by Government as a mere trustee. If, in these circumstances, it is not inequitable to give the adjacent proprietor and *raiyat* land which has accreted out of the river-bed and is the property of another, why should it be inequitable to give a *raiyat* an interest in a river-bed belonging to his landlord which has accreted to his holding and for which he will pay rent. In both class of rivers the proprietor will pay Government revenue for the accretion, and compensate himself by taking rent from his tenants. There is no question of any confiscation or taking away.

There is another rule also which applies to this case and which I think is based on equity and justice. The ordinary rule of conveyancing is, that a grant or lease of land abutting on a river by a person who is in a position to part with the soil is presumed to pass half the adjacent bed of the river without any reference to the instrument of grant; even where there is

(15) (1859) 4 De G. & J. 55 at p. 71; 5 Jur. (N.S.) 745; 7 W. R. 404; 124 R. R. 149; 45 E. R. 22.

(16) (1878) 4 C. P. D. 438; 49 L. J. C. P. 97; 44 J. P. 7.

(17) 2 C. L. J. 185; 9 C. W. N. 889; 27 A. 655; 2 A. L. J. 622; 8 O. C. 293; 7 Bom. L. R. 872; 15 M. L. J. 443; 33 I. A. 165; 8 Sar. P. C. J. 873 (P. C.).

(18) 11 W. R. 116.

no grant the lessee or tenant is entitled to claim the benefit of the presumptions. I take it that, in the absence of contract or proof of a re formation *in situ*, an occupancy *raiyat* in India would also be entitled to claim the benefit of this presumption. Therefore, in this case the *raiyats* would be entitled to claim the accretions at least up to the limit of the middle line.

But as, in my opinion, clause 1 of section 4 of the Regulation is applicable, they will be entitled to the whole of the accretion up to the opposite bank of the river, as the whole river-bed which has been marked as plot No. 759 in the Cadastral Survey map has been entered as the property of the landlord.

It remains to observe that, in addition to the authorities cited in *Furi Dass case* (4), we have had the advantage of referring to *Gobinda Hota* v. *Kristapada Singha Babu* (14). Their Lordships of the Calcutta High Court in unmistakable terms disagreed with the view expressed in a previous decision of that Court and held that in a small and shallow river the landlord was entitled to the benefit of clause (1), section 4, of Regulation XI of 1825.

In the present case it has not been clearly found whether the river is small or shallow, or large and navigable. But in my opinion in either case the appellants are entitled to claim the lands as accretions to their occupancy holdings.

I agree, therefore, that the appeals should be decreed with costs.

JWALA PRASAD, J.—I agree with the judgment delivered by my Lord the Chief Justice. The question involved in this case is not free from difficulty. The Court below has held that the 'lands in suit have been gained to the holding of the defendants by gradual accretion from the recess of river Gandak as contemplated by Regulation XI af 1825". The plaintiffs are the proprietors of the defendants' holdings. They are also the proprietors of the bed of the river and consequently of the lands in dispute which have gradually come out of the river in front of the defendants' holdings by gradual recess of the river and have become fit for cultivation. If Gandak was a small and shallow river, as contemplated by clause (4) of section 4 of Regulation XI of 1825, the bed of which belongs to the plaintiffs, the lands in question would belong to the plaintiffs as proprietors thereof "subject to the provisions stated in the first clause" of the present section (section 4). In *Gobinda Hota* v. *Kristapada Singha Babu* (14), their Lordships of the Calcutta High Court interpreted the words in clause (4), quoted above within inverted commas, as preserving the rights of the tenant to whose holding the lands were gained by gradual accretion from the recess of the river. Their Lordships held that, although the proprietor of the bed of the river will continue to be the proprietor of lands thus gained from the recess of the river, those lands shall be considered "an increment to the tenure of the tenant" he being liable to pay additional rent to the proprietor. In this view the lands in question would be an increment to the holdings of the defendants but the river in question, according to the finding of the Court below, is not a small and shallow river. Says the learned Subordinate Judge, "In the present case we are concerned with the accretion re-formed from river Gandak, which is more or less a navigable river and in which boats ply, as is admitted on behalf of both the parties. Of course, it is not like river Ganges, yet it is large and deep enough for plying of boats. It is also subject to annual floods only varying in degree in its severity in each year". The river in question is, therefore, a large and navigable one. Clause (3) of section 1 deals with *churs* or islands "thrown up in large and navigable rivers, the bed of which is not the property of an individual". But here the bed of the river Gandak belongs to the plaintiffs. Therefore, this clause does not apply. Clause (2) deals with cases in which a river by a sudden change of its course may break through and intersect an estate without any gradual encroachment, which is not the case here. Therefore, this clause also does not apply.

Clause (1) of the section deals with lands gained "by gradual accretion whether from the recess of a river or of the sea". This clause is a general one and applies to all kinds of rivers, and lays down the principle upon which the rights to the lands thus gained should be determined. Under this clause the land gained "shall

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be considered an increment to the tenure of the person to whose land or estate it is thus gained, whether such lands or estate be held immediately from Government by a Zemindar or other superior landlord, or as a subordinate tenure by any description of under-tenant whatever". The defendants under this section will, therefore, be entitled to claim the lands as an increment to their holding.

It has, however, been contended that the Regulation does not apply to lands which come out of a river whether gradually or by a sudden change of its course where the bed of the river belongs to an individual. It is contended that the Regulation, particularly clause (1) of section 4, applies only to the lands gained from rivers which are the property of the public or the Crown. A reference has been made to the preamble to the Regulation. The preamble, however, gives the reason for the rules "for the general information of individuals as well as for the guidance of the Courts of Justice" being enacted "in consequence of the frequent changes which take place in the channel of the principal rivers that intersect the provinces immediately subject to the Presidency of Fort William and the shifting of the sands which lie in the beds of those rivers" whereby "*churs* or small islands are often thrown up by alluvion in the midst of the stream, or near one of the banks, etc., and the lands gained from the rivers or the sea by the means above-mentioned are a frequent source of contention and affray". This may be the initial reason of enacting the rules, but the rules seem to deal with all kinds of rivers, navigable or non-navigable, large or small, deep or shallow. Clauses (1) and (2) of section 4 deal with lands gained by gradual accretion from the recess of all kinds of rivers or the sea. Clause (3) deals with large and navigable rivers, the bed of which is not the property of an individual. Clause (4) deals with small and shallow rivers the beds of which belong to an individual.

It is then said that the Regulation deals with the rights of riparian proprietors. No doubt, section 2 declares that the rights of the riparian proprietors of contiguous estates divided by a river shall be determined by such a clear and definite usage as may be established. Section 3 seeks to provide rules in the subsequent sections for determining the claims and disputes relative to lands gained by alluvion or by dereliction of a river or the sea when no legal usage referred to in section 2 is established. From this it is argued that the rules in section 4 are meant to apply to disputes between the riparian proprietors, and not to the case in hand where no riparian proprietor is concerned and the dispute is between the proprietor and his tenant on the same side of the river. The contention does not seem to be sound, for, though the primary object of the Regulation was to provide rules for determining disputes between the riparian proprietors, yet it has, as a matter of fact, dealt with the rights not only of proprietors but also of subordinate tenures. In fact, the Regulation seems to deal with disputes of all kinds, as is expressly declared by clause fifth of section 4, which says that "In...all claims and disputes respecting land gained by alluvion or...dereliction of a river or the sea, which are not specifically provided for by the rules contained in this Regulation, the Courts of Justice, in deciding upon...claims and disputes, shall be guided by the best evidence they may be able to obtain of established local usage, if there be any applicable to the case, or if not, by general principles of equity and justice." Thus, cases which have not directly come under the express rules of the Regulation have been decided on the principles of equity and justice, for instance, *Bhageerattee Dabea* v. *Greesh Chunder Chowdhry* (19) and *Sheogoolam Teewaree* v. *Faqeera Misser* (20). Even if none of the rules in section 4 applies to the present case, it has to be determined on the principles of equity and justice, as was done by their Lordships of the Judicial Committee in the case of *Nogender Chunder Ghose* v. *Mahomed Esoff* (21). The plaintiffs, no doubt, can claim the lands which come out of river Gandak as their own, inasmuch as there is nothing in principle or in the Regulations which would take away or destroy their rights in such lands, whether the lands be formed in the midst of the river as an island or be formed on the

(19) 2 Hay 541.
(20) 3 Agra H. C. R. 400.
(21) 18 W. R. 113; 10 B. L. R. 408; 3 Sar. P. C. J. 151 (P. C.).

banks of it by gradually silting up or recession of the river; but if the lands have been gained by gradual accretion from the recess of the river to the holding of the plaintiffs' tenants, there is, on the other hand, nothing in the Regulation or on the principle of equity and justice, in the absence of any custom or contract to the contrary, to prevent the plaintiffs' tenants (the defendants in the case) from claiming the land as an increment to their holding. The proprietorship of the lands in question, no doubt, will continue with the plaintiffs who are the owners of the bed of the river.

For these reasons, I agree with the view taken by the learned Chief Justice, though, as already observed, I confess that the point is not free from difficulty.

S. D.

Appeal allowed.

LOWER BURMA CHIEF COURT.

SPECIAL SECOND CIVIL APPEAL No. 170 OF 1920.

January 30, 1922.

Present:—Sir Sydney Robinson, KT., Chief Judge, and Mr. Justice Macgregor.

MAUNG PO NGWE AND ANOTHER—DEFENDANTS—APPELLANTS

versus

YACOOB ALLY—PLAINTIFF—RESPONDENT.

Construction of agreement—Agreement for sale—Unqualified agreement—Mortgage, inoperative—Charge, conversion into—Transfer of Property Act (IV of 1882), s. 100.

Where an owner of land receives a sum of money and delivers possession of the land to the payer in lieu of interest with the agreement that if the money is not paid, the latter would be entitled to call upon him to convey the land outright, there is no unqualified agreement to sell on the part of the owner of land. [p. 653, col. 1.]

Maung Po Maung v. *Maung Kaing*, 24 Ind. Cas. 57; 7 L. B. R. 262; 7 Bur. L. T. 86, *Lalchand Motiram* v. *Lakshman Sahadu*, 28 B. 466; 6 Bom. L. R. 510, *Kurri Veerareddi* v. *Kurri Bapireddi*, 29 M. 336; 1 M. L. T. 153; 16 M. L. J. 395 (F. B.), *Muthu Gounden* v. *Chellappa Gounden*, 8 Ind. Cas. 1089; 8 M. L. T. 464, referred to.

Section 100 of the Transfer of Property Act does not enable a mortgage to be converted into a charge if it cannot operate as a mortgage by reason of non-compliance with the formalities prescribed by the law [p 653, col 2.]

Ma Bon Lon v. *Maung Po Lu*, 32 Ind. Cas. 595; 8 L. B. R. 553; 9 Bur. L. T. 64, relied upon.

Special second civil appeal from a decree of the Divisional Judge, Toungoo, setting aside that of the District Judge, Toungoo.

Mr. *K. Ko Gyi*, for the Appellants.

Mr. *Maung Pu*, for the Respondent.

JUDGMENT.—Maung Po and his wife were the owners of two parcels of land which they mortgaged to a Chetty as security for the re-payment of a loan. Appellant, Maung Po Ngwe, executed the mortgage-deed as surety. Subsequently, he paid to the Chetty the sum of Rs. 3,400 in part payment of the amount due under the mortgage. By an agreement with Maung Po he was given possession of one of the two parcels of land (the one which forms the subject-matter of the present suit) with liberty to enjoy the rents and profits thereof in lieu of the interest accruing due on the Rs. 3,400. Later, he paid off Rs. 2,600, the balance that was then due under the mortgage to the Chetty, and he no doubt then acquired, under section 140 of the Indian Contract Act, all the rights which the Chetty had against Maung Po. Subsequently, he brought a suit against Maung Po to recover the sum of Rs. 2,600, the amount of the second payment that he had made to the Chetty. He did not include in his claim the Rs. 3,400, and thus he is not now competent to bring a suit to recover that money. The suit he did bring was compromised, and a consent-decree was passed in terms of the compromise. The terms were that there should be a decree for Rs. 3,000 with Rs. 150 for costs, and Maung Po Ngwe agreed that he would not be able to file any contribution suit against the defendants for the amount paid up by the plaintiff on behalf of the defendants to the M. S. M. M. Firm at Toungoo due on the mortgage-deed executed by Ko Po and himself for the principal sum of Rs. 5,000, bearing interest at Rs. 1-10 per cent. per mensem, and which mortgage-deed was filed in the case by him. That is to say, he then deliberately abandoned all the rights which he had acquired under section 140 of the Indian Contract Act. The position then was that he had a decree for Rs. 3,000 and costs, and he was in possession of a parcel of land with liberty to enjoy the rents and

profits in lieu of interest on Rs. 3,400 with the further agreement that, if Maung Po should not re-pay the Rs. 3,400, he could call upon him to convey the land outright to him. The compromise was made on the 11th December 1918, and on the 19th February 1919 Maung Po conveyed the land in suit to the respondent, Yacoob Ally, who also obtained possession of the land. Po Ngwe then brought a suit under section 9 of the Specific Relief Act and re-took possession. Yacoob Ally now sues for possession. The suit was dismissed by the First Court but decreed by the learned Divisional Judge, and the present appeal is brought from that decision.

The first point urged is that Po Ngwe is still entitled to all the rights of the Chetty mortgagee. In face of the compromise decree in which those rights were clearly and distinctly given up, we are unable to hold that he has any such rights as a mortgagee.

In the next place, it is urged that under the terms of the agreement made between him and Maung Po he is entitled to a charge on the property on the ground that there was an agreement to sell coupled with payment of the purchase price and delivery of possession. As to this, we are unable to hold that the facts justify the claim. The agreement merely was that he should take possession and enjoy the rents and profits in lieu of interest. If, later, Maung Po refused to pay or was unable to re-pay the Rs. 3,400, Po Ngwe would be entitled to demand that the land be sold to him. There was no unqualified agreement to sell the land, and Po Ngwe has never sought to reduce that agreement into being.

Reference has been made to the case of *Maung Po Maung* v. *Maung Kaing* (1) in which the provisions of section 55 (6) (*b*) of the Transfer of Property Act were applied. With that decision we are unable to agree. In that case there was an actual sale which was invalid by reason of there being no registered conveyance. The money had been paid and possession had been given. Here, as we have pointed out, there was no such sale, and to treat the agreement that was entered into in the present case as a contract of sale and to hold that it gave a charge on the property would, in the words of the judgment of the learned Judges in *Lalchand Motiram* v. *Lakshman Sahadu* (2), which was referred to in the Burma case, be overriding the plain provisions of the Transfer of Property Act. See also *Kurri Veerareddi* v. *Kurri Bapireddi* (3) and *Muthu Gounden* v. *Chellappa Gounden* (4).

Section 55 lays down the rights and liabilites applying between the buyer and the seller of immoveable property. Section 54 of the Transfer of Property Act lays down that a contract for sale of immoveable property does not of itself create any interest in or charge on such property. In the present case, putting it at its highest, there could be no more than a contract for sale, and not an actual sale, that was invalid for want of formalities.

We are next asked to treat appellant's position as that of a usufructuary mortgagee in possession and to hold that on this ground he is entitled to a charge on the property. We do not think it can properly be said that he was a usufructuary mortgagee, seeing that he had deliberately abandoned his rights as a mortgagee. If the transaction could be treated as one that was intended to be a usufructuary mortgage, that could not be converted into a charge unless it could be valid as a mortgage. This view was taken in the case of *Ma Ben Lon* v. *Maung Po Lu* (5) where it was held: "It must, therefore, be held that section 100 of Transfer of Property Act does not enable a mortgage to be converted into a charge, if it cannot operate as a mortgage by reason of non-compliance with the formalities prescribed by the law."

Lastly, it is urged that Yacoob Ally had notice or must be deemed to have had notice, of the possessory rights of Po Ngwe. This point was not, however, raised before, but even if it had been, as Po Ngwe had taken no steps to legalise his position by duly registered deeds, we cannot impute notice to Yacoob Ally. Had he made enquiries as to incumbrances on the land, he would have learnt that the

(1) 24 Ind. Cas. 57; 7 L. B. R. 262; 7 Bur. L. T. 86.

(2) 28 B. 466; 6 Bom. L. R. 510.

(3) 29 M. 336; 1 M. L. T. 153; 16 M. L. J. 395 (F. B.).

(4) 8 Ind. Cas. 1089; 8 M. L. T. 464.

(5) 32 Ind. Cas. 595; 8 L. B. R. 553; 9 Bur. L. T. 64.

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Chetty's mortgage had been satisfied and was no longer binding on the land in favour of any person. He would have been assured by his vendor that the land was unencumbered and he could not have referred to any registered documents as there were none. Po Ngwe was in possession under an oral agreement which, no doubt, gave him certin rights as against Maung Po. Those rights he never sought to enforce, and, this being so, he has acquired no legal title to the land, and we are unable to hold that he is entitled to retain possession as against Yacoob Ally, the purchaser for value by a registered deed.

The appeal will, therefore, stand dismissed with costs in all Courts, the decree of the lower Appellate Court being confirmed.

N. H.

Appeal dismissed.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 249 OF 1920.

February 7, 1922.

Present :—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Coyajee.

CHIMABAI MALGAUDA PATIL

PLAINTIFF—APPELLANT

versus

MALLAPA PAYAPPA—DEFENDANT—RESPONDENT.

Hindu Law—Adoption—Bombay Presidency—Widow, right of, to contest adoption made by her husband—Jains—*Adoption—Ceremony, nature of.*

In the Bombay Presidency a Hindu widow is not competent to contest an adoption made by her husband, and is bound to accept all the implications of an adoption made by him valid or invalid. [p. 655, col. 2.]

Per *Macleod, C. J.*—Amongst Jains an adoption is more a secular than a religious ceremony, and is not looked upon in the same way as amongst the regenerate classes. [p. 655, col. 2.]

First appeal from the decision of the First Class Subordinate Judge at Belgaum, in Suit No. 8 of 1918.

Mr. *A. G. Desai*, for the Appellant.

Mr. *K. N. Koyajee*, for Respondent Nos. 1 to 3.

JUDGMENT.

MACLEOD, C. J.—The plaintiff in this case is the widow of one Malgauda who died of plague on the 29th November 1915 and sues to recover possession of her husband's property against the first defendant who claims to be the adopted son of Malgauda. Various objections have been raised to the adoption, first, that Malgauda, having lost his brother Appu a few days previous to the date of the adoption, was in mourning and was, therefore, incapable of performing any religious ceremony; secondly, that the adopted son was the son of Malgauda's sister, and, therefore, could not be adopted; thirdly, that the adoption did not take place at all, although it had to be admitted that an adoption deed was executed and registered.

On the 14th December 1915 the plaintiff made a petition to the Mamlatdar to have her name inserted in C and D Registers since her husband had died a fortnight back. In that petition she said that there were factions in the village, and therefore, the village officers might enter any other name. But, on the 6th January 1916, she made a petition to the Collector admitting the adoption and requesting the first defendant's name to be entered in the Revenue Registers in place of the deceased Malgauda.

On the 7th January 1916 she was examined in connection with her petition and Varsa proceeding. She admitted the whole story which she now denies in the suit. The passing of orders on this petition was unfortunately delayed, so that the plaintiff, for some reason or other, made up her mind to dispute the first defendant's adoption.

On the 6th June 1916 she made a petition to the Collector saying that her husband did not adopt according to caste rites and customs, and that he could not adopt that boy according to Shastras. But she did not deny the fact that her husband had adopted the first defendant.

She was examined on 14th June 1916 when she pleaded that her previous statements had been made under coercion and threats, and for the first time she alleged that the first defendant was not present when he was alleged to have been adopted.

At the outset, we are met with the question whether a widow could be allowed to dispute an adoption made by her husband.

In *Bhau Adgauda Patil* v. *Narasagauda Tatya Patil* (1) the plaintiff claimed as the adopted son of one Adgauda. He had been

(1) 64 Ind. Cas. 614; 23 Bom. L. R. 1272; 46 B. 400.

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adopted by Adgauda's widow. The defendant was the son adopted by Adgauda in his lifetime. Mr. Shah at page 1275* says :

"Assuming, without deciding, that the adoption of defendant No. 1 by Adgauda was invalid, the question is whether Sitabai, the widow of Adgauda, could make another adoption to her husband during the lifetime of the boy adopted by her husband. The point is one of first impression. No reported precedent on the point has been cited to us: and it must be considered in the light of the power which the widow has in this Presidency to adopt, in the absence of any prohibition, expressed or implied, by her husband. It seems to me clear that the widow is bound by the act of her husband and to accept all the implications of an adoption by him, valid or invalid. In spite of the liberal interpretation of her powers to adopt in this Presidency, I do not think that the Hindu Law contemplated, and certainly it has not provided, that the widow could practically ignore and supersede her husband's act of adoption. There is no authority for it : and I think that the general effect of the Hindu Law of adoption is against such a power. Even an invalid adoption may become effective under certain conditions: and the wife—or rather the widow—cannot go against her husband's wishes so unequivocally expressed or treat the adoption by her husband as non-existent."

And at page 1276* the learned Judge concludes :—

"It may appear somewhat anomalous that the widow should not be allowed to treat as non existent an adoption by her husband which is invalid. But I do not think that there is anything anomalous in the widow being required to accept the act of adoption by her husband with all its implications at least so far as she herself is concerned."

It seems to me that an adoption by the husband whether valid or invalid would stand on much the same footing as a Will, so that it would be considered as an implied prohibition against the widow adopting after the death of her husband. It was contended for the appellant that those remarks of the learned Judge were *obiter*, but they were directly in point, as they dealt expressly with the widow's power to adopt the plaintiff against the adoption by her husband, and if it could be said that the husband had impliedly prohibited an adoption by his widow by his having adopted in his lifetime, it would necessarily follow that the validity of the plaintiff's adoption by the widow was directly in issue.

It does not seem necessary, therefore, to consider the other points which were raised in this case. But with regard to the *factum* of the adoption, all the evidence seems to point to the fact that it actually did take place, and that the suggestion by the widow seven months later that the adopted boy was not in Belgaum when it was alleged he was adopted, must be considered as a desperate attempt to get rid of the first defendant's claim to succeed to Malgauda. There are several witnesses who deposed that they were present at the adoption and that the first defendant was adopted. If the plaintiff really thought that the first defendant was not present, she would have made that allegation at once instead of waiting for seven months when she felt the necessity, if she wished to succeed to her husband's estate, of proving some fact which would put an end to the claim of the first defendant.

On the question whether amongst Jains the adoption of a sister's son is invalid, no doubt there is no judicial decision to the effect that Jains do not observe the same law as the regenerate classes. Therefore, if the question had to be decided in this case evidence would have to be led to prove the custom that the adoption of a sister's son amongst Jains is acknowledged.

Then, on the question whether Malgauda could not have adopted owing to his being in mourning we have been referred to no direct authority on the question. But it is argued that as Malgauda was in mourning, he was not competent to perform any religious ceremony, and, therefore, could not adopt. But the evidence certainly points to the fact that amongst Jains adoption is not looked upon in the same way as amongst the regenerate classes, and that adoption is really more a secular than a religious ceremony. The appeal, therefore, must be dismissed with costs.

COYAJEE, J.—I agree in holding that this appeal must fail. In *Bhau Adgauda Patil* v. *Narasagauda Tatya Patil* (1) which was a case decided by a Division Bench

*Pages of 23 Bom. L. R.—[*Ed.*].

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of this Court. Mr. Justice Shah observes at page 1276*: "It seems to me clear that the widow is bound by the act of her husband and to accept all the implications of an adoption by him, valid or invalid." I am bound to respect this opinion as coming from a learned Hindu Judge. I do so the more readily because we are in this case dealing with an adoption by a Hindu of his sister's son; and it is matter of common knowledge that in the Bombay Presidency adoptions of daughter's sons and sister's sons are not uncommon. For this proposition we have the high authority of Mr. Mandlik who in his Vyavahara Mayukh, Part II at p. 493, observes:

"I must note that the existence of a time-honoured custom, allowing the adoption of a *dauhitra* (daughter's son) or *bhagineya* (sister's son) is testified to in distinct terms by the Dvaita Nirnaya and the Vyavahara Mayukh and also impliedly by Krishna Bhatta. I have made special inquiries on the subject, and I have no hesitation in stating that in this Presidency such adoption are common, and not the slightest taint attaches to them on account of such relationship."

Special usages in favour of adoptions of daughter's sons and sister's sons have, moreover, been judicially recognised in some of the districts of this Presidency. I need only refer to the judgments of Candy, J. and Fulton, J. in *Manjunath* v. *Kaveribai* (2).

For these reasons, I agree in holding that it is not competent to the plaintiff, who is the widow of Malgauda, to seek to set aside the adoption made by her husband.

W. C. A. *Appeals dismissed.*

(2) 4 Bom. L. R. 140.

*Page of 28 Bom. L. R.—[*Ed.*].

PATNA HIGH COURT.

LETTERS PATENT APPEAL No. 49 OF 1922.

April 26, 1922.

Present:—Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Adami.

PRITHI MAHTON—DEFENDANT No. 1—APELPLANT

versus

JAMSHED KHAN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11, Explanations, application of, to execution proceedings—Appeal, second—Point not raised in first appeal—Abandonment.

Although the doctrine laid down in section 11 of the Civil Procedure Code relating to *res judicata* may be rightly applied in certain proceedings in execution arising out of the same judgment so as to put an end to litigation and may possibly be applied in certain cases where separate suits have been brought, raising points which have already been decided in execution cases fought between the same parties, still, the special rules laid down in the explanations to that section which go behind the ordinary doctrine of *res judicata*, ought not to be applied generally in execution cases. [p. 658, col. 1.]

A point which is taken before the Trial Court but is not taken before the lower Appellate Court must be considered to have been abandoned and cannot be raised in second appeal. [p. 658, col. 1.]

Kalyan Singh v. *Jagan Prasad*, 30 Ind. Cas. 528; 37 A. 589; 13 A. L. J. 828 and *Nityananda Gantayet* v. *Gajapati Vasudeva Devu*, 24 M. 681; 11 M. L. J. 313, referred to.

Letters Patent Appeal against the judgment of Mr. Justice Ross, dated the 27th May 1921.

Mr. *Murari Prasad*, for the Appellant.

Mr. *Mohamed Hasan Jan*, for the Respondent.

JUDGMENT.

MILLER, C. J.—This is an appeal on behalf of the defendant No. 1 from a decision of Mr. Justice Ross dated the 27th of May last year. The plaintiffs are the proprietors of a plot of land measuring 2 *bighas* 2 *dhurs* of which the defendant No. 2 and apparently the defendant No. 3, for there is some doubt about it, were the tenants or, at all events, the defendant No. 2 was the original tenant in January 1914. The tenants sold the land to the defendant No. 1 under a *kabala* but it appears from the terms of that *kabala* that the whole holding less 12 *kanwas* alone was sold under that *kabala*. The purchaser, therefore, was not the transferee of the whole holding but transferee of a portion of the holding. Before the date of this transaction, namely, on the 18th of September 1913, the plaintiff as landlord obtained a decree for rent against the defendant No. 1's vendors or their predecessor in title or, at all events, against the existing tenant at that time and

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on the 16th April 1914 the land was put up to sale in execution of that decree and purchased by the plaintiff. The decree obtained by the landlord, for some reason which has not been explained, was treated as a money-decree only, but, nevertheless, the land was sold and purchased by the landlord who, on the 4th August in the same year, actually got delivery of possession of the land. Subsequently, the defendant No. 1, Pirthi Mahto, the transferee, took proceedings under O. XXI, r. 90, Civil Procedure Code, for setting aside the sale and he produced his *kabala* under which he purchased the land in support of his application to show that he had an interest in the land. Now I pause here for a moment to point out that the interest asserted by the defendant No. 1 at the time of his application under O. XXI, r. 90 was an interest in a portion of the holding only, and, therefore, so far as the plaintiff was concerned, there appears to have been no reason why he should take the point that the holding was non transferable because, even if he succeeded in proving the point, nevertheless, a transfer of a portion only of the holding would be binding as against him, provided that the original holder or occupier had not abandoned possession of the whole holding. Eventually, the application of the defendant No. 1 under O. XXI, r. 90, proved successful and the sale was ordered to be set aside. He, however, had some difficulty in getting possession and further proceedings were taken, first, under section 144 Civil Procedure Code and, subsequently, under O. XXI, r. 101, but it would appear that, although the defendant No. 1 had been in possession at some time between the date of his *kabala* in September 1913 and August in the following year when the plaintiff got possession by an order of the Court, still from the latter date up to the time of this suit it seems, although it is not absolutely clear from the judgments, that the plaintiffs themselves had been in possession of this land. Indeed, in the plaint, amongst other things, the plaintiffs prayed for confirmation of their possession and that in fact is one of the reliefs granted by the learned Munsif which was affirmed both by the lower Appellate Court and by the Judge of this Court. I mention this because in one portion of the Munsif's judgment it would appear that he found upon the evidence of the plaintiffs' witnesses that the defendants were in fact in possession of the whole holding. It seems, however, that in arriving at that finding what he really was discussing was the original possession of the defendants up to sometime in August 1914.

The plaintiffs claimed that possession of the property in suit may be confirmed and that a perpetual injunction may be issued upon the defendant first party restraining him from getting possession over the property in suit or from recovering mesne profits, and further asked for that relief after finding that there was no custom of transferability in the *mauzah* in which the property is situated and that the original tenants had in fact abandoned the property in suit.

Various defences were raised in the suit, and, amongst others, it was contended that the suit was barred by reason of the provisions of section 11 read in the light of the fourth Explanation to that section of the Civil Procedure Code. It was contended that the question of non-transferability which, if established, would put an end to the defendants' claim could not now be raised because in the proceedings under O. XXI, r. 90, either no such point had been taken by the landlord, or if it had not been taken then it could not be taken now because it might have been taken then. It was, therefore, contended that the present suit was barred by *res judicata*. The Munsif, with regard to this question came to the conclusion that the point had really never been taken at all or decided by the execution Court in the proceedings under r. 90 of O. XXI and, therefore, held that the point not having been raised or decided, there was no bar to the plaintiffs raising the point now. He did not deal in terms with the fourth Explanation to section 11 but possibly he had in mind the result of certain cases which have been decided both in Madras and Allahabad, where it has been laid down that, whatever may be the extent to which an analogous doctrine to that laid down in section 11 may be applied in execution cases, still the Explanations, as for example Explanation 4 and Explanation 5 can have no application to proceedings of that nature so as to bar the plaintiffs in a subsequent suit from raising points which have not been determined in the previous execution proceedings. When the matter came before the District Judge, although a

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question was raised based upon the doctrine of estoppel, no question was raised as far as appears from the learned Judge's judgment upon the point which has now been argued before us in this appeal, and there is nothing to show that the point in fact was taken before the learned District Judge. Had it been taken it would have been open to the appellant before us to-day to bring some evidence or some proof that the point had in fact been argued and that the learned Judge omitted to deal with it. But it would appear, on reading the judgment of the learned District Judge, that the point was never taken and, therefore, one must assume that it was abandoned. Now, when the matter came before the Judge of this Court, that point, which I may say is the only point which has been argued before us to day, and other points were urged. The learned Judge dismissed the appeal and in dealing with the point I have just referred to, he pointed out that it should not succeed because for obvious reasons it had not been taken before the learned District Judge. and, therefore, the appellant ought not to be allowed to revive it in appeal before him. With that part of the learned Judge's judgment I entirely concur and that in itself would be sufficient to lead us to dismiss this appeal. I further think, however, that although the doctrine laid down in section 11 of the Civil Procedure Code relating to *res judicata* may be applied, and rightly applied, in certain proceedings in execution arising out of the same judgment so as to put an end to litigation and may possibly be applied in certain cases where separate suits have been brought raising points which have already been decided in execution cases fought between the same parties, still I do not think that the special rules laid down in the Explanations to that section which go beyond the ordinary doctrine of *res judicata* ought to be applied generally in execution cases. The High Court at Allahabad in the case of *Kalyan Singh* v. *Jagan Prasad* (1) held that "if a judgment-debtor does not take exception to the amount erroneously set forth in an application for the execution of a decree as being the sum due, he is not prevented by the principle of *res judicata* from doing so on a subsequent application for the execution of the same decree". It was argued in that case that, by reason of Explanation 4 to section 11 of the Code, the judgment-debtor not having taken the point in the first application for execution of his decree was barred from taking the point in a subsequent application. The Court who delivered the judgment in that case, consisting of the Chief Justice and Mr. Justice Rafique, refused to accept this contention and refused to apply the principle laid down in Explanation 4 to section 11 to cases of that nature. Again, in Madras in the case of *Nityananda Gantayet* v. *Gajapati Vasudeva Deru* (2) the Court refused to apply the law of *res judicata* as laid down in Explanation 3 of section 13 of the Code of 1882, which is now Explanation 5 of the present Code, to a case where the plaintiff had been awarded by a decree possession of land together with mesne profits and applied in execution for delivery of the land and for some profits but was not awarded mesne profits by the executing Court. In fact, that Court made no reference to it in its decision and when the plaintiffs subsequently applied for mesne profits they were met with the objection arising under what is now Explanation 5 of section 11, and the Madras High Court refused to entertain the argument based upon that Explanation in such a case. I see no reason to differ from the principles laid down in those cases and, therefore, on this ground also I think that this appeal should be dismissed. The respondents are entitled to their costs of this appeal.

ADAMI, J.—I agree.

R. N.

Appeal dismissed.

(1) 30 Ind. Cas. 523; 37 A. 589; 13 A. L. J. 826.

(2) 24 M. 681; 11 M. L. J. 313.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 494 OF 1920.

February 13, 1922.

Present:—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Coyajee.

SOMESHVAR JETHABHAI DAVE AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SOMESHVAR GOVINDRAM JOSHI—DEFENDANT—RESPONDENT.

Hindu Law—Widow—Alienation—Alienation set

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aside—Alienee, right of, to refund of consideration money.

If it has been proved that a sale by a widow having a limited interest has benefited the estate by the payment of debts which were binding on it, although the amount paid may not amount to the whole of the consideration money received for the property sold, the Court, when it sets aside the sale, will direct payment to the alienee to the extent of the benefit received by the estate, and it must follow that if the consideration money for the sale is found intact at the death of the widow, the estate has benefited to that extent, so that if the reversioner after the widow's death wishes to have the sale by her set aside, he can only succeed if he restores the money.

Second appeal from the decision of the Joint Judge, Ahmedabad, in Appeal No. 126 of 1917, modifying a decree passed by the Subordinate Judge at Umreth, in Civil Suit No. 128 of 1915.

Mr. *M. K. Mehta*, for the Appellants.

Mr. *G. N. Thakor*, for Respondent No. 6.

JUDGMENT.—There is only one question which arises in these two second appeals with regard to the direction of the Court below that defendant No. 4 should receive back the total sale price of Rs. 799 which he paid for the land which Sarasvatibai sold to him without any legal necessity, as has now been proved. It has been found as a fact that the whole of this amount of Rs. 799 came to the hands of the executors of Sarasvatibai after her death.

The appellants contend that as the sale must be set aside as having been made by the widow without legal necessity, the defendant is bound to hand back the property, while they can retain the purchase price as belonging to the widow's estate. There does not seem to be any direct authority on this question, although, we think, the principles of equity provide the only answer the Court should give. If it has been proved that a sale by a widow having a limited interest has benefited the estate by the payment of debts which were binding on it, although the amount paid may not amount to the whole of the consideration money received for the property sold, the Court, when it sets aside the sale, will direct payment to the alienee to the extent of the benefit received by the estate, and it must follow that if the consideration money for the sale is found intact at the death of the widow, the estate has benefited to that extent, so that if the reversioner after the widow's death wishes to have the sale by her set aside, he can only succeed if he restores the money. It would be different if it could not be proved that the purchase money was still intact in the estate. But in this case we are bound by the finding of fact by both the Courts below, that the purchase money came to the hands of the executors. Therefore, it was only right that the fourth defendant, having been directed to hand back the property which he purchased, should be entitled to the price he paid for it. Both the appeals fail and must be dismissed with costs.

Appeals dismissed.

W. C. A.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 393 OF 1919.

May 5, 1922.

Present:—Mr. Justice Piggott and Mr. Justice Walsh.

Mufti ALI JAFAR AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

FAZAL HUSAIN KHAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Specific Relief Act (I of 1877), s. 42—Declaratory suit—Discretion of Court—Infructuous decree, setting aside of—Civil Procedure Code (Act V of 1908), s. 92, scope of.

To grant a mere declaratory decree which is not calculated to produce any effect, unless as a stepping stone to fresh litigation is contrary to the principles governing the proper exercise of the discretion of a Court in the matter of granting relief in a declaratory suit, even where the express provisions of section 42 of the Specific Relief Act are not applicable. Such a decree is liable to be set aside. [p. 662, col. 2.]

Obiter Dicta:—

Per *Walsh, J*.—Suits with regard to trusts relating to public charities must either be brought under section 92 of the Civil Procedure Code or they cannot be brought at all. [p. 663, col. 1.]

Per *Piggott, J*.—The proper view of section 92 of the Civil Procedure Code seems to be that it is intended to be an exhaustive statement of the law applicable to suits based upon any alleged breach of any express or constructive trust, created for public purposes of a charitable or religious nature. [p. 662, col. 1.]

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A suit asking for relief by way of a declaration regarding the invalidity of an alienation by the trustees of a public trust would seem to be covered by section 92 (1), clause (*h*) of the Civil Procedure Code. [p. 662, col. 1.]

First appeal from a decree of the Second Additional Subordinate Judge, Jaunpur.

Dr. *Surendro Nath Sen* and Mr. *Mukhtar Ahmad*, for the Appellants.

Mr. *Peary Lal Banerji*, for the Respondents.

JUDGMENT.

PIGGOTT, J.—It is impossible to understand the questions raised by this first appeal without going back to the facts of a previous litigation, determined by a decree of this Court, dated the 20th of March 1914, and a subsequent compromise. One Ghazanfar Husain Khan, a Shia gentleman residing at Jaunpur, executed, shortly before his death, a deed of endowment by which he constituted a trust for public purposes of a charitable and religious nature and appointed three trustees for the management of the said trust. The heirs-at-law of the deceased founder of the trust brought a suit against the trustees contesting the validity of the entire transaction. The eventual result was that the deed of endowment was declared invalid and the heirs-at-law of Ghazanfar Husain Khan were found to be the rightful owners as regards the larger part of the property affected by the deed of endowment but the deed was affirmed in respect of a certain portion of the property affected. The trustees filed an application for leave to appeal to His Majesty in Council and obtained from this Court the necessary certificate entitling them to maintain such an appeal. While this was pending, however, a compromise was effected between the parties to that litigation, that is to say, between the heirs-at-law of Ghazanfar Husain Khan on the one side, and the trustees under the deed of endowment on the other. Virtually, the parties agreed to abide by the division of the disputed property effected by the decree of this Court. There remained, however, for determination the question of the liability of the trustees for costs of the litigation and also for the mesne profits claimed by the plaintiffs in that suit. The trustees were of opinion that they could not meet these claims and could not save any portion of the trust property without making alienations of the said property. They disposed of the matter by selling a small portion of the trust property to the plaintiffs and mortgaging the remainder with possession for a certain number of years. The net result of the transaction was that the whole of the property covered by the trust passed for the time being into the hands of the heirs-at-law of Ghazanfar Husain Khan, but subject to this condition that, after the stipulated period the bulk of the property which (according to the decision of this Court) had been made the subject-matter of a valid endowment, returned to the trustees to be used for the purposes set forth in the deed of trust. This litigation having been thus concluded, the present suit was instituted on the 20th of September 1917. The plaintiffs are two gentlemen belonging to the Shia community residing at Jaunpur. They claimed to sue as beneficiaries under the trust, in a representative capacity, on behalf of all the other members of their community in that place who were equally interested with themselves in the administration of the trust. They have not obtained the permission of the Advocate-General, or of the proper officer appointed in this behalf in these provinces, to entitle them to maintain their suit under section 92 of the Code of Civil Procedure; but they have obtained from the Trial Court permission under Order I, rule 8, of the Civil Procedure Code, to maintain their suit in a representative capacity. The allegations made in the plaint are of a most serious character and the object of the suit, on the very face of it, was to reverse the whole result of the previous litigation and, if possible, to recover for the purposes of the public trust in question the whole of the property covered by Ghazanfar Husain Khan's original deed of endowment. According to these plaintiffs, the trustees appointed by that deed of endowment had been guilty of a series of breaches of trust, all the more objectionable in character because they had been cloaked by a pretence of honest zeal in the support of the endowment. It was suggested that the trustees

were from the first in collusion with the heirs of Ghazanfar Husain Khan; that they did not honestly defend the suit brought by the said heirs, either in the Trial Court or in this Court; that the compromise which they eventually entered into was a dishonest one and that, in any case, the alienations effected by sale and mortgage in accordance with the terms of that compromise were outside the power of the trustees and the making of them constituted a breach of trust on the part of the latter. The Trial Court has, in effect, held that the plaintiffs are not entitled to re-open any of the questions determined by this Court's decree of the 20th of March 1914 and that there seems no reason for re-opening those questions. It has come to a clear finding in favour of the trustees, that they were not in collusion with the plaintiffs in that litigation and that they defended the interests of the trust zealously and to the best of their ability. As regards the compromise, however, the Court below has come to the conclusion that the trustees could not lawfully alienate by sale or by mortgage any portion of the trust property without the sanction of some competent Court of civil jurisdiction, such sanction being necessary to represent and re place the permission of the Qazi required by the ancient principles of Muhammadan Law. It has further been found that none of the orders passed by this Court, either the decree itself or the subsequent order upon the compromise, amounts to the granting of such permission. Upon the question raised, whether or not it was competent for himself to grant such permission retrospectively, the learned Subordinate Judge has doubted whether he could give such retrospective sanction, but has held that on the materials before him he could find no adequate grounds for doing so. The result has been that the greater portion of the plaintiffs' suit has been dismissed, but that they have been granted a decree which simply declares that the alienations of the trust property effected by way of sale and mortgage by two documents dated June the 14th 1915, executed in accordance with the compromise, are invalid. We have before us a petition of appeal by the plaintiffs, in which they challenge that portion of the decree of the Trial Court which has gone against them upon a great variety of grounds. It would seem, however, that these plaintiffs have found themselves in difficulties over the maintenance of this litigation upon which they had seen fit to enter ostensibly for the benefit of the entire community of which they are members. They have not found it possible to take the steps required by the rules of this Court in order to enable their appeal to be effectively prosecuted. They have not caused to be translated or printed any papers or documents on the record for the information of this Court and for the use of their Counsel. The result is, that the learned Counsel representing the plaintiffs-appellants has very properly and very candidly admitted to us to day that he is not in a position to argue this appeal because his clients have not furnished him with proper materials for doing so. We do not think it is necessary for us to go into this matter further. We have read so much of the judgment of the Trial Court as involves questions of law which are challenged in the plaintiffs' memorandum of appeal and on the materials before us it is quite sufficient for us to say that we find no valid reason for interfering with the decree of the Court below on any of the grounds taken by the plaintiffs.

We have, however, before us a petition of cross-objections filed by the defendants trustees under O. XLI, r. 22 of the Code of Civil Procedure which contains one or two pleas going to the very root of this litigation. We have had the advantage of hearing these pleas satisfactorily argued on both sides and we have come to the conclusion that they must prevail and that the suit before us ought to have been entirely dismissed. The actual result of that suit as it stands is obviously most unsatisfactory. A certain deed of sale and a certain mortgage have been declared invalid. The trustees themselves, as parties to the deed of compromise, are probably not entitled to take any action upon this declaration in the way of challenging the right of the vendee or of the mortgagee in possession, even supposing

that they feel inclined to do so. There is nothing in the decree of the Court below which lays the trustees defendants under any legal obligation to take any action of any sort or kind, and there is no operative portion of the decree of which the successful plaintiffs can take out execution in order to obtain any result whatsoever. The consequence is that we have before us a decree which, without some further litigation, can lead to no practical consequences. Now, this result has really been brought about by the frame of the plaint and the nature of the reliefs therein claimed. Those reliefs have obviously been framed in order to avoid the operation of section 92 of the Code of Civil Procedure. We entertain the gravest doubts whether a suit of this nature is maintainable at all, by two persons in the position of these plaintiffs, without previous action taken under section 92 of the Code of Civil Procedure. The proper view of that section seems to be that it is intended to be an exhaustive statement of the law applicable to suits based upon any alleged breach of any express or constructive trust, created for public purposes of a charitable or religious nature. It must be remembered that sub-section 2 of this section contains a provision introduced for the first time into the Civil Procedure Code of 1908. The express prohibition (subject only to a proviso which does not concern us here) of any suit claiming any of the reliefs specified in sub-section (1) in respect of any such trust therein referred to, except in conformity with the provisions of that sub-section was not to be found in the Code of Civil Procedure as it stood before the year 1908. It may be contended that it is perfectly possible, as the plaintiffs in the present case have attempted, to evade the provisions of section 92, sub-section (1), by judiciously framing the reliefs sought so as to avoid the operation of that sub-section. Even if the point is to be looked at from a purely technical point of view, it would seem that some effect must be given to the words of clause (*h*) of the sub section, which refer to the granting of such further or other relief as the nature of the case may require. It seems very difficult to hold that the relief by way of declaration regarding the invalidity of the sale and mortgage in question in their suit could not have been brought within the provisions of section 92, sub-section (1), clause (*h*) above referred to. We are content, however, to dispose of the matter by carrying the question one step further. In their effort to avoid the provisions of sub-section (1) the plaintiffs have sought relief by way of a series of declarations. The declarations sought by them, and certainly the only declarations actually decreed in their favour, are, as we have already pointed out, of such a nature that they are not calculated to produce any effect whatsoever unless it be as a stepping stone to a fresh litigation. The position thus arrived at is contrary to the general principles governing the proper exercise of the discretion of a Court in the matter of granting relief by way of declaration, even if it is not covered by the express provisions of section 42 of the Specific Relief Act. It is idle to contend that in the present suit the plaintiffs, assuming their allegations of fact to be true, could not have obtained effective relief by asking for the removal of these trustees, the appointment of other trustees, the vesting of the trust property in the new trustees so appointed, the taking of accounts from the defaulting trustees and perhaps the settling of a scheme for the management of the trust. Of course, any trustees guilty of such gross breaches of trust as those alleged in this plaint would presumably be liable to be removed; but even if it was considered, after enquiry, desirable that the present trustees should continue in management of the trust property, the Court would have been entitled upon a suit framed under section 92, sub section (1), not merely to declare these transfers void, but to replace the trustees in possession of the property. If it be suggested on behalf of the plaintiffs that they are not affected by the proviso to section 42 of the Specific Relief Act because they could not, *in the suit as brought*, seek further relief than a mere declaration, being forbidden to do so by the provisions of section 92, sub-section (1) of the Civil Procedure Code, it seems a sufficient answer to say that they ought to have availed themselves of those provisions and brought their suit in conformity with the same. For these reasons we are satisfied that the cross-objections must prevail. We dismiss the plaintiffs' appeal and, on the objections of the transferee defendants, we set aside the decree of

the Trial Court and dismiss this suit altogether, with costs against the plaintiff throughout, including fees in this Court on the higher scale.

WALSH, J.—I agree, and I agree in substance with the learned Judge's decision. He is probably right in the conclusions which he has come to with regard to Muhammadan Law. Where he seems to have gone wrong is just this. The plaintiffs were in a dilemma. If the act of the trustees in entering into the compromise was a breach of trust because it offended against the general principle of the Muhammadan Law, which is the only reason which the learned Judge gives, he having found all the other allegations in their favour, the plaintiffs could not sue in respect of it except under section 92. If, on the other hand, it was not a breach of trust, the plaintiffs had no cause of action in respect of the compromise, so that, in either event, the plaintiffs were bound to fail.

I agree that suits with regard to trusts relating to public charities must either be brought under section 92 or they cannot be brought at all. The Court has to look at the substance and not the form. It is easy to see that the relief in this case was carefully framed so as not to come within the reliefs specified in section 92 and, obviously, a Court would not lend itself to a dodge of this kind adopted by a litigant for the purpose of evading ancient and salutary provisions. As far as I can see, the main difficulty about section 92 is to bring certain classes of claims, which persons are forced to make, within its terms. A person who wants to keep out of it is clearly acting *mala fide*.

N. H.

Appeal dismissed.
Cross Objections allowed.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 294 OF 1920.

February 16, 1922.

Present :—Mr. Justice Greaves and Mr. Justice Ghose.

BAHIR DAS PAL AND ANOTHER—DEFENDANTS—APPELLANTS

versus

GIRISH CHANDRA PAL—PLAINTIFF—RESPONDENT.

Res judicata—*Dismissal of objection to execution proceeding for non-prosecution, effect of—Civil Procedure Code (Act V of 1908), O. XXI, r. 100, application under—Limitation—Limitation Act (IX of 1908), Sch. I, Art.* 165.

The dismissal for non-prosecution of an objection to an execution proceeding cannot operate as *res judicata* there being no decision with regard to the objection and no actual determination thereon.

Article 165 of Schedule I to the Limitation Act applies only to applications under O. XXI, r. 100 of the Civil Procedure Code.

Appeal against an order of the Additional District Judge, Hooghly at Howrah, dated the 27th April 1920, affirming that of the Subordinate Judge, Howrah, dated the 30th August 1919.

FACTS appear from the judgment.

Babu *Monmathonath Ganguly*, for the Appellants.—The present proceedings are barred by *res judicata* by reason of the fact that the respondent did not proceed with his objection case which he had previously filed. Refers to *Mungul Pershad* v. *Grija Kant* (1). Then again the period of limitation for an application like the present being 30 days under Article 165 of the Schedule to the Limitation Act, the proceedings are clearly barred by limitation. See *Ratnam Aiyar* v. *Krishna Dass* (2). And lastly, my grievance is that the Executing Court has wrongly altered the decree. As an Execution Court it had no power to amend the decree. If any amendment was necessary, it could only be done by the Court which passed the decree.

Dr. *Jadunath Kanjilal*, for the Respondent, was not called upon to reply.

(1) 8 C. 51; 11 C. L. R. 113; 8 I. A. 123; 4 Sar. P. C. J. 249; 4 Ind. Dec. (N. S.) 32.

(2) 21 M. 494 at p. 495; 8 M. L. J. 75; 7 Ind. Dec. (N. S.) 706.

G. I. P. RY. CO. v. JITAN RAM-NIRMAL RAM.

JUDGMENT.—This is an appeal by the defendants against a decision of the Additional District Judge affirming a decision of the Subordinate Judge. The respondent in the present appeal, sometime ago, instituted a suit for declaration of his title to, and for possession of, the land included in the present execution case. Now the suit was compromised and a decree was passed and the present appellants took out execution in respect of that decree and certain plots were seized. The present respondent made an objection but on the 11th December 1915 when the objection was brought on, apparently what happened was was that the present respondent said that he would not proceed with the case. We cannot find that there was any decision with regard to the objection or any actual determination on the point.

Three questions are urged before us on behalf of the appellants, firstly, it is stated that these proceedings are barred as the matter is *res judicata* by reason of the dismissal of the respondent's objection on the 11th December 1915. We think this point is not well founded having regard to the fact that there was no decision with regard to the objection and no actual determination thereon. Secondly, it is urged that under the provisions of Article 165 of the Indian Limitation Act the present proceedings, which have been treated as an application under section 47, Civil Procedure Code, are barred. The learned Additional District Judge points out that Article 165 applies only to applications under O. XXI, r. 100 and with this view we agree. Then, thirdly, it is stated that the Executing Court has wrongly altered the decree with regard to a particular plot. Now it does not appear that this point was raised in the lower Appellate Court although it was raised in the First Court. But reading the judgment of the Subordinate Judge, it seems to us that all that he has done is to construe the decree and not in fact to alter it. This point accordingly fails and the appeal must stand dismissed.

A cross-objection has been preferred on behalf of the respondents, and it is urged before us that the learned Additional District Judge has not considered the cross-objection that was raised by the present respondents before him. But he does refer in his judgment to the cross-objection with regard to certain strip of land. Then he goes on to say: "very little has been said against this decision on the merits. The map prepared by the Commissioner and the facts set forth by the learned Subordinate Judge seem to me to be conclusive." Now, we think that there is no doubt that in this portion of his judgment he was dealing not only with the contentions raised by the present appellants but also with the cross-objection that was raised before him by the present respondent. This being so, although he has only dismissed the appeal and has not expressly dismissed the cross-objection, we think that he did consider the cross-objection and came to a conclusion with regard to it.

The cross-objection accordingly fails.

We make no order as to costs.

B. N.

Appeal and Cross-objection dismissed.

PATNA HIGH COURT.

CIVIL REVISION No. 309 OF 1921.

January 29, 1922.

Present:—Mr. Justice Jwala Prasad.

THE G. I. P. RAILWAY COMPANY—DEFENDANT No. 2—PETITIONER

versus

MESSRS. JITAN RAM-NIRMAL RAM—PLAINTIFF—OPPOSITE PARTY.

Railways Act (IX of 1890), ss. 72 to 76—Carriers Act (III of 1865)—Contract Act (IX of 1872), ss. 151, 152, 161—Railway Company—Bailee—Common carrier—Liability for loss of goods—Risk-Notes Form A and B, effect of—Wilful neglect—Onus—Consignee to set forth particulars constituting neglect—Civil Procedure Code (Act V of 1908), O. VI, r. 4.

A Railway Company becomes a bailee under sections 151, 152 and 161 of the Indian Contract Act of 1872 and are common carriers under the Carriers Act, and would be liable for the loss,

destruction or deterioration of any consignment either wholly or in part of any goods consigned to them, and they are required to deliver the goods so consigned to the consignee in the condition in which they were consigned to them. [p 665, col. 2.]

This ordinary liability of a Railway Company under sections 72 to 76 of the Railways Act is intended to be limited by the special agreement between the Company and the consignor embodied in Risk-Notes A and B, and the consideration for limiting the liability of the Company is the reduction of the ordinary tariff rate. [p. 665, col. 2.]

The Railway Company under the Risk-Note is, therefore, liable only for the loss of one or more complete packages due to the wilful neglect of its servants, transport agents or carriers employed by them. [p. 666, col. 1.]

The Risk-Notes A and B fulfil the conditions for rendering a contract valid, and, therefore, the parties are bound by the contract embodied in the Risk-Notes. [p. 666, col. 1.]

The onus of proving wilful neglect and default of the Railway Company and thereby fixing the liability upon it must necessarily rest upon the plaintiff. [p. 666, col. 1.]

A plaintiff, in order to succeed in an action for compensation for the loss or deterioration of the goods consigned to the Railway must also set forth all the particulars constituting the wilful neglect or default of the Railway Company, which occasioned the loss or deterioration, as is required by O. VI, r. 4 of the Civil Procedure Code. [p. 666, col. 1.]

SheoBarat Ram v. *Bengal and North-Western Railway Company*, 15 Ind. Cas. 56; 16 C. W. N. 766, *East Indian Railway Company* v. *Nilkanta Roy*, 22 Ind. Cas. 679; 41 C. 576; 19 C. L. J. 142; 19 C. W. N. 95, *Agent, East Indian Railway Company* v. *Ajodhya Prasad*, 49 Ind. Cas. 498; (1919) Pat. 150, *East Indian Railway Company* v. *Nathmal Behari Lal*, 39 Ind. Cas. 180; 39 A. 418; 15 A. L. J. 321, *Magan Lal Purshotam* v. *Bombay Baroda and Central India Railway Co.*, Rail. Cas. 36, *Bombay Baroda and Central India Railway Co.* v. *Ambalal Sewak Lal*, Rail. Cas. 48, referred to.

Application against decree passed by the Subordinate Judge, Gaya, exercising powers of a Small Cause Court Judge.

Mr. *S. N. Bose*, for the Petitioner.

Messrs. *Kulwant Sahay* and *Kailaspati*, for the Opposite Party.

JUDGMENT.—This is an application under section 25 of the Provincial Small Cause Courts Act against a decree passed by the Subordinate Judge of Gaya, exercising the powers of a Judge of the Small Cause Court, against the G. I. P. Railway Company for compensation on amount of loss of a complete package out of a consignment of 16 bales of cotton yarn under R. R. No. 6047-11, invoice No. 1 on the 5th June 1920, delivered to the Railway for carriage by goods train and to be delivered to the plaintiff at Gaya. The consignor, at the time when the goods were made over to the Railway Company at Madan Mahal, signed what is known as Risk-Notes A and B. Under the Risk-Note the consignor paid a special reduced rate instead of the ordinary tariff rate chargeable for such a consignment and in consideration thereof he agreed that the Railway Company shall be "free from all responsibility for any loss, destruction, deterioration of, or damage to, the said consignment, from any cause whatever except for the loss of a complete consignment or of one or more of complete packages forming part of a consignment, due either to the wilful neglect of Railway administration, or to theft by or to the wilful neglect of its servants, transport agents or carriers employed by them, before, during, and after transit over the said Railway or other Railway lines working in connection therewith."

The Risk-Note B further provides that the term "wilful neglect mentioned therein shall be held not to include fire, robbery from running train or any other unforeseen event or accident."

The effect of the Risk-Notes A and B is to limit the ordinary liability of the Railway Company under sections 72 to 76 of the Indian Railways Act, (Act IX of 1890). The Railway Company becomes a bailee under sections 151, 152 and 161 of the Indian Contract Act of 1872 and are common carriers under the Indian Carriers Act. To state briefly, the Railway Company would be liable for the loss, destruction or deterioration of any consignment either wholly or in part of any goods consigned to them, and they are required to deliver the goods so consigned to the consignee in the condition in which they were consigned to them. This ordinary liability under sections 72 to 76 of the Act is intended to be limited by the special agreement between the Railway Company and the consignor embodied in Risk Notes A and B, and the consideration for limiting the liability of the Railway Company is the reduction of the ordinary tariff rate. Such an agreement has been saved by clause (2) of section 72, which says:—

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"An agreement purporting to limit that responsibility (of clause 1) shall, as far as limitation, be void, unless it is in writing signed by or on behalf of the person sending or delivering to the Railway administration the animals or goods, and is otherwise in a form approved by the Governor-General in Council."

The Risk Notes A and B fulfil the conditions for rendering the contract valid, and, therefore, the parties are bound by the contract embodied in the Risk-Notes. The Railway Company under the Risk-Note is, therefore, liable only for the loss of one or more complete packages due to the wilful neglect of its servants, transport agents or carriers employed by them. The plaintiff, therefore, in order to succeed in an action for compensation for the loss or deterioration of the goods consigned to the Railway must set forth all the particulars constituting the wilful neglect or default of the Railway Company, which occasioned the loss or deterioration as is required by O. VI, r. 4 of the Civil Procedure Code. The plaintiff is further required to substantiate by evidence the case of wilful neglect or default on the part of the Railway Company and its servants. In other words, the onus of proving wilful neglect and default of the Railway Company and thereby fixing the liability upon it must necessarily rest upon the plaintiff. No doubt without the Risk-Note the plaintiff need not have proved beyond the loss or deterioration of his goods and the onus would have been entirely upon the Railway Company under sections 72 to 76. This view has now been settled by a string of authorities: *Sheo Barat Ram* v. *Bengal and North Western Railway Company* (1), *East Indian Railway Company* v. *Nilkanta Roy* (2), *Agent, East Indian Railway Company* v. *Ajodhya Prasad* (3), *East Indian Railway Company* v. *Nathmal Behari Lal* (4), *Magan Lal Purshotam* v. *Bambay Baroda and Central India Railway Co.* (5), *Bombay Baroda and Central India Railway Co.* v. *Ambalal Sewak Lal* (6).

(1) 15 Ind. Cas. 56; 16 C. W. N. 766.
(2) 22 Ind. Cas. 679; 41 C. 576; 19 C. L. J. 142; 19 C. W. N. 95.
(3) 49 Ind. Cas. 498; (1919) Pat. 150.
(4) 39 Ind. Cas. 130; 39 A. 418; 15 A. L. J. 321.
(5) Rail. Cas. 36.
(6) Rail. Cas. 48.

The distinction between a case instituted under sections 72 to 76 of the Indian Railways Act, and that based upon the Risk Notes A and B has been dealt with in almost all the aforesaid authorities. In the case of *East Indian Railway Company* v. *Kanak Behary Haldar* (7), it was held that the cases under sections 72 to 76, *viz.*, *Surendra Lal Chaudhuri* v. *Secretary of State for India in Council* (8), and *Sesham Pater* v. *Moss* (9), do not apply to the case arising under the Risk Notes A and B. The facts of the present case appear to be exactly similar to those in *Toonya Ram* v. *East Indian Railway Company* (10), where a decision such as that arrived at by the Small Cause Court Judge in the present case was set aside upon the ground that the onus was wrongly placed upon the Railway Company instead of upon the plaintiff. The Judge of the Small Cause Court in the present case appears to be under a misapprehension of the scope of the plaintiff's suit. In the plaint no charge was laid against the Railway Company of wilful neglect or wilful default which occasioned the loss of the package in question. Far less was there any circumstance or fact disclosed in the plaint constituting wilful neglect or default such as is enjoined by O. VI. r. 4 to be stated in a suit based upon wilful neglect or wilful default. That the Judge was under a misapprehension is also apparent from the entire absence of the words wilful neglect or wilful default in his judgment. He does not come to any finding that the loss of the plaintiff's goods was due to the negligence of the defendant Company; in fact, he does not refer to any evidence on behalf of the plaintiff bearing upon the loss of the goods due to the negligence of the defendants. He simply says—

"From the statement of Ram Prasad it appears that the loss was caused at Madan Mahal which is a station of the second defendant."

He further admits that the goods were covered by the Risk Notes A and B, but he wrongly holds that these Notes would not exonerate the Railway Company in case of a loss of a complete consignment, and this

(7) 44 Ind. Cas. 691; 22 C. W. N. 622.
(8) 38 Ind. Cas. 702; 25 C. L. J. 37.
(9) 17 M. 445; 6 Ind. Dec. (N. S.) 308.
(10) 20 C. 257; 7 C. W. N. 370.

shows that the learned Judge of the Small Cause Court perhaps did not read the Risk Note (Exhibit B) which deals with the loss of a complete consignment or a complete package. He has treated the case as if it was under sections 72 to 76 of the Indian Railways Act and consequently he has fallen into the common error of throwing the onus upon the defendant instead of upon the plaintiff. This very point has been dealt with in the cases quoted above, and there is no authority to the contrary.

I wonder whether the cases cited above were placed before the learned Judge of the Small Cause Court, or his attention was ever directed to the distinction between the cases under sections 72 to 76 of the Indian Railways Act, and the Risk Notes A and B.

In terms of the order passed in the case of *Toonya Ram* v. *East Indian Railway Company* (10), I hold that the decree passed by the learned Judge of the Small Cause Court against the Railway Company is wrong in law and ought to be set aside under section 25 of the Provincial Small Causes Act.

The Rule is accordingly made absolute. In the circumstances of the case, there will be no order as to costs, each party bearing its costs throughout.

N. H.

Rule made absolute.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 223 OF 1921.

February 17, 1922.

Present :—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Coyajee.

Bai KARIMABIBI DAUDBHAI—PLAINTIFF—APPELLANT

versus

ABDEREHMAN SAYAD BANU—DEFENDANT—RESPONDENT.

Specific performance of contract for sale—Decree—Execution—Defendant, whether can execute decree—Civil Procedure Code (Act V of 1908), s. 2 (3), effect of.

A decree for specific performance of a contract to sell property is capable of being executed by the defendant as well as by the plaintiff, so where, in such a case the plaintiff refuses to take the sale-deed, and pay the consideration money, the defendant is entitled to come to Court and ask for the payment to him of the consideration money for the purchase on his tendering a sale-deed. [p. 668, col. 1.]

First appeal from the decision of the First Class Subordinate Judge, Surat, in Darkhast No. 51 of 1921.

Mr. *G. N. Thakor*, for the Appellant.

Mr. *M. B. Dave*, for the Respondent.

JUDGMENT.—The plaintiff in Suit No. 264 of 1919 in the First Class Subordinate Judge's Court at Surat obtained a decree for specific performance of a contract to sell immoveable property. The following order was passed :

"It is ordered that defendant No. 1 do execute to the plaintiff a sale-deed in respect of the property, the subject matter in suit, for Rs. 7,200. In default on his part, the plaintiff do apply for execution of the same. The plaintiff do deposit in the Court Rs. 6,449 being the balance of the purchase-money due at the foot of the agreement, the subject-matter of this suit. On his doing so, the plaintiff do take possession of the house, the subject-matter of this suit after the execution of the necessary sale-deed. But he is not to take possession before that. The defendant No. 2 do take Rs. 4,741-8-0 out of the said Rs. 6,449, and he do give over the balance to defendant No. 1. The documents lying in Court of defendant No. 2 (three mortgage-deeds) be given to the plaintiff. The plaintiff do also take the agreement given in writing to defendant No. 2 by the plaintiff and defendant No. 1."

The second defendant was the mortgagee from the first defendant. It also appears that the same property was the subject-matter of Civil Suit No. 217 of 1919 filed by one Ismail against the present defendants, the present plaintiff not being a party, and it appears that in that suit, after the decree in Suit No. 264 of 1919 had been passed, Ismail got a decree directing the defendants to give him possession of the suit property on Ismail's paying them Rs. 4,000.

In consequence of the decree in Suit No. 217 of 1919, the plaintiff was not anxious to get a sale deed from the defendants. The defendants were anxious to get the money which had been deposited in Court, and were perfectly willing to give the plaintiff a sale-deed. The defendants consequently took out

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Darkhast No. 51 of 1921. The plaintiff opposed any action being taken on the Darkhast on the ground that the defendants were not decree-holders as defind in section 2 (3) of the Civil Procedure Code, so that they had no right to file the Darkhast. This contention was overruled by the First Class Subordinate Judge who directed that the plaintiff should get a sale-deed which the defendants were willing to pass, and should get possession. The defendants should get the money as decreed in their favour on passing the deed and giving possession. If the plaintiff refused to take the deed and possession within a reasonable time, defendants were to be at liberty to apply to the Court for such orders as they were entitled to.

Now, it seems to me on general principles, leaving aside altogether the dealings between the defendants and other parties, that the decree for specific performance was capable of being executed by the defendants as well as by the plaintiff. If this were not so, it would follow that if a plaintiff who has obtained a decree for specific performance, refuses to take the sale-deed and pay the consideration money, the defendant is left with no remedy whatever, while, owing to the decree passed against him, he would still be debarred from dealing in any way with the suit property. We think it is clear in such a case that a defendant would be entitled to come to Court and ask for the payment to him of the consideration money for the purchase on his tendering a sale-deed. We think the order made by the Judge in the Court below was a perfectly correct order and that the defendants came within the definition of decree-holder in section 2 (3), Civil Procedure Code. If the plaintiff in a suit for specific performance, after having obtained a decree, discovers or is apprehensive that the defendant cannot give him a good title, then it seems to me his proper course is to apply to the Court that passed the decree for a review, or, in the alternative, it may be open to him to file another suit against the defendant to set aside the previous proceedings. The appeal must be dismissed with costs.

W C A.

Appeal dismissed.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 222 OF 1919.

January 30, 1922.

Present:—Mr. Justice Piggott and Mr. Justice Walsh.

CHATUR BHUJ AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

GOBIND RAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Antecedent debt—Pre-emption decree, money required for—Mortgage of ancestral property to pay off the decree—Ancestral property, liability of.

A pre-emption decree merely gives the decree-holder the option of acquiring certain property at a certain price. He is not thereby laid under any obligation to acquire that property. Consequently money required to satisfy such a decree is not an antecedent debt due from the decree-holder, and, therefore, if the decree-holder hypothecates joint ancestral property in order to take advantage of the decree, the hypothecation is not binding on the family property as having been made to pay off an antecedent debt. [p. 669, col. 2.]

To give true effect to the doctrine of antecedency in time, there must be real dissociation in fact. [p. 670, col. 1.]

Nathu v. *Kundan Lal*, 8 Ind. Cas. 836; 33 A. 242; 7 A. L. J. 1182, dissented from.

Sahu Ram Chandra v. *Bhup Singh*, 39 Ind. Cas. 280; 39 A. 437 at p. 449; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 44 I A. 126 (P. C.), followed.

First appeal from the decision of the First Additional Subordinate Judge, Aligarh, dated the 29th of March 1919.

Mr. *Gulzari Lal*, for the Appellants.

Messrs. *S. K. Dar* and *Panna Lal*, for the Respondents.

JUDGMENT.

PIGGOTT, J.—The plaintiffs, who are the appellants in this Court, sued Gobind Ram and his minor sons upon two mortgages of the 9th of September 1911 and the 25th of June 1912. The question in issue in the Court below and again in this Court was whether the joint ancestral property in the hands of Gobind Ram can be made liable for the whole, or for any part, of the consideration under these two deeds. The essential circumstances are as follows: On the 20th of July 1911 Gobind Ram had obtained a pre-emption decree entitling him to acquire certain property in a village called Loharra, on condition of his depositing a sum of Rs. 1,072, within a prescribed time. He borrowed this amount

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from the plaintiffs under the deed of September the 9th, 1911, by hypothecating under the said deed not only the share in village Loharra which he proposed to acquire, but also certain ancestral family property in his hands. He did not confine himself to raising the money necessary to acquire the property in Loharra under the pre-emption decree. He borrowed Rs. 1,246 more in order to pay off 2 promissory-notes. He acknowledged the previous receipt of Rs. 82 for incidental expenses and other unspecified necessities and he was paid Rs. 1,100 in cash and on registration. The total consideration for this bond, therefore, comes to Rs. 3,500. Subsequently, there was an appeal in the pre-emption case and the result was that, in order to secure the benefit of the pre-emption decree, Gobind Ram had to pay a further sum of Rs. 750. For this purpose, he executed the second of the two mortgages in suit for a nomial consideration of Rs. 800 of which Rs. 45 was received in cash and Rs. 5 was set down as due on account of the interest on the older bond of September, the 9th, 1911. The Court below has held that the property acquired by Gobind Ram in village Loharra is liable for the full amount of the debt due under both mortgages according to their terms, and this finding is not challenged by the defendants. With regard to the remainder of the consideration, the finding is that two antecedent debts due under a promissory note, for a total sum of Rs. 1,246 were in fact paid up out of the consideration of Rs. 3,500 received under the bond of September the 9th 1911. Consequently, the whole of the property hypothecated under the deed, including the joint ancestral family property, has been made liable for this amount. To this part of the decree again, the defendants have submitted. The appeal before us is by the plaintiffs. They contend :

Firstly, that the joint ancestral family property ought to have been made liable at least for the two sums of Rs. 1,072 and Rs. 750 applied to the satisfaction of the pre-emption decree. Secondly, that the sum of Rs. 1,100 paid in cash at the registration of the older deed was, in fact, borrowed in order to pay off the antecedent unsecured debts and was applied to that purpose. On the first point, there is one authority of this Court, the case of *Nathu* v. *Kundan Lal* (1), which appears to support the contention of the plaintiffs. We do not think that this decision can be regarded as good law in view of the subsequent pronouncements of their Lordships of the Privy Council on the question of antecedent debt to which it is not necessary for us to refer in detail. When all is said and done, the pre-emption decree merely gave Gobind Ram the option of acquiring certain property at a certain price. He was laid under no obligation to acquire the property unless he chose. It seems to us that it would be very dangerous to hold that the money required to satisfy the pre-emption decree was an antecedent debt due from Gobind Ram on the date on which each of these mortgages respectively was executed.

On the second point, we have come to the conclusion that we cannot come to a decision without exercising our power under O. XLI r. 27 of the Civil Procedure Code to call for certain further evidence. We find that, as early in the trial of the suit as the 29th of January, 1919, the plaintiffs had made a full disclosure of their case regarding this item of Rs. 1,100. They mentioned the names of four creditors of Gobind Ram for whose satisfaction they allege the money to have been borrowed and who they allege to have been actually paid off by means of this money. The case was set down for hearing on the 20th of March 1919 and, on the 7th of March the plaintiffs applied for summonses to issue against the four creditors whom they had already named to the Court. Summonses were duly served but the witnesses in question did not present themselves before the Court at the hearing of the 20th of March 1919. The plaintiffs applied for an adjournment to enable them to summon these witnesses but were refused. We cannot agree with the Court below that there were any laches on the part of the plaintiffs in this matter. So far as appears from the record, they did their best to get these witnesses before the Court. We think this is a case in which the Court from whose decree the appeal before us is preferred has refused to admit evidence which ought to have been admitted. We accordingly send

(1) 8 Ind. Cas. 836; 33 A. 242; 7 A. L. J. 1182.

down the case to the Court below with directions to afford the plaintiffs a further opportunity of requiring the attendance of those four witnesses in such manner as they may think proper. The witnesses should be directed not merely to attend the Court to give evidence, but to bring with them any documents in their possession relating to the alleged transactions between them and Gobind Ram. When this evidence has been duly recorded the record should be returned and sent down for further hearing of the appeal to this Court on the earliest convenient date. The four witnesses in question are Bal Makund, Ganga Nath, Mansukh Ram and Jai Jai Ram mentioned in the Court's *rubkar* of the 29th of January 1919 and summoned at the trial under the plaintiff's application of the 7th of March 1919.

WALSH, J.—I agree. With reference to the case of *Nathu* v. *Kundan Lal* (1) which has been relied on, I find a difficulty in following the reasoning contained in the judgment.

Whatever else it may be, a condition providing that the payment of a sum of money shall depend upon enforcing or taking up a pre-emption decree is certainly not a debt. The transaction, no doubt, was antecedent, but it does not result in debt. There is no person to enforce it if the pre emptor does not choose to act upon this plea. I entirely agree with what my brother has said that the passage in the judgment of their Lordships of the Privy Council *Sahu Ram Chandra* v. *Bhup Singh* (2) clearly shows that the decision in *Nathu* v. *Kundan Lal* (1) ought not any longer to be followed. "In truth" runs the opinion of Lord Shaw "to give true effect to the doctrine of antecedency in time there must be also real dissociation in fact." In *Nathu* v. *Kundan Lal* (1) and in the case before us, there is not only no such dissociation in fact, but there is the most intimate association. In the previous decision of this Court, reliance was placed in the judgment upon the fact that the condition of the decree had been actually complied with and the property had been acquired as the result of the money borrowed in the mortgage transaction which was in question. That seems to me to be exactly the vice against which the Privy Council have warned the Courts of India. On the other hand, it seems to me that the decision in *Kapildeo* v. *Thakur Prasad* (3) marks very clearly the other side of the dividing line, there being in that case an obligation incurred antecedent in time and dissociated in fact, either to take up the purchase at auction or to pay compensation for default.

N. H. & R. N. *Order accordingly.*

(2) 39 Ind Cas. 280; 39 A. 437 at p. 449; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 44 I. A. 126 (P. C.).

(3) 21 Ind Cas. 868; 36 A. 17; 11 A. L. J. 931.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2583 OF 1920.

March 10, 1921.

Present:—Mr. Justice Martineau.

DYALA AND OTHERS—PLAINTIFFS—APPELLANTS,

versus

HIRU AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLII, as amended by High Court—Appeal, second, memorandum of, unaccompanied by First Court's judgment—Presentation, validity of.

The presentation of a memorandum of second appeal to the Lahore High Court unaccompanied by a copy of the judgment of the Court of first instance, as required by r. 2 added by the High Court to O. XLII, of the Civil Procedure Code, is not a valid presentation.

Second appeal from the decree of the Additional Judge, Kangra at Dharamsala, dated the 31st May 1920, reversing that of the Tahsildar, exercising the powers of a Munsif, 3rd Class, Hamirpur, District Kangra, dated the 25th February 1920.

Lala *Mehr Chand Mahajan*, for the Appellants.

Lala *Jagan Nath*, for the Respondents.

JUDGMENT.—This is a second appeal from an appellate decree of the 31st May 1920, and a preliminary objection is taken for the respondents that the appeal was not properly presented till after the expiry of the period of limitation.

The appeal was first presented on the 28th September 1920, the day on which the Court opened after the vacation. It was accompanied by copies of the lower Appellate

Court's judgment and decree, but not by a copy of the judgment of the First Court, and it was accordingly returned to the appellant's Counsel, who filed it again on the 17th November with a copy of the First Court's judgment attached.

On the 17th October 1919 O. XLII of the Civil Procedure Code, relating to appeals from appellate decrees, was amended by the addition of rule 2, which provides that in addition to the copies specified in O. XLI, r. 1, the memorandum of appeal shall be accompanied by a copy of the judgment of the Court of first instance (P. G. Notification No. 4685 G., dated the 17th October 1919).

It is clear that the appeal in this case was not properly presented on the 28th September, as it was not accompanied by a copy of the judgment of the Court of first instance as required by r. 2 of O. XLII, *Chunilal Jethabhai* v. *Dahyabhai Amulakh* (1), which is cited on behalf of the appellants, does not help them.

There was no valid presentation of the appeal till the 17th November when the period of limitation had expired, and no reason is shown for admitting the appeal after the expiry of that period. The appeal is accordingly dismissed with costs.

W. C. A. *Appeal dismissed.*

(1) 32 B. 14; 9 Bom. L. R. 1138.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 421 OF 1918.

April 13, 1922.

Present :—Mr. Justice Piggott and Mr. Justice Walsh.

MOHAN LAL AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

MAHMUD HUSAIN AND OTHERS—DEFENDANTS—RESPONDENTS.

*Muhammadan Law—Gift—*Hiba-bil-ewaz*—Essentials.*

A conveyance by way of gift as between Muhammadans may be by deed of gift simply, or by deed of gift coupled with consideration. If the former, unless accompanied by delivery of the thing given, so far as it is capable of delivery, it is invalid. If the latter, actual payment of the consideration must be proved and the *bona fide* intention of the donor to divest himself *in præsenti* of the property and to confer it upon the donee must also be proved. [p. 672, col. 1.]

Second appeal from a decree of the District Judge, Bareilly.

Mr. *B. E. O'Conor* and Dr. *Surendro Nath Sen*, for the Appellants.

Messrs. *Iqbal Ahmad* and *Mukhtar Ahmad*, for the Respondents.

JUDGMENT.—This is a second appeal on the part of two plaintiffs whose claim for possession of certain house property in the town of Bareilly has been dismissed by both the Courts below.

The plaintiffs claim the property under a deed of sale of the year 1916 executed by two persons, Abdul Latif and Abdul Hafiz. Their case is that the said vendors obtained the property by inheritance from their mother, Zohra Bibi, who again obtained the property by gift from her mother, *Musammat* Sakina Bibi. The deed of gift in question is dated the 2nd of June 1900, and was executed, not by Sakina Bibi herself, but by one Saiyid Ali Husain acting as her special attorney. The plaintiffs having been put to proof of their title, a number of issues were framed, and, as a matter of fact, both parties pressed upon the Courts below alternative and inconsistent pleadings to an extent which has served to cloud the plain issues in the case and to introduce elements of confusion which have led to the delay and trouble we have found in determining the appeal. When it was first argued before us, we decided that it was not expedient that we should proceed further without obtaining clear findings upon certain questions of fact. The findings on the issues remitted by us are substantially in favour of the plaintiffs-appellants, so far as they go; but as the case has been finally argued out after the return of the remand findings, we have come to the conclusion that the appeal cannot succeed.

The first question is whether *Musammat* Zohra Bibi held a good title to this property under the deed of gift of the 2nd of June 1900. We may pass over a number of questions which were raised in this connection and concentrate upon what is really the essential point in the case. The deed of the 2nd of June 1900 is unquestionably what is konwn in the Muhammadan Law as a *heba bil ewaz*, or a gift for consideration. The authority of the special attorney, who executed the same, most definitely was to convey this house property in Bareilly to

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Musammat Zohra Bibi as a gift, but for a consideration, that consideration being the surrender by Zohra Bibi of certain rights. It is not important to consider what those rights precisely were. The deed itself upon its wording carries out the intention expressed in the power-of-attorney, that is to say, it purports to convey the house property in return for the surrender of *Musammat* Zohra Bibi's rights. Their Lordships of the Privy Council in the case of *Chaudhri Mehdi Hasan* v. *Muhammad Hasan* (1) have clearly laid down the law upon this point. A conveyance by way of gift as between Muhammadans may be by deed of gift simply, or by deed of gift coupled with consideration. If the former, unless accompanied by delivery of the thing given, so far as it is capable of delivery, it is invalid. If the latter, actual payment of the consideration must be proved and the *bona fide* intention of the donor to divest himself *in præsenti* of the property and to confer it upon the donee must also be proved. The learned Diartriet Judge has found that there is no evidence that *Musammat* Zohra Bibi relinquished anything, or surrendered any rights, or, in short, returned any consideration for the conveyance in her favour purporting to be effected by this document. In view of this finding it seems scarcely necessary for us to go into the alternative question whether it is proved that possession passed, except in so far as that alternative question is involved in certain further pleas taken on behalf of the appellants. In the Courts below mush reliance was placed by the plaintiffs upon the contention that they and their predecessors in-title had perfected a good title by adverse possession againt Sakina Bibi and her heirs for twelve years and more from the date of the deed of gift. As a matter of fact, in the month of June 1900, the property was in the possession of certain lessees and remained in the possession of those lessees until the year 1913. There is no evidence that those lessees ever paid rent to *Musammat* Zohra Bibi. They appear to have paid rent to Muhammad Ehsan, son of Sakina Bibi, and, therefore, brother of Zohra Bibi. It is claimed on his behalf that he received that rent as owner; while the case for the appellants, when sifted out thoroughly will be found to rest upon the contention that Muhammad Ehsan received this rent as agent for Zohra Bibi. It seems sufficient to say that there is no real foundation for this plea, either in the findings of the Courts below, or in such evidence as has been brought to our notice.

The other point taken is that the heirs of Sakina Bibi are in some way or other estopped from denying, either the validity of the transfer in Zohra Bibi's favour, or the fact of her possession. This plea is based in substance upon certain words used in the judgment of the lower Appellate Court which are quoted in the first paragraph of the memorandum of appeal before us. Undoubtedly, the expression so quoted, taken by itself, lends some colour to the appellants' contention, although it may be noted that the expression used, namely, that the "family" had allowed the sons of Zohra Bibi to hold the property in suit as exclusive owners, is a dangerously vague one. Apart from this, however, the judgment of the learned District Judge requires to be fairly considered as a whole. When so considered, it seems clear enough that the lower Appellate Court intended to find, what it has found in express words in a later paragraph of the judgment, namely, that possession never passed to Zohra Bibi and that the evidence for the plaintiffs failed to prove anything more than that in the year 1913 the sons of Zohra Bibi had somehow come to be in effective possession of the house to this extent that they executed a fresh lease in favour of another tenant and managed to put their tenant into possession. This finding is not sufficient to support either the general plea of estoppel in the form in which it is taken in the memorandum of appeal, or any more explicit plea based upon the wording of section 41 of the Transfer of Property Act No. IV of 1882.

For these reasons, we dismiss this appeal with costs.

W. C. A. *Appeal dismissed.*

(1) 28 A. 439 at p. 448; 10 C. W. N. 706; 3 A. L. J. 405; 8 Bom. L. R. 387; 9 O. C. 196; 4 C. L. J. 295; 1 M. L. T. 163; 28 I. A. 68 (P. C.).

RAKHAL CHANDRA GHOSE v. DURGA DAS.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2561 OF 1919.

January 13, 1922.

Present:—Justice Sir N. R. Chatterjea, Kt., and Mr. Justice Panton.

RAKHAL CHANDRA GHOSE AND OTHERS —PLAINTIFFS—APPELLANTS

versus

DURGA DAS SAMANTA AND ANOTHER—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 142—Possession, suit for—Plaintiff dispossessed and out of possession—Burden of proof as to title and possession—Possession—User—Constructive possession—Presumption that in case of conflict of evidence possession goes with title, when arises.

Where the plaintiff while in possession has been dispossessed and is out of possession at the date of suit the onus is upon him to prove that he was in possession and was dispossessed within 12 years of the suit. [p. 676, col. 1.]

In cases coming under Article 142, although the plaintiffs' title is proved, the onus is not upon the defendant to show that the plaintiff lost his title by adverse possession on the part of the defendant. [p. 681, col. 1.]

Maharajah Koowar Baboo Nitrasur Singh v. *Baboo Nund Loll Singh*, 8 M. I. A. 199; 1 Suth. P. C. J. 420; 1 Sar. P. C. J. 744; 1 W. R. P. C. 51; 19 E. R. 503, *Rajah Sahib Perhlad Sein* v. *Maharajah Rajender Kishore Sing*, 12 M. I. A. 292 at p. 337; 2 Suth. P. C. J. 225 at p 239; 2 Sar. P. C. J. 430; 20 E. R. 349, *Beer Chunder Jobraj* v. *Deputy Collector of Bhullooah*, 13 W. R. 23 (P. C.), *Mohima Chunder Mozoomdar* v. *Mohesh Chunder Neoghi*, 16 C. 473; 16 I. A. 23; 5 Sar. P. C. J. 321; 8 Ind. Dec. (N. S.) 312 (P. C.), *Mahammud Amanulla Khan* v. *Badan Singh*, 17 C. 137; 16 I. A. 148; 13 Ind. Jur. 330; 5 Sar. P. C. J. 412; 23 P. R. 1890; 8 Ind. Dec. (N. S.) 629 (P. C.), *Rani Hemanta Kumari Debi* v. *Maharaja Jagadindra Nath Roy Bahadur*, 10 C. W. N. 630 (P. C.); 3 A. L. J. 363; 8 Bom. L. R. 400; 1 M. L. T. 135; 16 M. L. J. 272 (P. C.), *Karan Singh* v. *Bakar Ali Khan*, 5 A. 1; 9 I. A. 99; 4 Sar. P. C. J. 382; 2 Ind. Dec. (N. S.) 1044 (P. C.), *Radha Gobind Roy* v. *Inglis*, 7 C. L. R. 384; 3 Suth. P. C. J. 899 (P. C.), *Secretary of State for India in Council* v. *Rajah Chelikani Rama Rao*, 35 Ind. Cas. 902; 20 C. W. N. 1311; 31 M. L. J. 324; (1916) 2 M. W. N. 224; 39 M. 617; 14 A. L. J. 1114; 20 M. L. T. 435; 4 L. W. 486; 18 Bom. L. R. 1007; 25 C L. J. 69; 43 I. A. 192 (P. C.), *Basanta Kumar Roy* v. *Secretary of State for India*, 40 Ind. Cas. 337; 44 C. 858 at p 873; 1 P. L. W. 593; 32 M. L. J. 505; 21 C. W. N. 642; 15 A. L. J. 398; 25 C. L. J. 487; 19 Bom. L. R. 480; (1917) M. W. N. 482; 6 L. W. 117; 22 M. L. T. 310; 44 I. A. 104 (P. C.), *Mahomed Ali Khan* v. *Khaja Abdul Gunny*, 9 C. 744 at p. 751; 12 C. L. J. 257; 4 Ind. Dec (N. S.) 1145 (F. B), *Mirza Shamsher Bahadur* v. *Munshi Kunj Behari Lal*, 12 C. W N. 273; 3 M L. T. 212; 7 C. L. J. 414, *Shiva Prasad Singh* v. *Hira Singh*, 62 Ind. Cas. 1; (1921) Pat. 305; 2 P. L. T. 487; 6 P. L. J. 478; 3 U. P. L. R. (Pat.) 61, referred to and discussed.

It is now firmly settled beyond all probability of controversy that the plaintiff in an action for ejectment must not only prove his title but also his possession within 12 years of the suit. [p. 681, col. 1.]

Mirza Shamsher Bahadur v. *Munshi Kunj Behari Lal*, 12 C. W. N. 273; 3 M. L. T. 212; 7 C. L. J. 414 and *Shiva Prasad Singh* v. *Hira Singh*, 62 Ind. Cas 1; (1921) Pat. 305; 2 P. L. T. 487; 6 P. L. J. 478; 3 U. P. L. R. (Pat.) 81, referred to.

Where definite evidence of acts of possession is forthcoming there is no difference between the proof of possession in the case of jungle, waste or uncultivated lands and in that of cultivated lands. But whereas in the case of cultivated lands the plaintiff will fail if he does not prove his possession within 12 years, in the case of jungle or waste lands, if he proves his title, there is a presumption in his favour where, having regard to the nature of the land, possession cannot be expected to be proved by acts of actual user and enjoyment. If, however, the plaintiff asserts that he exercised acts of ownership upon the land and adduces evidence in support of such assertion, he cannot, where such evidence is disbelieved by the Court, turn round and rely upon any presumption, because the case set up by him negatives the existence of circumstances which would give rise to the presumption, and is inconsistent with it [p. 683, col. 2.]

Possession is not necessarily the same thing as actual *user*. The nature of the possession is to be looked for, and the evidence of its continuance must depend upon the character and condition of the land in dispute. [p. 681, col. 2.]

Where the rightful owner proves possession until the land goes under water or otherwise becomes wholly incapable of enjoyment in the usual modes, he is deemed to be in constructive possession until the land emerges out of water and becomes capable of enjoyment in the usual mode and he is actually dispossessed by the defendant. No such presumption, however, arises in the case of a wrong-doer. [p. 681, col. 2.]

Radha Gobind Roy v. *Inglis*, 7 C. L. R. 364; 3 Suth. P. C. J. 809 (P. C.), *Basanta Kumar Roy* v. *Secretary of State for India*, 40 Ind. Cas. 337; 44 C. 858 at p. 873; 1 P. L. W. 593; 32 M. L. J. 505; 21 C. W. N. 642; 15 A. L. J. 398; 25 C. L. J. 487; 19 Bom. L. R. 480; (1917) M. W. N. 482; 6 L. W. 117; 22 M. L. T. 310; 44 I. A. 104 (P.C.), *Kally Churn Sahoo* v. *Secretary of State for India*, 6 C. 725; 8 C. L. R. 90; 4 Shome L. R. 95; 3 Ind. Dec. (N. S.) 470, *Secretary of State for India* v. *Krishnamoni Gupta*, 29 C. 518 (P. C.); 29 I. A. 104; 6 C. W. N. 617; 4 Bom. L. R. 537; 8 Sar. P. C. J. 260, *Mano Mohun Ghose* v. *Mothura Mohun Roy*, 7 C. 225; 8 C. L. R. 126; 3 Ind. Dec. (N. S.) 694, *Rajkumar Roy* v. *Gobind Chunder Roy*, 19 C. 660 at p. 674 (P. C.); 19 I. A. 140; 6 Sar P. C. J. 140; 9 Ind. Dec. (N. S.) 883 (P. C.), referred to.

In cases where the land is not incapable of enjoyment, but may produce some profit, though trifling in amount and only of occasional occurence as is often the case with jungle land, it

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would be unreasonable to look for the same evidence of possession as in the case of a house or a cultivated field. All that can be required is that the plaintiff should show such acts of ownership as are natural under the existing condition of the land, and, in such cases, when he has done this his possession is presumed to continue so long as the state of the land remains unchanged unless he is shown to have been dispossessed. [p. 682, col. 1.]

Mahomed Ali Khan v. *Khaja Abdul Gunny*, 9 C. 744 at p. 751; 12 C. L. J. 257; 4 Ind. Dec. (N. S.) 1145 (F. B.), *Watson & Co* v. *Government*, 3 W. R. 73 at p. 80, referred to.

The presumption that in case of conflict of evidence, possession goes with the title, arises only where the evidence is equally strong on both sides and cannot be called in aid to give weight to evidence unworthy of credit any more than if no evidence at all had been given. [p. 683, col. 1.]

Runjeet Ram Panday v. *Goburdhun Ram Panday*, 20 W. R. 25 (P. C.), *Dharm Singh* v. *Hur Pershad Singh*, 12 C. 38; 6 Ind. Dec. (N. S.) 26, *Babu Kasturi Singh* v. *Rajkumar Babu Bissun Prayas Narain Singh*, 8 C. W. N. 876, *Thakur Singh* v. *Bhogeraj Singh*, 27 C. 25; 14 Ind. Dec. (N. S.) 17, *Lala Singh* v. *Latif Hossein*, 28 Ind. Cas. 477; 21 C. L. J. 480, *Fakira Lal Sahoo* v. *Munshi Ram Charan Lal*, 35 Ind. Cas. 554; 1 P. L. J. 146, *Shiva Prasad Singh* v. *Hira Singh*, 62 Ind. Cas. 1; (1921) Pat. 305; 2 P. L. T. 487; 6 P. L. J. 478; 3 U. P. L. R. (Pat.) 81, referred to.

Appeal against a decree of the District Judge, Birbhum, dated the 4th of September 1919, affirming that of the Munsif, First Court at Bolpur, dated the 30th of January 1919.

FACTS appear from the judgment.

Babu *Jogesh Chandra Roy* (with him Babu *Sarat Chandra Mukherjee*), for the Appellants. —The plaintiffs are the appellants. The appeal arises out of a suit for recovery of possession on declaration of plaintiffs' title thereto. The plaintiffs' case is that the land in suit was a *khas patit* land in the possession of the plaintiffs and that the defendants had excavated a tank on the land four or five years previous to the suit claiming the land to be within his *patni mehal*. The defendant not having given up possession the present suit has been brought. The First Court dismissed the suit holding that neither possession nor title has been made out by us. On appeal the learned District Judge has found our title but has dismissed the suit on the ground that we could not macke out our possession within 12 years. Hen e the present appeal. I submit the learned Judge has erred in throwing the burden of proof on us. It has been found that we have *title to the land*. The defendant should make out adverse possession in his favour. Refers to *Karan Singh* v. *Bakar Ali Khan* (1), *Radha Gobind Roy* v. *Inglis* (2), *Secretary of State for India in Council* v. *Rajah Chelikani Rama Rao* (3), *Basanta Kumar Roy* v. *Secretary of State for India* (4), *Secretary of State for India in Council* v. *Vira Rayan* (5), *Chintamani Pramanik* v. *Hriday Nath Kamila* (6), *Babu Kasturi Singh* v. *Rajkumar Babu Bissun Pragas Narain Singh* (7). The observations of the Judicial Committee in *Basanta Kumar Roy* v. *Secretary of State for India* (4), *Secretary of State for India in Council* v. *Rajah Chelikani Rama Rao* (3), *Karan Singh* v. *Bakar Ali Khan* (1), and *Radha Gobind Roy* v. *Inglis* (2) are clearly in my favour. Whatever be the nature of the land, the burden of proof of title by adverse possession is on the defendant. Refers to *Shiva Prasad Singh* v. *Hira Singh* (8), *McDonnell* v. *McKinty* (9). In the present case the lower Appellate Court ought to have found when the discontinuance took place. Discontinuance of possession means abandonment of possession followed by the possession of another. I had possession and title. Therefore presumption would be in my favour. Refers to *Dharm Singh* v. *Hur Pershad Singh* (10), *Mirza Shamsher Bahadur* v. *Munshi Kunj Behari Lal* (11). Grazing of cattle by the villagers would be consistent with my possession. There could be no ouster by the defendant by reason of this fact. The defendant must show that he had excavated the tank more

(1) 5 A. 1; 9 I. A. 99; 4 Sar. P. C. J. 382; 2 Ind. Dec. (N. S.) 1044 (P. C.).
(2) 7 C. L. R. 364; 3 Suth. P. C. J. 809 (P. C.).
(3) 35 Ind. Cas. 902; 20 C. W. N. 1311; 31 M. L. J. 824; (1916) 2 M. W. N. 224; 39 M. 617; 14 A. L. J. 1114; 20 M. L. T. 435; 4 L. W. 486; 18 Bom. L. R. 1007; 25 C. L. J. 69; 43 I. A. 192 (P. C.).
(4) 40 Ind. Cas. 337; 44 C. 858 at p. 873; 1 P. L. W. 593; 32 M. L. J. 505; 21 C. W. N. 642; 15 A. L. J. 393; 25 C. L. J. 487; 19 Bom. L. R. 480; (1917) M. W. N. 482; 6 L. W. 117; 22 M. L. T. 310; 44 I. A. 104 (P. C.).
(5) 9 M. 175; 3 Ind. Dec. (N. S.) 519.
(6) 51 Ind. Cas. 123; 29 C. L. J. 241.
(7) 8 C. W. N. 876.
(8) 62 Ind. Cas. 1; (1921) Pat. 305; 2 P. L. T. 487; 6 P. L. J. 478; 3 U. P. L. R. (Pat.) 81.
(9) (1847) 10 Ir. L. R. 514.
(10) 12 C. 38; 6 Ind. Dec. (N. S.) 26.
(11) 12 C. W. N. 273; 3 M. L. T. 212; 7 C. L. J. 414.

than 12 years ago. This evidence has not been disbelieved by the lower Appellate Court. Three of the twelve plots were recorded to be in the possession of my predecessor. Apart from the question of law the Court of Appeal below has disbelieved the evidence adduced by the defendant. I submit the presumption that title follows possession being in my favour I ought to succeed on that ground.

Babu *Sarat Chandra Roy Chowdhury* (with him Babu *Hemendra Nath Sen*), for the Respondents.—As regards the question of limitation the plaintiff in his plaint stated that the tenants used to graze cattle on the land. He further says that the defendant has dispossessed him by excavating a tank thereon four or five years prior to the suit. Article 142 of the Indian Limitation Act contemplates the possession of the plaintiff. In other words the plaintiff is bound to prove his possession within 12 years. Refers to *Mohima Chunder Mozoomdar* v. *Mohesh Chunder Neoghi* (12). There it has been held that anterior possession by the plaintiff was not enough to shift the burden of proof on to the defendant. The question in such cases would be when the plaintiff was dispossessed. In the Madras cases the plaintiff's case was that he had acquired title by adverse possession. Those cases have no bearing at all to the present case. The case in *Basanta Kumar Roy* v. *Secretary of State for India* (4) does not apply. The findings of fact in the present case are concurrent on the question of limitation and title. No doubt the land has been described as *khas patit* land but that means that the land has not been settled with any tenant. "*Patit*" does not mean waste land. They must show that the land is not capable of physical possession and is not culturable. Refers to *Mahomed Ali Khan* v. *Khaja Abdul Gunny* (13). The plaintiff must prove some act of possession if the land is capable of physical possession. Otherwise the right would be lost. The whole question depends upon the character of the land. Simple assertion of the land being *khas patit* would not do. He must prove that the land was not capable of physical possession or that he had done some act of possession within twelve years. The observation in *Secretary of State for India in Council* v. *Rajah Chelikani Rama Rao* (3) has no bearing to the present case at all.

[CHATTERJEA, J.—How does the question of Article 142 or Article 144 arise in that case?]

Because there the question was whether the Crown had a subsisting title to the land. There the plaintiff's case was that the title of the Government was lost by reason of the adverse possession by plaintiff. In the present case the principle of *Radha Gobind Roy* v. *Inglis* (2) applies. Refers to *Basanta Kumar Roy* v. *Secretary of State for India* (4), *Thakur Singh* v. *Bhojeraj Singh* (14), *Dharm Singh* v. *Hur Pershad Singh* (10). It has not been found in the present case that the plaintiff was in possession through the tenants who grazed cattle on the land. On the other hand the evidence as to the grazing of cattle has been disbelieved by the Courts below concurrently. The presumption of continuance does not apply. The question raised by the other side is purely academical. Further the *chittas* prove that the lands were in the possession of the defendant. I submit the findings of the lower Appellate Court are conclusive on the point. The learned Judge has rightly held that the onus of proof lies on them.

Babu *Jogesh Chandra Roy*, replied in brief.

JUDGMENT.—This appeal arises out of a suit for recovery of possession of the land in dispute on declaration of plaintiff's title thereto. The plaintiff and the defendant are *patnidars* under the owners of Touzi Nos. 92 and 14, respectively, both the Touzis being situate in the same village. The plaintiff claimed the land as appertaining to Touzi No. 92 while the defendant claimed it as part of Touzi No. 14.

The Court of first instance held that the plaintiff had failed to prove both title and possession and dismissed the suit. The learned District Judge on appeal found that plaintiff's title was proved, but that he failed to prove possession within 12 years and accordingly dismissed the suit. The plaintiff has appealed to this Court.

It is contended on behalf of the appellant, first, that the title having been found to be

(12) 16 C. 473; 16 I. A. 23; 5 Sar. P. C. J. 321; 8 Ind. Dec. (N. S.) 312 (P. C.).

(13) 9 C. 744 at p. 751; 12 C. L. J. 257; 4 Ind. Dec. (N. S.) 1145 (F. B.).

(14) 27 C. 25; 14 Ind. Dec. (N. S.) 17.

with the plaintiffs the onus was upon the defendant to prove that the claim was barred by limitation by reason of adverse possession on his part. Secondly, that in any case, having regard to the nature of the land, the onus should have been placed on the defendant. Thirdly, that the evidence on both sides having been found to be unsatisfactory, there was a presumption that possession follows title.

With regard to the first contention, it is to be observed that plaintiff alleged that he was in possession of the land which was *khas patit*, and that the defendant excavated a tank on the land in spite of the objections of the plaintiff four or five years before the suit claiming the same as part of his *patni mahal*, and he was accordingly dispossessed from the land. The case, therefore, clearly was one under Article 142 of the Limitation Act. It is well settled that, where the plaintiff while in possession has been dispossessed and is out of possession at the date of suit the onus is upon him to prove that he was in possession and was dispossessed within 12 years of the suit.

It is contended, however, on behalf of the appellant that some of the authorities show that where plaintiff's title is proved, the onus is upon the defendant to show that the plaintiff lost that title by adverse possession for 12 years on the part of the defendant. It is necessary, therefore, to examine the authorities on the point.

One of the earliest cases is that of *Maharajah Koowar Baboo Nitrasur Singh* v. *Baboo Nund Loll Singh* (15). In that case, it appears that decrees were made in the year 1816 in suits respecting disputed boundaries of certain *mouzahs* in two Zemindaries, and the boundary line was determined. In 1845 a suit was brought by the representatives of one of the parties in the above suits to recover land alleged to be part of one of these *mouzahs* which land it was admitted by the plaintiff that the defendant had been in possession of since the year 1834. It was pleaded in defence, first, that the land claimed was within the boundary declared by the decrees of 1816 to belong to the defendant; and, secondly, that the plaintiff or those under whom he claimed had been out of possession for upwards of twelve years and that the cause of action was consequently barred by Regulation III of 1793, section 16. Lord Justice Turner, in delivering the judgment of the Judicial Committee, observed that "the issue of possession is the first to be considered in this case, and that it is wholly independent of the boundary question. The appellant is seeking to disturb the possession admitted to have existed for about eleven years of defendants, who insist on a possession of much longer duration as a statutory bar to the suit. It clearly lies on him to remove that bar by satisfactory proof that the cause of action accrued to him (for that is the way in which the Regulation puts it) on a dispossession within twelve years next before the commencement of the suit, and, therefore, that he, or some person through whom he claims, was in possession during that period. No proof of anterior title, such as would be involved in the decision of the boundary question in his favour, can relieve him from this burden, or shift it upon his adversaries by compelling them to prove the time and manner of dispossession. The lands in question may have been part of Mouzah Gopaulpore, and as such may have been enjoyed by his ancestor, and yet he may have lost, by lapse of time, his right to recover them. Their Lordships, therefore, proposed to consider, in the first place, what evidence there is that the appellant, or any person through whom he claims, was in possession of the lands in question at any time within twelve years next before the commencement of the suit."

In 1869, in the case of *Rajah Sahib Perhlad Sein* v. *Maharaja Rajender Kishore Sing* (16), the Judicial Committee affirmed the same principle. Their Lordships observed: "The appellant comes into Court admitting upon the face of his plaint that he is out of possession, and has been so for more than ten years: and the date which he assigns to his dispossession is the 20th of March 1851. Upon the issue as settled by the Court it lay upon him to establish that he was in possession up to that date, or, failing in that, that the date at which he or some former proprietor of Ramnuggur was last in possession is consistent with a

(15) 8 M. I. A. 199; 1 Suth. P. C. J. 420; 1 Sar. P. C. J. 744; 1 W. R. P. C. 51; 19 E. R. 503.

(16) 12 M. I. A. 292 at p. 337; 2 Suth. P. C. J. 225 at p. 239; 2 Sar. P. C. J. 430; 20 E. R. 349.

right to institute this suit. Act No. VIII of 1859, section 32, shows, that the plaintiff is bound to satisfy the Court that his right of action is not barred by lapse of time."

In 1870, again, in the case of *Beer Chunder Jobraj* v. *Deputy Collector of Bhullooah* (17) where the palintiff brought a suit to recover immoveable property which was in the possession of the defendant since 1845 and at the time of the institution of the suit, it was held by their Lordships that, "it was essential for the appellant (the plaintiff in that case) to have proved two things—first, possession within twelve years before his suit, and, secondly, title to possession.....the onus of proof rests with the appellant."

The question again came up before the Judicial Committee in 1883 in the case of *Mohima Chunder Mozoomdar* v. *Mohesh Chunder Neoghi* (12).

There the plaintiffs had shown that they formerly were proprietors of the lands to which they alleged title, and from which they claimed to oust the defendants but they had been dispossessed or their possession had been discontinued some years before the suit was brought by them, and the land was occupied by the defendants who denied their title. The plaintiffs were found to be the rightful owners, but their Lordships observed that the question for decision was not "whether or not the title of the defendants was created just after the disturbance or otherwise, but when were the plaintiffs dispossessed or when did they discontinue possession....." "This is in reality what in England would be called an action for ejectment, and in all actions for ejectment where the defendants are admittedly in possession, and *a fortiori* where, as in this particular case, they had been in possession for a great number of years, and under a claim of title, it lies upon the plaintiff to prove his own title. The plaintiff must recover by the strength of his own title, and it is the opinion of their Lordships that, in this case, the onus is thrown upon the plaintiffs to prove their possession prior to the time when they were admittedly dispossessed, and at some time within 12 years before the commencement of the suit, namely, for the two or three years prior to the year 1875, or 1874, and that it does not lie upon the defendants to show that in fact the plaintiffs were so dispossessed." In the next year (1889) in the case of *Mahammud Amanulla Khan* v. *Badan Singh* (18), the Judicial Committee again held that if a claim comes within the terms of Article 142 adverse possession is not required to be proved in order to maintain a defence.

Lastly, in 1906 under Act XV of 1877 in the case of *Rani Hemanta Kumari Debi* v. *Maharaja Jagadindra Nath Roy Bahadur* (19) the Judicial Committe affirmed the same principle: Their Lordships observed: "The difference between the admitted possession and the period of limitation being so narrow (one year) the question of onus is important; and their Lordships adhere to the principle stated in the Privy Council case cited by the learned Judge in the High Court [*Mohima Chunder Mozoomdar* v. *Mohesh Chunder Neoghi* (12)] and hold that it is for the appellant, as plaintiff in a suit for ejectment, to prove possession prior to the dispossession which she alleges."

In all these cases it was clearly held that where the plaintiff has been dispossessed and the suit is one for recovery of possession the onus is upon the plaintiff to prove that he was in possession within 12 years of the suit.

It is contended, however, that a different principle has been laid down in some other cases, *viz.*, *Karan Singh* v. *Bakar Ali Khan* (1), *Radha Gobind Roy* v. *Inglis* (2), *Secretary of State for India in Council* v. *Raja Chelikani Rama Rao* (3), *Basanta Kumar Roy* v. *Secretary of State for India* (4).

In *Karan Singh* v. *Bakar Ali Khan* (1) their Lordships in dealing with the contention that the plaintiff must prove that he was in possession within twelve years held that it was not correct under the Limitation Act IX of 1871. Their Lordships observed: "It would have been correct under the old law, under which the suit must have been brought within twelve years from the time of the cause of action, but under the present law it may be brought within twelve years from the time when the possession of the defendant,

(17) 13 W. R. 23 (P. C.).

(18) 17 C. 137; 16 I. A. 148; 13 Ind. Jur. 330; 5 Sar. P. C. J. 412; 23 P. R. 1890; 8 Ind. Dec. (N. S.) 629 (P. C.).

(19) 10 C. W. N. 630; 3 A. L. J. 363; 8 Bom. L. R. 400; 1 M. L. T. 135; 16 M. L. J. 272 (P. C.).

or of some person through whom he claims, became adverse to the plaintiff."

It was a case under Article 145 of Act IX of 1871 (see page 6 of the report) corresponding to Article 144 of Act XV of 1877 and Act IX of 1908, and there can be no doubt that the suit was dealt with by the Judicial Committee as coming under Article 145 of Act IX of 1871 because that Article deals with cases where the limitation runs from the date when the possession of the defendant became adverse to the plaintiff. Under Act XIV of 1859, the period of limitation for suits for the recovery of immoveable property or of any interest in immoveable property to which no other provision of the Act applied (there were no other provisions in the Act similar to those of Article 143 or 145 of Act IX of 1871), was twelve years from *the time when the cause of action arose.* So that all suits, whether they came under Article 143 or 145 of Act IX of 1871, had to be brought under section 15 of Act XIV of 1859 within twelve years from the time when *the cause of action arose.* Under Act IX of 1871, for the first time, a distinction was drawn between, (1) suits for possession when the plaintiff while in possession has been dispossessed or has discontinued the possession, and (2) suits for possession of immoveable property or any interest therein not otherwise provided for. In the first class of cases, the starting point was the date of the dispossession or discontinuance, and came under Article 143 (Article 142 of Act XV of 1877 and Act IX of 1908). In the second class of cases the starting point was the date when the possession of the defendant became adverse to the plaintiff (Article 145 of Act IX of 1871 and Article 144 of Act XV of 1877 and Act IX of 1908). *Karan Singh's case* (1) fell under Article 145 of Act IX of 1871, and the Judicial Committee was merely referring to the change in the law stated above. Their Lordships did not and could not have laid down that the law of limitation had been in any way changed so far as suits coming under Article 143 of Act IX of 1871 (Article 142 of the present Act) were concerned, as the reference to "twelve years from the time when the possession of the defendant became adverse to the plaintiff" unmistakeably shows that their Lordships were dealing with cases under Article 144 (Article 145 of Act IX of 1871). It is unnecessary to further discuss this matter which is clear enough, but we may refer to the Full Bench decision in *Mahomed Ali Khan* v. *Khaja Abdul Gunny* (13), which was a case under Act IX of 1871, and where it was stated: "There is no doubt as to the general rule, that under the former Limitation Act the cause of action, and under the present law the event from which limitation is declared to run, must have occurred within the prescribed period, and that it lies on the plaintiff to show this. Accordingly, where the suit is for possession, and the cause of action is dispossession, it has more than once been held by the Privy Council that the plaintiff is bound to prove possession and dispossession within twelve years."

The case of *Radha Gobind Roy* v. *Inglis* (2) was also considered by the Full Bench in *Mahomed Ali Khan's case* (13). Wilson, J., observed: "We do not understand that case as establishing the broad proposition contained in the head-note, which would be in conflict with the earlier decisions of the same Tribunal."

In that case, their Lordships having disposed of the other questions which were raised say: "The question remains whether the disputed land had or had not been occupied by the defendant for twelve years before the suit was instituted, so as to give him a title against the plaintiff by the operation of the Statute of Limitation. On this question, undoubtedly the issue is on the defendant. The plaintiff has proved his title; the defendant must prove that the plaintiff has lost it by reason of his, the defendant's adverse possession." But the land in dispute in that case had formed part of the bed of a *beel* or lake; the title to the *beel* and its bed was found to be in the plaintiff, and he had been in possession so long as the land was covered with water. The *beel* gradually dried up, and the defendant occupied the land so formed. There was a controversy as to when the land dried up and the defendant occupied the land. It was found by the High Court that the land had been formed quite recently within six or seven years or at *all events within less than twelve years before the suit* and their Lordships held that, "if the High Court are right in that finding, of course the Statute cannot apply." The constructive possession of the rightful owner continu-

ed till within 12 years of the suit, and the defendant relied upon adverse possession for more than 12 years. The observations with regard to the onus of proof quoted above must be taken with the facts of the case.

Much reliance is placed upon the case of *Secretary of State for India in Council* v. *Rajah Chelikani Rama Rao* (3). The disputed lands in that case formed part of islands which had formed in the bed of the sea within the territorial limits, and which, therefore, belonged to the Crown, and the lands were constituted a Reserved Forest under the Madras Forest Act (Madras Act V of 1882). The respondents claimed proprietary rights in the said lands, which were disallowed by the District Judge in a proceeding under the Act, holding that the title being originally in the Crown, the onus was upon the claimants to prove adverse possession for sixty years, and that they had failed to do so. The High Court was of opinion that it rested upon the Crown to show that the possession became adverse to the Crown within sixty years prior to the Notification under which the land was constituted a Reserved Forest. The Judicial Committee held that it was for the claimants to prove that they or their predecessors-in-title had been in adverse possession for sixty years.

The principle laid down is consistent with that laid down by the Judicial Committee in previous cases. The claimants in that case were in the position of *plaintiffs*, and they claimed a *title* to the property by adverse possession. Their Lordships observed: "In their Lordships' opinion objectors to *afforestation* thus preferring claims are in law in the same position as persons bringing a suit in an ordinary Court of justice for a declaration of right. To such a situation in the one case, as in the other, their Lordships think that Article 144 of the Limitation Act XV of 1877 (Schedule II) applies, the period of twelve years thereunder being, however, extended to a period of sixty years by Article 149. In an ordinary suit for a declaration it cannot be doubted that the onus of establishing possession for the requisite period would rest upon the plaintiff. In their Lordships' opinion the situation of a claimant under *afforestation* proceedings is the same upon this point. Reference may be made to *Radha Gobind Roy* v. *Inglis* (2) decided by this Board." Referring to the view taken by the High Court that the Crown had to prove that it has a subsisting title by showing that the possession of the claimants commenced or became adverse within the period of limitation their Lordships observed: "Nothing is better settled than that the onus of establishing property by reason of possession for a certain requisite period lies upon the person asserting such possession. It is too late in the day to suggest the contrary of this proposition. If it were not correct it would be open to the possessor for a year or a day to say, 'I am here; be your title to the property ever so good, you cannot turn me out until you have demonstrated that the possession of myself and my predecessors was not long enough to fulfil all the legal conditions.' Such a singular doctrine can be well illustrated by the case of India, in which the right of the Crown to vast tracts of territory, including not only islands arising from the sea, but great spaces of jungle lands, necessarily not under the close supervision of Government officers, would disappear, because there would be no evidence available to establish the state of possession for sixty years past. It would be contrary to all legal principles thus to permit the squatter to put the owner of the fundamental right to a negative proof upon the point of possession.

"In so far as this negatives the duty resting upon the claimants to establish affirmatively their and their predecessors' possession for sixty years, their Lordships' opinion is, as stated, that this is erroneous. But, secondly, with reference to the 'subsisting title,' it appears to their Lordships that nothing further is needed than the acknowledgment of the undisputed fact that these islands formed in the sea belonged to the Crown. That fact is fundamental: until adverse possession against the Crown is complete, that is to say, is for the period of sixty years that fundamental fact remains, and that fact forms 'subsisting title.' And, thirdly, it is no part of the obligation of the Crown to fortify its own fundamental right by any inquiry into possession or the acceptance of any onus on that subject."

The title of the Crown to the land could not be disputed; the claimants set up a *title* by adverse possession, and there can be no question that it was upon the plaintiff who wanted a declaration of his title by adverse possession to prove that he acquired such a title by adverse possession for the statutory period. That is all that was laid down in that case, and the general observations made at page 204 must be taken with the facts of that case, in which the claimants stood in the position of a plaintiff seeking a declaration of his title to the property. Such a person, on the strength of possession for a short period, cannot throw upon the opposite party the burden of proving that he, the claimant, had not been in possession for the statutory period. We do not think, therefore, that that decision laid down any principle different from that laid down previously in a series of cases by the Judicial Committee.

It is to be observed that their Lordships, while dealing with the cases coming under Article 144, referred to *Radha Gobind Roy* v. *Inglis* (2), which clearly shows that the latter case also was treated as one falling under Article 144.

The case of *Basanta Kumar Roy* v. *Secretary of State for India* (4) also does not help the contention of the appellants. There the land was diluviated, and parts of the diluviated land emerged during part of the year. It was held that the annual cultivation of such parts of diluviated lands as emerge during part of the year is not a dispossession of the owner of the lands within Article 142 of the Limitation Act, and that the constructive possession of lands while diluviated being in the true owner cannot be continuous adverse possession within Article 144 while *it is diluviated during part of every year*, and that no rational distinction could be drawn between the case where the re-flooding was seasonal, and *Secretary of State for India* v. *Krishnamoni Gupta* (20), where the lands were submerged for several years.

Their Lordships observed: "If, as their Lordships think, no dispossession occurred, except possibly within twelve years before the commencement of this suit, Article 144 is the Article applicable, and not Article 142. It is not easy to see, in the circumstances of a case such as this, how conduct insufficient to evidence dispossession of the plaintiffs can be used to evidence adverse possession available to the defendants: but, be that as it may, in their Lordships' opinion the defendants' contention resting on Article 144 fails on another ground."

This case, therefore, is no authority for the proposition that, in a case coming under Article 142, the onus is upon the defendant. Their Lordships were dealing with the question what constitutes dispossession in cases of diluviated lands coming out of water during part of the year, and the question of adverse possession having regard to the nature of the land, and the nature of possession exercised upon the land.

None of the four cases relied upon by the appellant, therefore, is any authority for the proposition contended on behalf of the appellant.

It is to be observed that *Radha Gobind Roy* v. *Inglis* (2) was decided in 1880, and that of *Kuran Singh* v. *Bakar Ali Khan* (1), in 1882. Had those cases intended to lay down any different principle, the Judicial Committee in 1888 in *Mohima Chunder's case* (12), without even referring to these cases, could not have laid down the principle that the plaintiff in a suit for ejectment cannot succeed without proving possession within 12 years although his title is proved. They were not referred to evidently because they were cases falling under Article 144. *Mohima Chunder's case* (12), was expressly followed 18 years afterwards (in 1906) by their Lordships in *Rani Hemanta Kumari Debi's case* (19).

We do not think it reasonable to hold that the Judicial Committee in *Secretary of State for India in Council* v. *Raja Chelikani Rama Rao* (3) laid down any principle at variance with that enunciated so far back as 1860 in *Maharajah Kooar Baboo Nitrasur Singh's case* (15), and which was followed in all cases (where the plaintiff while in possession was dispossessed) up to 1906 *Rani Hemanta Kumari Debi's case* (19), *i e*, for nearly half a century. Even leaving aside the earlier cases which were decided under the Regulations or Act XIV of 1859, (though as

(20) 29 C. 518 (P. C.); 29 I. A. 104; 6 C. W. N. 617; 4 Pom. L. R. 537; 8 Sar. P. C. J. 260.

stated above, there was no difference in the law so far as cases coming under Article 142 are concerned) their Lordships laid down the same principle in *Mohima Chunder's case* (12), *Mahammud Amanulla Khan's case* (18), and *Rani Hemanta Kumari Debi's case* (19).

There is in fact no inconsistency in the decisions of the Privy Council because the decisions relied upon by the appellant, as stated above, show that they were cases not falling under Article 142 of the Limitation Act, and the contention of the appellant is based merely upon some general observations in some of the judgments detached from the context and the facts of the cases. So far as this Court is concerned, the principle laid down by the earlier Privy Council decisions, and in *Mohima Chunder Mozoomdar* v. *Mohesh Chunder Neoghi* (12) and *Rani Hemanta Kumari Debi's case* (19), and the Full Bench decision in *Mahomed Ali Khan's case* (13), has always been taken as settled law on the point, and we need only refer to the case of *Mirza Shamsher Bahadur* v. *Munshi Kunj Behari Lal* (11) where Mookerjee and Caspersz, JJ., observed: "It is now firmly settled beyond all probability of controversy, that the plaintiff in an action for ejectment must not only prove his title but also his possession within 12 years of the suit." A recent full Bench of the Patna High Coprt also, upon a review of the decisions on the point has taken the same view. See *Shiva Prasad Singh* v. *Hira Singh* (8)].

We are accordingly of opinion that, in cases coming under Article 142, although the plaintiff's title is proved, the onus is not upon the defendant to show that the plaintiff lost his title by adverse possession on the part of the defendant.

The next question is, whether the onus of proof is upon the defendant having regard to the nature of the land, and this brings us to the question as to what the plaintiff has to prove in order to show that he was in possession within 12 years of the suit. As pointed out by Wilson, J., in the judgment of the Full Bench in *Mahomed Ali Khan's case* (13), possession is not necessarily the same thing as actual *user*. The nature of the possession is to be looked for, and the evidence of its continuance must depend upon the character and condition of the land in dispute. Where the land is *incapable* of actual enjoyment, as in the case of diluvion by a river, if the plaintiff shows his possession down to the time of the diluvion, his possession is presumed to continue so long as the lands continue to be submerged. The cases of *Kally Churn Sahoo* v. *Secretary of State for India* (21), [overruled by *Secretary of State for India* v. *Krishnamoni Gupta* (20) in so far as it held that there was constructive possession in favour of a wrong-doer]. *Mano Mohun Ghose* v. *Mothura Mohun Roy* (22) *Radha Gobind Roy* v. *Inglis* (2), *Rajkumar Roy* v. *Gobind Chunder Roy* (23) (where, however, possession of the plaintiff was held to be proved) *Secretary of State for India* v. *Krishnamoni Gupta* (20) and *Basanta Kumar Roy* v. *Secretary of State for India* (4) illustrate the principle that where the rightful owner proves possession until the land goes under water or otherwise becomes wholly incapable of enjoyment in the usual modes, he is deemed to be in constructive possession until the land emerges out of water and becomes capable of enjoyment in the usual mode and he is actually dispossessed by the defendant. No such presumption, however, arises in the case of a wrong-doer.

In *Basanta Kumar Roy* v. *Secretary of State for India* (4) the Judicial Committee observed: "The Limitation Act of 1877 does not define the term 'dispossession', but its meaning is well settled. A man may cease to use his land because he cannot use it, since it is under water. He does not thereby discontinue his possession: constructively it continues, until he is dispossessed; and, upon the cessation of the dispossession before the lapse of the statutory period, constructively it revives. 'There can be no discontinuance by absence of use and enjoyment, when the land is not capable of use and enjoyment:' Per Cotton, L. J., in *Leigh* v. *Jack* (24). It seems to follow that there can be no continuance

(21) 6 C. 725; 8 C. L. R. 90; 4 Shome L. R. 95; 3 Ind. Dec. (N. S.) 470.

(22) 7 C. 225; 8 C. L. R. 126; 3 Ind. Dec. (N. S.) 694.

(23) 19 C. 660 at p. 674 (P. C.); 19 I. A. 140; 6 Sar. P. C. J. 140; 9 Ind. Dec. (N. S.) 883 (P. C.).

(24) (1879) 49 L. J. Ex. 220; 5 Ex. D. 264; 42 L. T. 463; 28 W. R. 452; 44 J. P. 488.

of adverse possession, when the land is not capable of use and enjoyment, so long as such adverse possession must rest on *de facto* use and occupation. When sufficient time has elapsed to extinguish the old title and start a new one, the new owner's possession, of course, continues until there is fresh dispossession, and revives as it ceases."

In cases where the land is not incapable of enjoyment, but may produce some profit, though trifling in amount and only of occasional occurrence, as is often the case with jungle land, it would be unreasonable to look for the same evidence of possession as in the case of a house or a cultivated field. All that can be required is that the *plaintiff should show such acts of ownership as are natural under the existing condition of the land, and in such cases, when he has done this his possession is presumed to continue so long as the state of the land remains unchanged unless he is shown to have been dispossessed.* [See *Mahomed Ali Khan* v. *Khaja Abdul Gunny* (13)]. In *Watson & Co.* v. *Government*(25) Sir Barnes Peacock, C. J., referred to the "cutting or preserving the wood, gathering wax or wild honey collecting stick lac, etc.," as evidence of possession of jungle lands. In waste lands (and jungle lands also) possession may be exercised by grazing of cattle, putting up boundary marks or fences and the like.

The cases of diluviated lands or jungle or waste lands, however, are no exception to the general rule that a plaintiff who is *dispossessed* and brings a suit for recovery of possession must show that he was in possession within 12 years of the suit. The rule of law, as pointed out by the Judicial Committee in *Rani Hemanta Kumari Debi* v. *Maharaja Jagadindra Nath Roy Bahadur* (19), is that it is for the plaintiff in a suit for ejectment to prove possession prior to the alleged dispossession, at the same time in this *question of possession the initial fact of plaintiff's title comes to his aid with greater or less force according to the circumstances established in evidence.*

Bearing the above principles in mind, we have to see what the plaintiff has proved in the present case. The land was asserted by the plaintiff to be *khas patit* formerly but it was admitted in the plaint that the defendant had excavated a tank on the land 4 or 5 years before the suit. The Court of first instance found that the tank was excavated more than 12 years before the suit. Upon that finding there can, of course, be no question of any presumption in favour of the plaintiff because he was *ousted* from possession 12 years before the suit by the excavation of the tank. The Court of first instance further found that, before the excavation of the tank, the land was under cultivation of certain persons (Hirina and Jala Majhis) with whom the land was exchanged by the defendant. Had these findings been affirmed by the Court of Appeal below, no question of onus of proof or any presumption could arise. The learned District Judge, however, while agreeing with the Munsif that the suit was barred by limitation, observes that the best evidence regarding excavation of the tank had not been produced by the defendant. It is not clear what he meant, because the excavation of the tank 4 or 5 years before the suit was admitted by the plaintiff in his plaint, and spoken to by his own witnesses. Probably, he meant that the excavation of the tank earlier, and the exchange of land, as set up by the defendant, was not satisfactorily proved, and that the evidence of possession on both sides prior to the excavation of the tank was unsatisfactory. It is contended on behalf of the appellant that in this conflict of evidence the Court ought to have presumed that possession went with the title. That presumption, however, can arise only where the evidence is equally strong on both sides. In *Runjeet Ram Panday* v. *Goburdhun Ram Panday* (26) the Judicial Committee observed: "Now the ordinary presumption would be that possession went with the title. That presumption cannot, of course, be of any avail in the presence of clear evidence to the contrary; but where there is strong evidence of possession, as there is here, on the part of the respondents,—opposed by evidence, apparently strong also on the part of the appellant,—their Lordships think that, in estimating the weight due to the evidence on both sides, the presumption

(25) 3 W. R. 73 at p. 80.

(26) 20 W. R. 25 (P. C.).

may, under the peculiar circumstances of this case, be regarded: and that, with the aid of it, there is stronger probability that the respondents' case is true than that of the appellant." See also *Dharm Singh* v. *Hur Pershad Singh* (10), *Babu Kasturi Singh* v. *Rajkumar Babu Bissun Pragas Narain Singh* (7), *Mirza Shamsher Bahadur* v. *Munshi Kunj Behari Lal* (11), (the word 'unsatisfactory' at page 280* is evidently a slip). The principle does not apply to a case where the evidence is equally unworthy of reliance on both sides, see *Thakur Singh* v. *Bhogeraj Singh* (14), *Lala Singh* v. *Latif Hossein* (27), *Fakira Lal Sahoo* v. *Munshi Ram Charan Lal* (28), (the observations with regard to waste or jungle lands are obiter).

The question was discussed by a Full Bench of the Patna High Court in the recent case of *Shiva Prasad Singh* v. *Hira Singh* (8), where it was held (overruling two decisions of that Court) that the presumption can be raised only where the evidence is equally strong on both sides and cannot be called in aid to give weight to evidence unworthy of credit any more than if no evidence at all had been given. The subject-matter of dispute in that case was cultivated land. In the Order of Reference the learned Judge expressed the opinion that the cases of submerged or jungle or waste land, the continuance of possession may be presumed if antecedent title and possession are proved. The observation has reference to land of such a nature that possession cannot be expected to be proved by acts of actual user and enjoyment and the learned Chief Justice referred with approval to the observations of Wilson, J., in the judgment of the Full Bench in *Mahomed Ali Khan's case* (13), (with regard to jungle lands) that the plaintiff should show such acts of ownership as are natural under existing conditions and that where this has been done prior possession may be presumed to have continued until the plaintiff is shown to have been dispossessed.

In the present case, the plaintiff alleged that the land was waste but it was not the case of the plaintiff that no acts of ownership could be or were exercised upon the land. The plaintiff adduced some evidence of possession, *viz.*, grazing of cattle upon the land prior to the excavation of the tank by the defendant. The defendant adduced evidence to show that the land was under cultivation before he excavated the tank. According to both parties, therefore, acts of possession were exercised upon the land, now where definite evidence of acts of possession is forthcoming there is no difference between the proof of possession in the case of jungle, waste or uncultivated lands and in that of cultivated lands. But whereas in the case of cultivated lands the plaintiff will fail if he does not prove his possession within 12 years; in the case of jungle or waste lands, if he proves his title, there is a presumption in his favour where having regard to the nature of the land possession cannot be expected to be proved by acts of actual user and enjoyment. If, however, the plaintiff asserts that he exercised acts of ownership upon the land and adduces evidence in support of such assertion, he cannot, where such evidence is disbelieved by the Court, turn round and rely upon any presumption, because the case set up by him negatives the existence of circumstances which would give rise to the presumption, and is inconsistent with it.

In the present case, if the plaintiff had been able to show that neither party had exercised any act of possession, or that he had exercised such acts of ownership as were natural under the existing conditions, a presumption could have been raised in his favour on the question of possession of the land prior to his dispossession by the defendant's excavation of the tank. He attempted to prove such acts of possession, but the evidence was not accepted by the Courts below.

It is contended, however, on behalf of the appellant that the learned District Judge should not have held that "plaintiff's witness No. 1's statement that cattle of all villagers grazed on the disputed land, was consistent with the plaintiff's case as much as with the defendant's," and ought to have held that plaintiff's possession prior to the excavation of the tank by the defendant was thereby proved. But in that passage the learned Judge was merely commenting upon the statements of the plaintiff's witness No. 1 and what he meant was that "villagers" who are said to have grazed their cattle on

(27) 28 Ind. Cas. 477; 21 C. L. J. 480.
(28) 35 Ind. Cas. 554; 1 P. L. J. 146.

*Page of 12 C. W. N.—[*Ed.*].

the land were tenants under the *patni taluks*, of both the plaintiff and the defendant, both the *taluks* being in the same village. He did not find that the plaintiff's tenant grazed cattle on the land, because further on referring to the plaintiff's witnesses who all deposed to the same effect, he says: "The lower Court rightly disbelieved them as they were clearly not independent and disinterested witnesses." In these circumstances, we do not think that there was any presumption in favour of the plaintiff.

The appeal accordingly fails, and must be dismissed with costs.

S. D.

Appeal dismissed.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEALS NOS. 390 OF 1918 AND 382 OF 1919.

January 25, 1922.

Present:—Sir Grimwood Mears, Kt., Chief Justice and Justice Sir P. C. Banerji, Kt.

Kunwar MUHAMMAD SHAFI KHAN —PLAINTIFF—APPELLANT

versus

Kunwar MUHAMMAD MOAZZAM ALI KHAN—DEFENDANT—RESPONDENT.

Promissory-note, suit on—Consideration—Onus—*Defendant, when entitled to succeed without proving want of consideration.*

The ordinary rule is that in a claim to recover money lent, the defendant must prove absence of consideration if that is his case. [p. 686, col. 1.]

But in a case where consideration is denied in the written statement and the plaintiff goes into the witness-box, and the result of his cross-examination is such that he fails to establish the point which he set out to make, namely, that he gave the consideration and the Court is thus satisfied that he did not give the consideration, the defendant can avail himself of that and has a right to a decree. [p. 685, col. 2; p. 686, col. 1.]

First appeal from the decision of the Second Additional Subordinate Judge, Aligarh, dated the 23 d of August 1918.

Dr. *Tej Bahadur Sapru*, Dr. *S. M. Sulaiman* and Mr. *Panna Lal*, for the Appellant.

Mr. *Iqbal Ahmad*, for the Respondent.

JUDGMENT.—These two appeals have been heard together and can conveniently be dealt with in one judgment. The plaintiff, Kunwar Muhammad Shafi Khan, claims, in the first case Suit No. 104 of 1918, the sum of Rs. 9,000 and interest, and, in the second case, the sum of Rs. 10,000 and interest against Kunwar Muhammad Moazzam Ali Khan, a young man, who, at the time of the transactions, had recently attained his majority. According to the statement of the plaintiff he is a man of independent means and a very remote relation of the defendant. The defendant has an elder brother, by name Kunwar Muhammad Makarram Ali Khan, who is dead, and is the grandson of Nawab Sir Faiyaz Ali Khan. He is a well known Rais of Pahasu in the Bulandshahr District. There is reason to believe that the grandsons are regarded as his expectant heirs, and the present recipient of his bounty. At the time of these transactions, the Nawab was a gentleman of about 65 years of age. The story as told by the plaintiff is, that he was approached by these two young men some time very early in July of 1915, with the request that he should lend them money. He stated that he was not on good terms with the family of the defendants, that these two young men had no property, no money, no business, nothing at all except their expectations from their grandfather. He stated that he did not know why these two young men wanted to borrow this sum of Rs. 18,000 and his only reason for making the loan was relationship. The exact relationship was that the grandfather's father's sister's daughter was the mother of the plaintiff. Although, he says, that the relationship between their family and his was such, and is even now, that is, in 1919, that he could not visit their house, his heart was moved by this extremely remote relationship for the two young men who were already under the care of their grandfather, that he advanced to them on no security at all a sum of Rs. 18,000. The story does not end there, because, on the 15th December 1915, again moved by relationship, he advanced, according to his story, the further sum of Rs. 20,000 to these young men. He was unable to tell

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the Court what possible legitimate use the young men could either have for the Rs. 18,000 and still more for the Rs. 20,000 alleged to have been borrowed after so short an interval. The Suit No. 104 was in respect of the one-half share of the promissory-note of the 9th of July 1915, which he sought to recover from the younger brother, the elder having drifted into bankruptcy. After that suit had been decided, an application was made that Suit No. 163 of 1918 should be decided before another Judge and Mr. Lal Gopal Mukerji, who had decided the first case, very readily assented to the circumstances surrounding the second promissory-note being investigated by another Judge, and consequently that second case was decided by Mr. Jagat Narain. The plaintiff, therefore, has had two opportunities of putting forward his claim. Both Courts have decided against him and when the judgments of both Courts are looked at, although they differ in form, yet, throughout both judgments, there runs a strong disbelief in the honesty and truth of the plaintiff. We share that disbelief in honesty and truth, and we think both of these were most regrettable transactions for a man who put himself forward as a man of position to enter into with these young men.

The matter, however, must be carefully analysed and legal grounds must be shown for our view that both of these appeals must be dismissed. The plaintiff sued on a promissory-note. The defendant denied the execution, denied receipt of the consideration, and set up a story in paragraph 7 of the written statement, which we must accept as being regarded as a defence of fraud. The plaintiff went into the witness-box. At the moment the case opened, all that the plaintiff need have done was to have proved the execution of the document sued upon, and if he had obtained an answer by the defendant to an interrogatory that the document bore the defendant's signature, then all that he need have done was to have put in the document. But it happened to be necessary in this case that the plaintiff himself should go into the witness-box to prove that he actually saw the defendant put his name to the promissory-note in suit, and having commenced the story in the examination-in-chief and proved the execution, he asserted that he gave Rs. 18,000 in currency notes to these two young men. He was cross-examined on that matter and both Judges disbelieved in the first case that he had paid Rs. 18,000 to the young men, and, in the second case that he had paid Rs. 20,000. They did not believe that he had made a true statement about that matter. He swore that Rs. 18,000 and Rs. 20,000 were paid over. They certainly had extremely good grounds on which they could have come to that conclusion, because when he was asked if he kept account-books, he said that he did, "an account-book is kept at my place but not in a regular way. In my account-book, there is an entry of Rs. 18,000 having been advanced. The daily cash balance of my treasury is entered in the accounts. The sum which was lent was included in the cash balance. I cannot produce my accounts. The reason is that, in the first place, they are not in a regular form, and, secondly, because all public and private matters are entered in them and I do not want to disclose them." If any thing more were needed to satisfy a Court as to the untruth of the statement which the plaintiff took upon himself to prove, namely, the giving of the consideration, it is to be found in the story of the money. He says that he had, in July 1918, lying in his house this large sum of money. He says that, in December, he had also Rs. 20,000 lying in his house. It was not deposited in any Bank but was simply a dead weight in the house. From the evidence, it would appear that the amount was in Rupees, because, he says: "In order to carry the money to Delhi, I got the cash changed into notes. I do not remember from whom I obtained the notes." There was some evidence given to suggest that he himself was in debt and not likely to have so large a sum as Rs. 18,000 and then Rs. 20,000 lying idle at his house, available for a transaction of this kind. We agree entirely with the views expressed in the two judgments, and, though it is undoubted that the onus does lie upon the defendant, in cases of this kind, to prove that no consideration was given, nevertheless, if a plaintiff when, as in this case, consideration was denied in the written statement, goes into the witness-box, and if the result of his examination is such that he fails to establish the point which he set out to make, namely, that he gave the consideration and the Court it

thus satisfied that he did not give the consideration which he alleges, the defendant can avail himself of that and has a right to a decree. This, in any (no ?) way, trenches upon the ordinary rule that the defendant must prove absence of consideration if that is his case. The result, therefore, is that both these appeals must be dismissed with costs including fees on the higher scale.

N. H. & R. N.

Appeals dismissed.

PATNA HIGH COURT.

APPEALS FROM ORIGINAL DECREES NOS. 128 AND 135 OF 1919.

May 27, 1922.

Present:—Mr. Justice Das and Mr. Justice Adami.

IN F. A. No. 128

DWARKA PRASAD MARWARI AND OTHERS—APPELLANTS

IN F. A. No. 135

TEJI BABI WIDOW OF LATE GULAB RAM MARWARI AND OTHERS—APPELLANTS

versus

JAI BARHAM AND OTHERS—RESPONDENTS IN BOTH.

Sonthal Parganas Settlement Regulation (III of 1872), ss. 11, 25 A, application of—Certificate of publication of Record of Rights, effect of production of—Hindu Law—Joint family estate, impartible, incidents of—Jurisdiction, meaning of—Jurisdiction, want of—Decision when null and void—Documentary evidence, production of, at first hearing—Regulation (III of 1872), object and scope of—Operation of Record of Rights as between members of joint family.

Section 11 of Regulation III of 1872 bars every suit regarding any matter decided by any Settlement Court, except such suits as are brought to contest the finding or record of the Settlement Officer, where only the rights of Zemindars and other proprietors as between themselves are concerned, provided they are brought within 3 yea from the date of the publication of the Record of Rights. [p. 689, col. 1.]

The production of a certificate of publication of a Record of Rights by the defendant raises a presumption that there was publication according to the procedure laid down in Regulation III of 1872, throwing the *onus* on the plaintiff to establish that there was no regular publication of the Record of Rights. [p. 691, col. 2.]

Under Hindu law the impartibility of an estate does not destroy its nature as a joint family property or render it the separate property of the last holder unless there is something equivalent to partition. But at the same time the other members of the family have no such property in it to enable them to challenge an alienation made by the holder of the estate either during his lifetime or after his death. [p. 697, col. 2.]

Sartaj Kuari v. *Deoraj Kuari*, 10 A. 272; 15 I. A. 51; 5 Sar. P. C. J. 139; 12 Ind. Jur. 213; 6 Ind. Dec. (N. S.) 182 (P. C.), *Baijnath Prasad Singh* v. *Tej Bali Singh*, 60 Ind. Cas. 534; 33 C. L. J. 388; 19 A. L. J. 317; 40 M. L. J. 387; (1921) M. W. N. 300; 25 C. W. N. 564; 2 P. L. T. 257; 23 Bom. L. R. 654; 43 A. 228; 3 U. P. L. R. (P. C.) 35; 29 M. L. T. 358 (P. C.) and *Sri Raja Rao Venkata Surya Mahipati Rama Krishna* v. *Court of Wards*, 22 M. 383; 1 Bom. L. R. 277; 3 C. W. N. 415; 26 I. A. 83; 7 Sar. P. C. J. 481; 9 M. L. J. Sup. 1; 8 Ind. Dec. (N. S.) 276 (P. C.), referred to.

Jurisdiction means power and authority conferred on a Court to pronounce the sentence of the law or to award the remedies provided by law, upon a state of facts, proved or admitted, referred to the Court for decision and authorised by law to be the subject of investigation or action by that Court and in favour of or against persons who present themselves or who are brought before the Court in some manner sanctioned by law as proper and sufficient. [p. 699, col. 2.]

When want of jurisdiction of a Court is apparent on the face of the record, any judgment rendered by such a Court is null and void, incapable of ratification and subject to collateral impeachment. But a Court has jurisdiction to decide whether it has jurisdiction to entertain the suit and the decision of the Court that it has jurisdiction is final and conclusive in all collateral enquiries. Where, however, the want of jurisdiction is not apparent on the face of the proceedings but the absence of jurisdiction depends on a fact, in the knowledge of a party which he had an opportunity of bringing forward in Court, then, if he does not bring that fact forward but allows the Court to proceed with the judgment, he ought not to be permitted to impeach the jurisdiction of the Court in any collateral proceeding. [p. 699, col. 2; p. 700, col. 1.]

Obiter dicta.—The Civil Procedure Code compels the parties to produce all the documentary evidence of every description in their possession or power on which they intend to rely at the first hearing of the suit and provides that such evidence which should have been, but has not been, produced shall not be received at any subsequent stage of the proceedings unless good cause is shown to the satisfaction of the Court for the non-production thereof. This rule, however, was

enacted to prevent fraud by the late production of suspicious documents and since no suspicion can attach to certified copies of public documents, they may be received in evidence though they have not been produced at the first hearing. [p. 691, col. 1.]

The policy of the Legislature in enacting Regulation III of 1872 was to have a complete Record of Rights and interests in land in the Sonthal Parganas and to exclude the jurisdiction of Civil Courts except in certain matters. The Regulation gives no scope for the view that the members of a joint family may allow the name of the *karta* to be recorded in the Record of Rights and yet claim to have an interest in the estate. [p. 695, col. 1.]

Shankir Prosad Jha [*Januki Persad Jha*] v. *Babu Lal Jha*, 28 Ind. Cas. 241; 19 C. W. N. 499, referred to.

The Record of Rights framed under Regulation III of 1872 operates as between members of a joint Hindu family as completely as between strangers. [p. 695, col. 2.]

Appeal from a decision of the Subordinate Judge, Bhagalpur.

Messrs. *Hasan Imam, N. C. Sinha, Ranjit Sinha, Juggernath Prasad, A. Sen* and *N. C. Ghosh*, for the Appellants.

Messrs. *S. P. Sen, S. M. Mullick, S. M. Das* and *N. C. Roy*, for the Respondents.

JUDGMENT.

DAS, J.—On the 14th August 1895, one Thakur Barham, in consideration of a large sum of money then due by him to the defendants and of a present advance of Rs. 3,959-7-3, executed a bond in favour of the defendants by which he agreed to pay to the defendants the sum of Rs. 1,25,000 with interest thereon at 13-annas per cent. per month, and secured this sum by a mortgage in their favour of an 8-annas of Tappa Patsunda in the Sonthal Parganas and an 8-annas of *milik* Kosapat Amdar in Bhagalpur. On the 15th September 1900, the defendants commenced a suit against Thakur Barham in the Court of the Subordinate Judge of Bhagalpur to enforce the mortgage of the 14th August 1895, and on the 8th September 1902, recovered a mortgage-decree as against Thakur Barham for Rs. 2,57,600. Thakur Barham appealed to the Calcutta High Court and as a condition for stay of execution pending the disposal of the appeal, gave as further security another 2-annas of Patsunda. On the 16th December 1903, the Calcutta High Court dismissed the appeal of Thakur Barham. The defendants then commenced execution proceedings, and on the 5th October 1904, purchased the 10-annas of Patsunda and 8-annas of Kosapat at a Judicial sale held in execution of their mortgage-decree. The sale was duly confirmed and on the 21st December 1904, the defendants obtained delivery of possession of the properties purchased by them. Thakur Barham died on the 7th September 1905; and on the 7th April 1916, the plaintiffs, who claim to have had a joint interest with Thakur Barham in all the properties that stood recorded in the name of Thakur Barham including the mortgaged properties, instituted the suit out of which this appeal arises for redemption of the mortgage of the 14th August 1895, and in the alternative for possession. The learned Subordinate Judge, agreeing with the contentions put forward on behalf of the plaintiffs, has given them a decree for possession.

The case of the plaintiffs, as made in the plaint, is a simple one. They contend that they were joint with Thakur Barham and that the proceedings taken by the defendants against Thakur Barham cannot affect their right to redeem the mortgage. They also contend that Tappa Patsunda, being situate within the Sonthal Parganas, the Bhagalpur Court had no jurisdiction to entertain the suit or to sell the mortgaged properties. They accordingly ask for a decree for redemption and in the alternative, for a decree for possession with mesne profits. The defendants in their written statement rely upon the admitted fact that there was a Settlement of the Sonthal Parganas, including Tappa Patsunda, in 1905, and they contend that the present suit is barred by certain provisions of Regulation III of 1872. On the merits they say that the properties dealt with by Thakur Barham formed part of his impartible Zemindari and that the plaintiffs were not necessary parties to the mortgage action and have no right to redeem the mortgage. They also challenge the contention of the plaintiffs that the Bhagalpur Court had no jurisdiction to entertain the mortgage action.

The learned Subordinate Judge framed twenty-nine issues for trial between the parties, but, in my opinion, the questions that arise in the case are three in number; first, is the suit maintainable in view of section 11 and 25A of Regulation III of 1872; secondly, had the Bhagalpur Court jurisdiction to entertain the mortgage action, and

lastly, was the Zemindari of which Thakur Barham was in possession, an impartible Zemindari, and, if so, have the plaintiffs, in the events which have happened, any right to redeem the mortgage. The learned Subordinate Judge has decided all these questions in favour of the plaintiffs and has given them a decree for possession.

I will first consider the question whether the present suit is maintainable in view of section 11 and section 25A of Regulation III of 1872. In order to appreciate the arguments which have been advanced to us on the point it is necessary to remember that there was a Settlement of the Sonthal Parganas, including Tappa Patsunda, under the provisions of Regulation III of 1872 between 1903 and 1905, and that, in that Settlement, known as McPherson's Settlement, the defendants were recorded as owners of Tappa Patsunda. The certificates of publication of the Record of Rights were granted on various dates in May and June 1905, and it is alleged by the defendants that they were duly published in the villages in accordance with the rules laid down in the Regulation. On the 23rd May 1905 Gaja Barham for self and as guardian of the minors Nitia Nand and Pram Nand, Balbhaddar Barham and Jai Kishen Barham, presented a petition of objection in the Court of the Settlement Officer of Dumka in which they contended that Tappa Patsunda was the ancestral property of the objectors and that they had a right to get their respective names recorded in the Settlement Department in respect of 10 annas 8 pies share. Although Jai Barham's name does not appear in the petition of objection, as printed in the paper-book, it is clear from Mr. Allanson's order, dated the 24th June 1905, that he was a party to the proceedings. It will be noticed, therefore, that all the present plaintiffs were represented in the petition of objection which was rejected by Mr. Allanson, who succeeded Mr. McPherson as the Settlement Officer on the 24th June 1905. The learned Subordinate Judge says that this petition was filed before the completion of the Record of Rights. This is wrong. It was actually filed after the publication of the Record of Rights in respect of two hundred villages, and the decision of Mr. Allanson was pronounced after the publication of the Record of Rights in respect of the remaining villages.

On these facts it was argued that, in view of section 11 and section 25A of the Regulation, the present suit is not maintainable. Section 11 of the Regulation provides as follows:—"Except as provided in section 25A no suit shall lie in any Civil Court regarding any matter decided by any Settlement Court under these rules, but the decision and orders of the Settlement Courts made under these rules, regarding the interests and rights above-mentioned, shall have the force of a decree of Court."

Section 25A provides as follows:—"Where only the rights of Zemindars and other proprietors as between themselves are concerned a suit may, unless it is barred by section 11* of the Code of Civil Procedure, be brought in a Court established under the Bengal, Agra and Assam Civil Courts Act, 1887, to contest the finding or record of the Settlement Officer, within three years from the date of the publication of the Record of Rights, or of the final order of the Revenue Court. But no such suit shall be brought in any Court after the expiration of three years from such date. If in any such suit it is found that the finding of the Settlement Officer is erroneous, the record shall be amended accordingly." It was contended on behalf of the defendants that the quesiton in controversy between the parties was decided by the Settlement Officer in favour of the defendants and that section 11 of the Regulation operates as a bar to the suit. The plaintiffs replied that the rights involved in this suit fell within the class of rights mentioned in section 25A of the Regulation and that the present case, therefore, falls within the exception and not the prohibition of section 11. The defendants retorted that even then the suit is barred by limitation as it has been brought after the expiration of three years from the date of the publication of the Record of Rights.

Speaking with great respect, I think there has always been some confusion as regards the applicability of section 11 and section 25A of the Regulation. It was argued as though, when the rights of Zemindars and other proprietors as between themselves are concerned, the prohibition contained in section 11 does

* s. 13 of the Code of 1882.—[*Ed.*].

not operate. I read the sections somewhat differently. In my opinion section 11 bars every suit regarding any matter decided by any Settlement Court, except such suits as are brought to contest the finding or record of the Settlement Officer, where only the right of Zemindars or other proprietors as between themselves are concerned, provided they are brought within three years from the date of the publication of the Record of Rights. Section 11 provides that every decision and order of the Settlement Officer regarding the interests and rights of the parties shall have the force of a decree. Section 25A provides a procedure for avoiding the decree only when the question in controversy between the parties involves the determination of the rights of the Zemindars or other proprietors as between themselves. When the question in controversy between the parties does not involve the determination of such rights, the decree under section 11 cannot be avoided by a suit under section 25A but when the question in controversy does involve the determination of such rights, the decree under section 11 can be avoided by a suit under section 25A. In my opinion section 11 operates in every case to give to every decision and order of the Settlement Courts the force of a decree and section 25A enables a party affected by such decisions and orders to sue for setting aside such decisions and orders, provided the rights decided fall within the class of rights mentioned in section 25A. I have no doubt whatever as to the rights of the parties under the Regulation. Under section 14, the Settlement Officer has to give due notice to the people of a village for which he is about to prepare a Record of Rights, so that all persons interested may bring forward their claims either in writing or by verbal application, and he has to enquire into, settle and record all rights in, or claims to, the lands of a village of which he is preparing a Record of Rights, even though such claims or rights may not be urged by the parties interested. The parties then have an opportunity of representing their views to the Settlement Officer before the preparation of the Record of Rights. The decisions arrived at by the Settlement Officer in the course of such enquiry are decisions within the meaning of section 11 and operate as decrees of Court, and the only way in which such decrees may be avoided is by a suit under section 25A, provided the decision affects the rights of Zemindars and other proprietors as between themselves. But the Settlement Officer may himself set aside the decision in an appropriate proceeding under section 24 of the Act which makes it obligatory on the Settlement Officer, after he shall have made the Record of Rights for any village, to notify and publish the contents of such record to the persons interested by posting it conspicuously in the village and otherwise in such manner as may be convenient and which enables any person interested to bring forward in the Settlement Courts within a period of six months from the date of publication of such Record of Rights any objection he may desire to make to any part of such record. The section provides that any objection so made shall be enquired into and disposed of by a decision in writing under the hand of the Officer presiding in the Court. The decision arrived at under section 24 is, again, a decision within the meaning of section 11 and operates as a decree of Court, and the only way, again, in which such a decree can be avoided is again by a suit under section 25A provided the decision affects the rights of Zemindars and other proprietors as between themselves. Section 25 provides that after a period of six months from the date of the publication of the Record of Rights of any village, such record shall be conclusive proof of the rights and customs therein recorded, other than the rights mentioned in section 25A, except so far as concerns entries in such record regarding which objection by parties interested may still be pending in the original or Appellate Court, or may still be open to appeal. It follows from this provision that, where the rights dealt with in the Settlement proceeding are such rights as are mentioned in section 25A, the Record of Rights cannot be relied on as a bar to a suit which asserts a right contrary to the entry in the Record of Rights, for section 25 is quite clear that a Record of Rights is not conclusive proof of the rights mentioned in section 25A. But the

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decision which is the basis of the Record of Rights constitutes a bar to the suit under section 11. A distinction has been drawn in the Regulation between "the decision and orders" of the Settlement Court and the Record of Rights. The decision and orders have the force of a decree of Court, whereas the Record of Rights is conclusive proof of the rights and customs therein recorded other than the rights mentioned in section 25A. In my opinion when in any suit we are concerned with such rights as are mentioned in section 25A, and a decision of the Settlement Court is pleaded as a bar to the suit, all that we have to see is whether there is such a decision as is alleged by the defendants and it is wholly immaterial to enquire whether the Record of Rights was published in accordance with law.

Now, the defendants have been recorded in the Record of Rights as the proprietors of Tappa Patsunda. The question was, as we have seen, directly raised by the plaintiffs before the Settlement Officer by their petition Exhibit C, dated the 25th May 1905. The Settlement Officer directly decided the question against the plaintiffs by his order, Exhibit F F, dated the 24th June 1905. In my opinion that order operated as a decree between the parties under section 11 of the Regulation. It is conceded that the rights decided by Settlement Officer fell within the class of rights mentioned in section 25A of the Regulation. It must, therefore, follow that the plaintiffs had the right to contest the finding of the Settlement Officer, provided they brought their suit within three years from the date of the publication of the Record of Rights. Is the present suit, then, a suit to contest the finding or record of the Settlement Officer?

In my opinion, it is not. It is sufficient to refer to the plaint to make good the point, that the suit is not a suit to contest the finding or record of the Settlement Officer. There is not a word about the finding or record of the Settlement Officer in the plaint, and there is nothing in the plaint, which either expressly or by necessary implication invites the Court to set aside such finding or record. In my view the present suit cannot be regarded as a suit under section 25A of the Regulation, and there being no challenge of the order of the Settlement Officer dated the 24th June 1905 that order operates as a bar to the present suit.

The learned Subordinate Judge was of opinion that the decision of a Settlement Court does not operate as a decree under section 11 of the Regulation, unless there is proof of the publication of the Record of Rights. I have dealt with this point, and all that I need say is that I am unable to concur in this view. It is impossible, in my opinion, to escape from the provision of section 11 that the decision and orders of the Settlement Courts shall have the force of a decree of Court. There is nothing in the language employed by the Legislature in section 11 to suggest that they shall have the force of a decree only on proof of the publication of the Record of Rights.

It was argued before us that the nature of a defence under section 11 is substantially equivalent to a plea of *res judicata*, and that it was for the defendants to establish the decree upon which they relied as operating as *res judicata*, and reliance was placed upon *Nadiar Chand Singh* v. *Chunder Sikhur Sadhu* (1). I quite agree that it is for the defendants to establish the decree upon which they rely, but what is the decree under section 11? Not the Record of Rights, but the decisions and orders of the Settlement Courts.

It was then argued that the plaintiffs could not be expected to bring a suit to contest the finding or record of the Settlement Officer, since they do not admit that there is a Record of Rights relating to these lands. The argument completely ignores the provisions of section 25A which gives a party the right to contest not only the record but also the finding of the Settlement Officer, and it is conceded that the plaintiffs were aware of the finding of the Settlement Officer contained in the order dated the 24th June 1905. It was open to the plaintiffs to sue for setting aside the finding, but this course they did not adopt. In my opinion the decision of the 24th June 1905 constitutes a complete bar to the suit under section 11 of the Regulation.

I will now deal with the question whether the Record of Rights was published in

(1) 15 C. 765; 7 Ind. Dec. (N. S.) 1034.

accordance with law. In other words, I will assume that the suit is one under section 25A, and enquire whether it has been brought within three years from the date of the publication of the Record of Rights. The defendants filed certain extracts from the Record of Rights which did not contain the certificate of publication; but during the hearing of the case, they tendered in evidence the certified copies of the Record of Rights containing the certificates of publication. On the 23rd December 1918, the learned Subordinate Judge accepted these documents in evidence, but reviewing his own order later in the day, he came to the conclusion that he would not be justified in accepting these documents at that stage. He accordingly returned the documents to the defendants. The Civil Procedure Code, it is true, compels the parties to produce all the documentary evidence of every description in their possession or power on which they intend to rely at the first hearing of the suit and provides that such evidence which should have been but has not been produced shall not be received at any subsequent stage of the proceedings unless good cause is shown to the satisfaction of the Court for the non-production thereof. But it has been held in numerous cases that the rule was enacted to prevent fraud by the late production of suspicious documents and that no suspicion can attach to certified copies of public documents and that such copies may be received in evidence though they have not been produced at the first hearing. In my opinion the explanation offered by the defendants should have been accepted by the learned Subordinate Judge and that, in order to do complete justice between the parties, he should have accepted these documents in evidence. Having rejected them, however, he had no difficulty in coming to the conclusion that the internal evidence furnished by the documents themselves did not establish that there was due publication of the Record of Rights.

In this Court Mr. Hasan Imam tendered in evidence the documents containing the certificates of publication in respect of each village of Tappa Patsunda. Mr. Sen, on behalf of the plaintiffs, very properly did not object to these documents going in, and they have been marked as Exhibits in the case. They bear the facsimile signature of Mr. McPherson, and the autograph signature of Mr. Hossein, who was the Assistant Settlement Officer. The learned Subordinate Judge has made a point of the fact that Mr. McPherson left India in April and that the publication, according to the certificates took place in May and June. That is true, but the rules framed under section 10 of the Regulation provide that the Settlement Officer or the Assistant Settlement Officer shall certify on the record the date of its publication. They are all certified by the Assistant Settlement Officer, and constitute important evidence on the point under investigation.

Under the Bengal Tenancy Act, the certificate of publication would be conclusive proof of publication. We have no such provision in the Regulation, but, in my opinion, the production of the certificate of publication by the defendants raises a presumption that there was publication according to the procedure laid down in the Regulation, throwing the onus on the plaintiffs to establish that there was no regular publication of the Record of Rights. The plaintiffs have, however, given no evidence on the point, whereas the defendants have called certain witnesses to prove due publication of the Record of Rights in accordance with law. It appears that Deonath Sahai (D. W. No. 12) and Dil Kishan Jha (D. W. No. 14) between them looked after the publication of the Record of Rights in all the villages. I have carefully considered their evidence and I am of opinion that the evidence establishes beyond reasonable doubt that there was actual publication of the Record of Rights in the villages.

I will shortly deal with the arguments employed by the learned Subordinate Judge for rejecting the case of the defendants as to publication of the Record of Rights. He makes a grievance that the plaintiffs' witnesses were not cross-examined on this point. In my opinion it is not the duty of any Counsel to unnecessarily get a point against him by cross-examination. As a matter of fact Bolaki Das (P. W. No. 2) was cross-examined on the point and he admitted that McPherson's Settlement did take place and that "all the tenants got *parcha* slips and according to the same the *jamabandi* was prepared". Then he complains of the paucity of evidence on the side of the defendants. He is of opinion that the defendants should have

examined the *amins*, and Mr. DeCosta, the defendants' manager, and he thinks that the *amins*' diaries and the account-books of the defendants should have been produced, the former to show that the *amins* did in fact do the work which they purported to do, the latter to show whether any expenses were in fact incurred by the defendants in sending their officers to look after the publication of the Record of Rights. The Record of Rights, according to the certificates, of publication, were published in May and June 1905, the defendants were giving their evidence in Court in December 19 8. I am of opinion that it was unreasonable to expect them to produce in December 1918 the *amins*' diaries of May and June 1905 or their account books of that period. The evidence, in my opinion, is more than sufficient to establish the defendants' case on the point. That case on the certificates of publication is inherently probable, and that case was not contradicted in the witness-box by any of the witnesses examined on behalf of the defendants. In my opinion the defendants have established that there was due publication of the Record of Rights in May and June 1905. The present suit, regarded as a suit under section 25A, is clearly barred by limitation.

My decision on this point is sufficient to dispose of the appeal, but I think it just as well that I should deal with the other two points which have been argued before us. First, I will deal with the question of impartibility, as to which the onus is undoubtedly on the defendants. That the family is an ancient and a noble one admits of no doubt whatever. The history of the family will be found at page 244 of the District Gazetteer, Sonthal Parganas. It appears that one Deb Barham, a Khetaur Chief of Kharagpur, being driven out of that tract by the Rajput invaders, obtaind a grant of Patsunda and Barkop from the Mughul Viceroy of Emperor Akbar. In 1687 the estate was divided between two of his descendants Man Barham and Chandra Barham. Man Barham retaining Barkop while Patsunda was handed over to his younger brother Chandra Barham. Thakur Barham is the lineal descendant of Chandra Barham. We have no authentic history of the mode of succession from Chandra Barham to Sital Barham. Sital had three sons, Fateh Barham, Dowlat Barham and Ratan Barham. Permanent Settlement was admittedly concluded with Fateh Barham. Fateh Barham died in January 181 and was succeeded by his only son, Tej Barham. Tej Barham died on the 30th January 1848 leaving four sons Tilak, Kirat, Rudar and Lachman, of whom the eldest Tilak was recorded in the Government records as the owner of the property. Thakur Barham was the only son of Tilak, and succeeded him to the exclusion of his uncles.

In my opinion the admitted history of the family makes the case of the desendants inherently probable. The founder of the family was a Khetaur Chief who, no doubt in return for such services as he was able to render to the Mughul, secured a grant of an extensive tract of land from the Mughul. It is permissible to infer that that which he secured as a Chief he intended to retain as a Chief. The next important event is the succession of Fateh Barham to the estate and the fact that Permanent Settlement was concluded with Fateh Barham to the exclusion of his brothers. It is admitted by the plaintiffs that Fateh Barham had two brothers, Dowlat and Ratan; but Tulsi Jha, the first witness examined on behalf of the plaintiffs, says that they died minors during their father's lifetime, though in cross-examination he admits that his evidence on the point is hearsay. The learned Subordinate Judge says that the evidence of the plaintiffs shows that the two brothers "died during the lifetime of their father and that they left no heirs." This is wrong. There is no evidence on the side of the plaintiffs that they left no heirs. The defendants have given evidence that Dowlat and Ratan left sons whose descendants are still in existence; but the evidence on this point is weak, and I am not prepared to differ from the learned Subordinate Judge on this point. The fact that the Permanent Settlement was concluded with Fateh Barham is, therefore, not conclusive.

The succession of Tej Barham calls for no comment, since he was the only son of his father. Tej Barham, however, left four sons Tilak, Kirat, Rudra and Lachman. On the 16th November 1848, Tilak applied for registration of his name in the Government record and asserted that, though his father

had left three other sons, he alone was entitled to have his name recorded as the *malik* of the Zemindaris and household goods left by his father. It is necessary to quote the exact language employed by Tilak in making the application. "According to the custom of the family and under Act X of 1800," he asserted, "your petitioner has been in possession and occupation of all the properties left by his father, considering them to be the jungle *tari mahals*, and has been paying the Government Revenue for the same. It is apparent that on the death of a father, his eldest son becomes the *malik* of all the Zemindaris and household goods left by him, has a right to pass orders, and maintain his brothers and other heirs of the deceased." The learned Subordinate Judge says that the word "*malik*" means a manager, and that the petition, Exhibit 5, read as a whole, shows "that the estate was a joint concern and that after the death of Tej Barham his sons became equal co-parceners therein." It may be assumed that the estate was the family property of a joint undivided family in the sense that it had never been divided and that the succession thereto would be governed by the rules of survivorship obtaining in a joint Mitakshara Hindu family but an estate may be the family property of a joint undivided family, and yet be impartible. There is, however, nothing in the petition to suggest that the brothers of Tilak were equal co-parceners with him in the estate. On the contrary, there is an assertion, clear and unequivocal that Tilak was in possession and occupation of all the properties left by his father to the exclusion of his brothers and that he alone was entitled to have his name recorded in the Government records as the proprietor of the estate. The reference to Regulation X of 1800 puts the matter beyond all reasonable doubt. By Regulation XI of 1793, the estates of proprietors of land dying intestate were declared liable to be divided among the heirs of the deceased agreeably to the Hindu or Muhammadan Law. But a custom having been found to prevail in the jungle *mahals* of Midnapore and other districts by which the succession to the landed estates invariably devolved to a single heir without the division of the property, it became necessary for the Governor-General in Council to pass a Regulation to save such customs from the operation of Regulation XI of 1793. Regulation X of 1800 was accordingly passed, and it provided that Regulation XI of 1793 shall not be considered "to supersede or affect any established usage which may have obtained in the jungle *mahals* of Midnapore and other districts, by which the succession to landed estates, the proprietor of which may die intestate, has hitherto been considered to devolve to a single heir, to the exclusion of the other heirs of the deceased," and that "in the *mahals* in question the local custom of the country shall be continued in full force, as heretofore." The assertion of Tilak Barham in the petition was that he was in possession and occupation of all the properties left by his father to the exclusion of his brothers according to the custom of the family and under Regulation X of 1800. This, in my opinion, was equivalent to an assertion that the estate which belonged to his father, was an impartible estate, and had devolved on him as a single heir of his father.

This application was disposed of by a *rubkari* of the Collectorate, Exhibit TT, dated the 16th January 1894. The *rubkari* shows that notices of the application were duly issued, that there was no opposition from anybody, that the petitioner examined three witnesses who gave evidence to the effect that Tilak Barham had succeeded to the estate according to family custom and that his brothers were in receipt of maintenance from him and that the Court directed the name of Tilak Barham to be recorded in the Government Sherista. Exhibit 8 and Exhibit TT, in my opinion, strongly support the case of the defendants.

In September 1862 Tilak died, leaving three brothers and a son, Thakur Barham. If the property left by him was partible property then Kirat Barham, as the eldest male member of the family, would be entitled to take up the management of the estate. But, as a matter of fact, Thakur Barham, on the 14th January 1863, applied to have his name recorded in the Government Sherista in respect of the Zemindari which stood recorded in his father's name. He asserted in his petition, Exhibit UU, that his father had died leaving him as his only heir, and that he had taken possession of the estate of the deceased. He asked that the witnesses named by him might be

examined in support of the case and his name duly recorded in the Government Sherista. Notices of this application were apparently served on the brothers of Tilak, and Rudar Barham, one of the brothers of Tilak, promptly presented a petition of objection on the 27th February 1863. In this petition Exhibit 8, he alleged that on the death of Tej Barm, all his sons came into possession of his estate, although the name of Tilak was recorded in the Government Sherista. According to him, the custom of the family was that "all the brothers unanimously get the name of one of them registered in the Government Sherista and the costs of maintenance, marriages and deaths, all the expenses of the three brothers are jointly defrayed from the usufruct of the said estate after the payment of Government Revenue." There was thus a direct challenge upon the title of Thakur Barham and on his right to have his name recorded in the Government Sherista in respect of the Zemindari. Thakur Barham replied to this petition by his petition, Exhibit 8 (a), dated the 26th March 1863. In this petition he asserted that his father, Tilak Barham, had succeeded to the estate according to the custom of the family and under the provisions of Regulation X of 1800, under which the eldest son becomes proprietor of all the properties left by his deceased father, and that the objection petition of Rudar Barham was not tenable inasmuch as he had accepted the petition on which Tilak Barham had succeeded in having his own name recorded. On the question of maintenance as to which his petition of the 14th January 1863 was silent and of which Rudar Barham had made a grievance, he said that he had not deprived Rudar of maintenance and that he was in receipt of it. It is impossible to escape from the conclusion that there is, in this petition [Exhibit 8 (a)], a definite assertion that the estate was an impartible one and that he had succeeded to it as the sole owner, subject only to the right of his uncles to receive maintenance from him. This position was accepted by the uncles of Thakur Barm, as the fifth paragraph of the petition, and a statement signed by Rudar Barham at the foot of the petition, conclusively establish. That statement was as folllows: "As Thakur Barham, the petitioner, has accepted the terms of the petition, dated the 16th November 1848, filed by Tilak Barham, upon which depended the proof of the allegations, contained in the objection petition, in respect of the costs of maintenance and of marriages and deaths, and has stated everything in this petition according to the custom prevailing in the family, I accept the contents of this petition and have no objection to the name of the petitioner being registered". I regard the petition of Thakur Barham, dated the 26th March 1863 and the statement signed by Rudar Barham at the foot of the petition as wholly destructive of the case of the plaintiffs. As I have said before, there is a definite assertion in the petition that according to the family custom and under the provisions of Regulation X of 1800, the eldest son becomes the proprietor of all the properties left by his deceased father. Ruder Barham in his statement at the foot of the petition says that Thakur Barham "has stated everything in this petition according to the custom prevailing in the family"; and he accepts the contents of Thakur Barham's petition. From his statement it would appear that his object in opposing the application of Thakur Barham was to get an admission from him as to his right of maintenance. There was that admission in the petition of Tilak Barham, and his brothers did not oppose his application. There was no such admission in the petition of Thakur Barham dated the 14th January 1863, and there was a prompt challenge upon his title. But in the petition of the 26th March 1863, Thakur Barham made it quite clear that he did not intend to repudiate the position adopted by his father, and they at once admitted the validity of the family custom which was the basis of Thakur Barham's claim. The learned Subordinate Judge says that the transaction does not show that the parties considered the estate to be impartible and that the estate was in fact recognised by them as joint. The learned Subordinate Judge is obviously under the impression that an assertion that an estate is the family property of an undivided family carries with it an admission that it is not an impartible estate. This is, of course, an erroneous view. I regard the documents in connection with Thakur Barham's succession to the estate as strong evidence in support

of the defendants' case that the estate is in fact an impartible one.

In 1878, the estate was brought under the Settlement operation which took place in pursuance of Regulation III of 1872, and Thakur Barham was recorded as the proprietor of the estate. It is argued by the defendants that, had the plaintiffs any proprietary interest in the estate, they would undoubtedly have been recorded in the Record of Rights to the extent of their interest in the estate. The learned Subordinate Judge dismisses the argument as wholly inadmissible. According to him, as the name of Thakur Barham stood recorded in the Government records as the proprietor of the estate, it is only natural that his name should be recorded in the Record of Rights. He also thought that the Record of Rights "was in consonance with the conception of a joint Hindu family." The argument employed by the learned Subordinate Judge completely overlooks the policy of the Legislature in enacting Regulation III of 1872 which was, as the learned Judges in *Shankir Prosad Jha* [*Januki Fersid Jha*] v. *Babu Lal Jha* (2) pointed out, "to have a complete Record of Rights and interest in land in the Sonthal Parganas and to exclude the jurisdiction of Civil Courts except in certain matters". Section 12 of the Regulation empowers the Settlement Officers to enquire into, to decide, and to record the rights of the Zemindars and other proprietors, and section 13 lays down that the Record of Rights to be prepared by a Settlement Officer shall show the nature and incidents of each right and interest held by each class of occupiers or owners in a village, or, if need be, of each individual owner, occupier or headman in a village. Section 14 requires the Settlement Officer to enquire into, settle, and record, all rights in, or claims to, the lands of a village of which he is preparing a Record of Rights even though such claims or rights may not be urged by the parties. The Regulation, in my opinion, gives no scope for the argument that the members of a joint family may allow the name of the *karta* to be recorded in the Record of Rights and yet claim to have an interest in the estate. The case just cited makes interesting reading. One Joyram died leaving three sons, Babu Lal, Surjee and Dinabandhu. Surjee died in 1303, leaving four sons who were the plaintiffs in the action. Their case was that the family properties remained in charge of their uncles, defendants Nos. 1 and 2, and they claimed a partition of the joint family properties. But the defendant No. 1 was recorded in the Settlement records as the proprietor of the estate, and he took the plea that the suit was barred under section 25A of the Regulation which, as we have already seen, enables a party prejudiced by the Record of Rights to bring a suit to contest the record within three years of the date of publication of the Record of Rights and which lays down that no such suit shall be brought after the expiration of three years from that date. The Court gave effect to the plea and dismissed the plaintiff's suit as regards properties in Sonthal Parganas. The decision is an authority for the view that the Record of Rights framed under Regulation III of 1872 operates as between members of a joint Hindu family just as completely as between strangers. In my opinion, it is impossible to take the view that the entry in the Record of Rights, to quote the language of the learned Subordinate Judge, "was in consonance with the conception of a Joint Hindu family."

The defendants have also relied upon a series of transactions into which Thakur Barham entered, by which he dealt with the estate as the sole owner thereof. The first is a statement, Exhibit M, made by Thakur Barham to Babu Surya Narain Singh in the course of a negotiation for a loan. He asserted that he was the sole proprietor of the entire 16 annas of Tappa Patsunda. The next in point of time is Exhibit O, the bond executed by Thakur Barham in favour of the defendants on 26th Kartic 1300, and the last is Exhibit DD, the bond executed by Thakur Barham in favour of the defendants of 30th Savan 1302. In each of the documents he asserted his sole and exclusive title to the 16 annas of Tappa Patsunda. It was the last-mentioned transaction that formed the basis of the mortgage-suit brought by the defendants against Thakur Barham, and there is evidence

(2) 28 Ind. Cas. 241; 19 C. W. N. 499.

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hat Gaju Barham, the father of the plaintiffs Nos. 3 and 4, was aware of the mortgage-decree that had been passed against Thakur Barham and that he was actually negotiating for a loan to pay off the defendants. That evidence will be found in the orders, dated the 28th April 1904 and 25th July 1904, respectively, of the Court executing the decree against Thakur Barham, in Exhibit 9, the affidavit of one Pheku Lal and Exhibit H. the deposition of Pheku Lal in those proceedings. It appears that about the time when the Court was about to pass orders for the sale of the mortgaged properties an application was filed for adjournment of the sale on the ground that the judgment-debtor was negotiating for a loan by which he proposed to pay off the decree-holders. The deposition of Pheku Lal in those proceedings makes it perfectly clear that Gaju Barham was one of the persons who was acting on behalf of Thakur Barham. Now it may be asked why Gaju Barham should make any endeavour to have the defendants' mortgage satisfied if in point of fact that mortgage conveyed no interest to the defendants? If, indeed, Thakur Barham were not the sole proprietor of the properties mortgaged the mortgage-decree obtained by the defendants could not affect the interest of Gaju Barham, and one would not expect Gaju Barham to make a tour of the banking houses in order to raise a loan on behalf of Thakur Barham. Gaju Barham, in my opinion, has no doubt that Thakur Barham was the sole proprietor of the estate which was an impartible one.

Then there is a clear admission by *Musammat* Kalabati, one of the plaintiffs in the action that "the estate Patsunda is an impartible estate and is placed in the hands of a single member who manages the property for the time being." See Exhibit Y, the petition dated the 1st of June 1906. Then there is some evidence of conduct in regard to Jai Kissen, another plaintiff in the present action, showing that, so far as he is concerned, he believed in the custom of primogeniture. Exhibit MM4 shows that Jai Kissen claimed a *khorposh* grant during the Settlement proceedings, a claim which was disallowed by the Settlement Officer. Now, in my opinion, an assertion that a person has a *khorposh* grant in the estate carries with it the admission that he has no proprietary interest in the estate; for, if the estate were an ordinary partible estate he would undoubtedly have a proprietary interest in it.

I now come to the oral evidence, and this is all in favour of the defendants. There is one circumstance in connection with the oral evidence which has escaped the attention of the learned Subordinate Judge. As the onus of the issue in regard to the question of impartibility was on the defendants, the plaintiffs asked for, and obtained, leave reserving to themselves the right to adduce rebutting evidence on this issue after the close of the defendants' case. This is clear from the order of the Court dated the 30th November 1918. The order of the 21st December 1918 shows that the plaintiffs declined to produce any rebutting evidence on the issue of impartibility. The result is that the evidence adduced on behalf of the defendants remains uncontradicted, although it was open to the plaintiffs after the close of the defendants' case to pledge their oath against the case set up by the defendants. The inference is irresistible that their evidence would have supported the case of the defendants on this point.

Pheku Lal, the first witness examined on behalf of the defendants, was the Patwari of Thakur Barham from 1281 to 1312. He is, therefore, in a position to say on whose behalf he made the collections. He says that Thakur Barham was the *malik* of the estate and that he made *khorposh* grants in favour of his uncles. Cross-examined as to the reason for the arrangement, he said that he heard from Thakur Barham that "such was the family custom and that accordingly the eldest member of the eldest branch became the *malik* and the others enjoyed the profits of some villages for their expenses". Bakshi Lal (P. W. No. 3) held a power-of-attorney from Thakur Barham, and he says that during the lifetime of Thakur Barham the plaintiffs had no concern with the estate and that Jai Kissen succeeded to the estate on the death of Thakur Barham according to family custom. It may be pointed out, in connection with this evidence that the Executive Authorities undoubtedly

took the view that the estate was an impartible one and that on the death of Thakur Barham, Jai Kissen, as the eldest of the eldest line, succeeded to all that was left of the properties. Exhibit MM shows that, onThakur Barham's death, under the orders of the Deputy Commissioner, the property of Thakur Barham was made over to Jai Kissen. Jai Kissen recieved the property and granted a reciept for it; but subsequently, in order to safeguard their interest in the civil suit, he joined with the rest of the plaintiffs in presenting an application asking that the property made over to Jai Kissen may be declared as made over to him and the other petitioners. That petition was obviously presented with a view to create evidence in their favour; but the fact remains that the Deputy Commissioner did make over the property to Jai Kisren and that Jai Kissen did receive it and grant a receipt for it.

Sowkhi Lal Singh (D. W. No. 5) was a *mohurrir* under Thakur Barham, and he says that according to the custom of the family the eldest son of the eldest line always succeeds to the estate. He also says that he heard of the custom from Thakur Barham, Rudar Barham, Maula Barham, Lal Barham, Jai Barham, and others: Jai Barham is one of the plaintiffs, and he did not think it necessary to contradict, in the witness box, the evidence of Sowkhi Lal. Sunder Chand Das, (D. W. No. 9) also gives evidence on this point, and he says that there were maintenance grants in favour of the younger members of the family.

Before concluding this part of my judgment, I think it necessary to refer to the evidence of two witnesses examined on behalf of the plaintiffs. Tulsi Jha (P. W. No. 1) admits that Thakur Barham used to be called Raja by every one and that the other members of the family were called Babus. He also admits that one member of the family has all along been called Raja, and the others Babus. He finally admits that Tappa Patsunda is known as a Raj and that it has never been partitioned. The importance of this evidence lies in the custom of *gaddinashini* to which it speaks which is an important consideration in any investigation relating to the question of impartibility. Bolaki Das (P. W. No. 2) is more definite. His evidence is as follows: "There has all along been only one Raja for the whole estate at a time. Tilak Barham was the Raja before Thakur Barham. The eldest son of the eldest branch becomes the Raja. and this has all along been the family custom". This is clear, precise and definite, and completely supports the defendants' case.

It remains for me to consider the only piece of evidence on which the plaintiffs rely. It is pointed out that in 1687 the estate then consisting of Barkop and Patsunda was divided between two of the descendants of the original founder of the family, and it is argued that the partition which admittedly took place in 1687 completely destroys the custom upon which the defendants rely. I am unable to agree with this contention. There are numerous instances to be found in theLawReports where separate estates have been formed by the division of one entire estate; but it has never been held that that is a circumstance which decides the issue in favour of partibility. We do not know the circumstances under which the division took place in 1687, but we do know that there never has been a partition since 1687 and that, to quote the language of Bolaki Das, "the eldest son of the eldest branch becomes the Raja, and this has all along been the family custom". I have considered all the evidence on this issue with great anxiety, and I have come to the conclusion that the defendants have established their case that the estate which was in the possession of Thakur Barham is an impartible one.

It was argued by Mr. Mullick on behalf of the respondents that, even assuming that the estate in the hands of Thakur Barham was an impartible one, the plaintiffs have sufficient interest in it to challenge the validity of the mortgage executed by Thakur Barm in favour of the defendants, and as a last resort, to redeem the mortgage. Now it is quite true that the impartibility of the estate did not destroy its nature as joint family property or rendered it the separate property of the last holder, unless there was something equivalent to partition which, I am satisfied, there was not. But what are the rights of the members of the joint family other than the holder of the estate? If this case were argued before the decision of the Judicial Com-

mittee in *Sartaj Kuari* v. *Deorai Kuari* (3) Mr. Mullick's argument would be conclusive but, in that case, it was held that the property in the paternal or ancestral estate acquired by birth under the Mitakshara Law is so connected with the right to a partition that it does not exist when there is no right to it. Mr. Mullick then argues that the decision in *Sartaj Kuari's case*(3) has been misunderstood by the Courts and that the Judicial Committee in *Baijnath Prasad Singh* v. *Tej Bali Singh* (4) has explained that decision. In dealing with *Sartaj Kuari's case* (3) the Judicial Committee in *Baijnath Parsad Singh's case* (4) said as follows: "Now what was decided was that in an impartible Raj there was no restriction on the power of alienation by the member of the family who was on the *gaddi* and was in possession, in respect that there was no such right of co-ownership in the other members as to give them a title to prevent such alienation. The right of the other members that was being considered was a presently existing right. The chance each member might have of a succession emerging in his favour was obviously outside the sphere of enquiry." It was argued, on this passage, that, though there is no right in the other members to prevent alienation during the lifetime of the holder making the alienation, that right comes into existence on the death of the holder. I am unable to see that the decision in *Baijnath Prasad Singh's case* (4) gives any support to the argument. The question involved in *Baijnath Prasad Singh's case* (4) was one of succession, and it was argued on behalf of the appellants on the basis of what was said in *Sartaj Kuari's case* (3) that there was no coparcenary which would give the succession to the respondent. Their Lordships pointed out that *Sartaj Kuari's case* (3) decided no question of succession but that it considered the rights of the other members "as a presently existing right." In my opinion, the argument is an impossible one, having regard not only to *Sartaj Kuari's case* (3) but also to *Pittapur case* [*Sri Raja Rao Venkata Surya Mahipati Rama Krishna* v. *Court of Wards* (5)]. I hold that the plaintiffs had no interest in the mortgaged properties at the time of the mortgage and were not necessary parties to the mortgage action and cannot be allowed, in this action, to redeem the mortgage.

The only other question left for determination is whether the Bhagalpur Court had jurisdiction to entertain the mortgage action brought by the defendants against Thakur Barham. The matter in dispute in that suit exceeded the value of Rs. 1,000 and the Civil Procedure Code was, therefore, applicable; see *Maha Prasad Singh* v. *Ramani Mohan Singh* (6). Section 19 of the Civil Procedure Code (Act XIV of 1882) provided that "if the immoveable property be situate within the limits of different districts the suit may be instituted in any Court, otherwise competent to try it, within whose jurisdiction any portion of the property is situate". The plaintiffs in their plaint alleged that one of the properties mortgaged was situate within the jurisdiction of the Subordinate Judge of Bhagalpur. This was not disputed by Thakur Barham in his written statement but he asserted, in the second paragraph of his written statement that the suit was "not fit to be entertained" by the Bhagalpur Court and that "it should have been instituted in the Court of the Sub-Divisional Officer of Godda, having power of a Sub-Judge". In the third paragraph, he gave his reasons for his assertion that Bhagalpur Court had no jurisdiction to try the suit. According to him, the Civil Procedure Code was not effective in the Sonthal Parganas, and, as one of the properties mortgaged was situate in the Sonthal Parganas, the Bhagalpur Court had no jurisdiction to try the suit. In the fifth paragraph of the written statement, he contended without giving any reason therefor, that the Bhagalpur Court could not, in any circumstances, pass a decree so as to affect the property situate in the Sonthal Parganas. At the

(3) 10 A. 272; 15 I. A. 51; 5 Sar. P. C. J. 139; 12 Ind Jur. 213; 6 Ind. Dec (N. s) 182 (P. C.).

(4) 60 Ind. Cas. 534; 33 C. L J. 388; 19 A. L. J. 317; 40 M. L. J. 387; (1921) M. W. N. 300; 25 C. W. N. 564; 2 P. L. T. 257; 23 Bom. L. R. 654; 48 A. 228; 3 U. P. L. R. (P. C.) 35; 29 M. L. T. 358 (P. C.).

(5) 22 M. 383; 1 Bom. L. R. 277; 3 C. W. N. 415; 26 I. A. 83; 7 Sar. P. C. J. 481; 9 M. L. J. Sup. 1; 8 Ind. Dec (N. s.) 276 (P. C.).

(6) 25 Ind. Cas. 451; 42 C. 116; 18 C. W. N. 994; 16 M. L. T. 105; (1914) M. W. N. 565; 1 L. W. 619; 20 C. L. J. 231; 27 M. L. J. 459; 16 Bom. L. R. 824; 41 I A. 197 (P. C.).

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hearing of the suit the defendant did not appear and the learned Subordinate Judge came to the conclusion, on the pleadings, that he had complete jurisdiction to try the suit. On appeal to the Calcutta High Court, it was pressed on behalf of Thakur Barham that the decision of the Subordinate Judge as to his jurisdiction to entertain the suit was erroneous. The question was again argued on the pleadings and the High Court rejected the argument which was advanced on behalf of Thakur Barham. The direct attack on the jurisdiction of the Bhagalpur Court has accordingly failed. It has now been made the subject of a collateral impeachment in this suit.

As I have said before, the Bhagalpur Court had, under the Civil Procedure Code, general jurisdiction to try the suit but the plaintiffs rely upon section 5 of the Regulation III of 1872 which provided as follows:—"Till such time as a settlement of the whole or any part of the Sonthal Paraganas shall be made under the rules hereinafter provided, and the said settlement shall be declared by Notification in the Calcutta Gazette to have been completed and concluded, no suit shall lie in any Court established under the said Act VI of 1871 in regard to any land or any interest in or arising out of any land or for the rents and profits of any land...except as hereinafter provided; but such suit shall be heard and determined by the officer appointed by the Lieutenant Governor of Bengal under section 2 of the said Act XXXVII of 1855 or by the Settlement Officers hereinafter mentioned, accordingly as the said Lieutenant Governor from time to time directs". This is followed by a proviso which does not affect the present case.

The first Settlement of the Sonthal Parganas known as the Woods' Settlement began in 1875 and was in fact concluded in 1879. The next Settlement known as McPherson's Settlement began in 1903 The mortgage suit was instituted in the Bhagalpur Court on the 17th of September 1900. But though the first Settlement was concluded in 1879, by a strange omission on the part of the authorities, no Notification has yet been issued declaring the Settlement to have been completed and concluded. It follows, therefore, that, in the special circumstances of the case, the Bhagalpur Court had no jurisdiction to try and determine the suit.

The question now arises, whether the jurisdiction of the Court to entertain the mortgage action can now be impeached in this suit. Jurisdiction may be defined as the power and authority conferred on a Court to pronounce the sentence of the law or to award the remedies provided by law upon a state of facts, proved or admitted, referred to the Court for decision and authorised by law to be the subject of investigation or action by that Court, and in favour of, or against, persons who present themselves, or who are brought before the Court in some manner sanctioned by law as proper and sufficient. See Black on Jurisdiction, section 215. The rule is well-established that when the want of jurisdiction of a Court is apparent on the face of the record, any judgment rendered by such a Court is null and void, incapable of ratification, and subject to collateral impeachment. But it is equally well established that the Court has jurisdiction to decide whether it has jurisdiction to entertain the suit, and that the decision of the Court that it has jurisdiction is final and conclusive in all collateral enquiries.

In this case, the question of jurisdiction was distinctly raised by Thakur Barham. The Court decided that it had jurisdiction to entertain the suit. That decision was made the subject of a direct attack in the High Court. The High Court upheld the decision of the Subordinate Judge. That decision should, on ordinary principles, be regarded as final and conclusive, so far as this suit is concerned.

But it was argued by Mr. Mullick, on behalf of the plaintiffs that the question was not raised in the form in which the plaintiffs have raised it in this suit. The basis of this argument is that section 5 of the Regulation was not specially pleaded as having ousted the jurisdiction of the Civil Court. It is true that there is no reference to section V of the Regulation in the written statement, but Thakur Barham did contend that, under no circumstances, had the Court any power to affect the property situate in the Sonthal Parganas by its decision. In my opinion the question was raised and finally decided and that decision is not open to impeachment in this suit.

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But if the question was not, in fact, raised, the plaintiffs are in no better position. As I have said before, but for the fact that the authorities forgot to issue a Notification declaring the settlement to have been completed and concluded the Bhagalpur Court had complete jurisdiction to try and dispose of the suit. The absence of jurisdiction in the Bhagalpur Court, therefore, depended on a fact which had to be proved, like any other fact in the case. In my opinion, when there is no want of jurisdiction in the Court to try a suit, that is to say, when the want of jurisdiction is not apparent on the face of the proceedings, but the absence of jurisdiction depends on a fact in the knowledge of the party which he had an opportunity of bringing forward in the Court, then, if he does not bring that fact forward but allows the Court to proceed with the judgment he ought not to be permitted to impeach the jurisdiction of the Court in any collateral proceeding. The question has often been debated in England in connection with the grant of a writ of prohibition, and the distinction between a latent want of jurisdiction, *i. e.*, something becoming manifest in the course of the proceedings, and a patent want of jurisdiction, *i. e.* a want of jurisdiction apparent on the face of the proceedings, was pointed out by Lopes, L. J., in *Farquharson* v. *Morgan* (7). In my opinion, the Bhagalpur Court had, on the face of the proceedings, complete jurisdiction to try and dispose of the mortgage action, and it is not open to the plaintiffs now, in this suit, to impeach that jurisdiction on the ground of the existence of a fact, which fact was never put forward in that suit.

I would allow this appeal, set aside the judgment and decree of the Court below and dismiss the plaintiffs' suit with costs throughout.

The judgment will, by consent of parties, govern First Appeal No. 135 of 1919. The suit giving rise to First Appeal No. 135 of 1919 will accordingly stand dismissed, but without costs.

ADAM, J.—I entirely agree.

N. K. *Appeal allowed.*

(7) (1894) 1 Q. B. 552; 63 L. J. Q. B. 474; 9 R. 202; 70 L. T. 152; 42 W. R. 306; 58 J. P. 495.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 1274 OF 1918.

February 16, 1922.

Present:—Mr. Justice Abdul Raoof and Mr. Justice Campbell.

JAUGAL SINGH AND ANOTHER—DEFENDANTS—APPELLANTS

versus

GHULAM MAHOMED—PLAINTIFF AND WADHAWA SINGH—DEFENDANT—RESPONDENTS.

Specific Relief Act (I of 1877), s. 22—Specific performance—Delay—Abandonment—Evidence.

Delay in bringing a suit for specific performance may, in certain cases, be evidence of abandonment or acquiescence, but, on the other hand, delay which does not amount to waiver, abandonment or acquiescence and in no way alters the position of the defendant, does not disentitle the plaintiff to sue for specific performance. [p. 704, col. 1.]

Kissen Gopal Sadaney v. *Kally Prosonno Sett*, 33 C. 633, relied upon.

The Court will decide in each case whether the delay on the part of the plaintiff was evidence of abandonment by him of his rights; and if the suit is within time and the delay is not so great as to induce the Court to hold that the plaintiff had forfeited his right, it will not refuse to grant the equitable relief claimed by him [p 705, col. 1.]

First appeal from a decree of the Senior Subordinate Judge, Lyallpur, dated the 25th February 1918.

Pandit *Sheo Narain*, R. B., for the Appellants.

Dr. *Mahomed Iqbal* and Lala *Niamat Rai*, for the Respondents.

JUDGMENT.—This is a first appeal arising out of a suit for the specific performance of a contract of sale executed on the 28th April 1915 by Wadhawa Singh, defendant No. 1, in favour of the plaintiff, Ghulam Mahomed. Under the contract the plaintiff agreed to sell the property in dispute in lieu of Rs. 7,000, out of which Rs. 100, were paid as earnest-money, and the plaintiff undertook to get the deed of sale duly registered within one year and receive the remaining sale price, namely, Rs. 6,900. The following condition was entered in the agreement:—

"In case of breach of the agreement I will pay Rs. 1,000 as damages besides refunding earnest-money. Moreover, I will be bound for specific performance of the contract. If the vendee breaks the

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agreement, he shall also be liable for payment of Rs. 1,000 as damages and the earnest-money will be forfeited. In case of breach of promise on my part the vendee shall be competent to recover the damages by means of a suit, and by compelling me for specific performance of the contract he will get a compulsory registration of the deed effected." From the above it is clear that a sale-deed was to be executed and completed by the 28th April 1916; but no sale-deed, however, was executed in favour of the plaintiff, and, on the contrary, defendant No. 1, in October 1917, sold the property in dispute to defendants Nos. 2 and 3. Thereupon the present suit was instituted on the 29th October 1917, against Wadhawa Singh and the vendees, Jaugal Singh and Jiwan Singh. The plaint averred that the plaintiff had repeatedly requested defendant No. 1 to execute and complete the sale-deed in favour of the plaintiff, and to take the balance of the sale-money, but that defendant No. 1 always put it off on the pretext that he had no time; that, ultimately, on the 25th April 1916, he sent a notice to the plaintiff calling upon the latter to get the sale effected and have the sale-deed registered; that the said notice, dated the 25th April 1916, was received by the plaintiff on the 27th April 1916; that on the 28th April 1916 the plaintiff took the purchase-money to Lyallpur, but defendant No. 1 did not come; that the plaintiff remained there for three days continuously waiting for defendant No. 1, but he did not turn up; and that, finally, the plaintiff sent a notice to the defendant on the 1st May 1916 under a registered cover, and that in reply to the plaintiff's notice, defendant No. 1 sent a second notice dated the 23rd May 1916 by which the latter refused to perform the contract. It is also alleged in the plaint that a notice was sent by the plaintiff to defendants Nos. 2 and 3, informing them that defendant No. 1 had contracted to sell the property in dispute to the plaintiff and that defendants Nos. 2 and 3 would be liable to be sued in Court if they purchased the property in spite of the information given. On the above allegations the plaintiff claimed the specific performance of the contract and Rs. 1,000 as damages. The suit was resisted by defendant No. 1 on the allegations that a breach of contract was committed by the plaintiff himself; that the plaintiff being heavily indebted was unable to pay the purchase-money, and that the plaintiff was not entitled to the relief claimed owing to the long delay in bringing the claim.

Defendants Nos. 2 and 3 eventually pleaded ignorance of the agreement of sale between the plaintiff and defendant No. 1 and averred that the notice given by the plaintiff was received by them after the sale had been executed by Wadhawa Singh in their favour, and that the plaintiff was estopped by his long silence from claiming any relief against them.

The following issues were framed by the lower Court on the pleadings of the parties:—

(1) Was plaintiff ready to perform his part of contract, as incorporated in the agreement, dated 28th April 1915, and did defendant commit a breach with respect to it?

(2) Did defendants-vendees know about the existence of the prior contract to sell in favour of the plaintiff and did they, with this knowledge, obtain the sale in their favour?

(3) If Issues Nos. 1 and 2 are proved in plaintiffs' favour to what amount for damages, if any, is he entitled in addition to the relief for specific performance?

(4) Is plaintiff estopped from bringing the present claim by his long silence, if any?

(5) To what relief is the plaintiff entitled, and against which of the defendants?"

Upon all these issues the Trial Court found in favour of the plaintiff and against the defendants, with the result that the claim for specific performance has been decreed, but the claim for damages has been disallowed.

The vendees-defendants have preferred this appeal, but defendant No. 1, vendor, has remained quiet. Pandit Sheo Narain, Counsel for the appellant, has argued the case before us very fairly and has pressed all the points that can fairly be put forward. He has fairly admitted that the notice sent by the plaintiff had been received by his clients in time, and that it was not open to them to plead that they were

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bona fide purchaser without notice, and as such protected by the proviso attached to section 27 of the Specific Relief Act. The main contentions put forward by the learned Counsel are as follows :—

(1) that a sale-deed has not been executed in favour of the plaintiff owing to his own fault, and that he himself has been guilty of a breach of contract ;

(2) that there has been considerable delay on the part of the plaintiff and the evidence in the case shows that the delay was of such a nature from which it ought to be inferred that the plaintiff had abandoned his claim under the agreement ;

(3) that in any case having regard to the long delay in preferring his claim the Court, in the exercise of its discretionary power under section 22 of the Specific Relief Act, should refuse to grant specific performance in this case.

In support of the first contention the learned Counsel has relied upon the following circumstances, namely, that Wadhawa Singh sent the first notice on the 25th April 1916, and the plaintiff paid no attention to it, and that he sent the second notice dated the 23rd May 1916 to the plaintiff finally informing him that the contract between the parties would be considered to be at an end, and that the plaintiff had not even then moved in the matter.

On behalf of the plaintiff-respondent in reply to this contention it has been argued that on receipt of the notice of the 25th April 1916 the plaintiff, at once, proceeded to Lyallpur and there awaited the arrival of Wadhawa Singh, but he did not turn up ; and that eventually on the 1st May a notice was sent by the plaintiff to Wadhawa Singh under a registered cover. The notice, however, is not forthcoming, nor has the plaintiff been able to produce a copy of it. He has, however, given evidence to prove that the notice was sent by him on the 1st May 1916. At page 6 of the paper book is to be found a copy of the Postal Registered Receipt No. 447, dated the 1st May 1916, marked as Exhibit P.9 in the following words :—

"Received a regd: P. C. addressed to Wadhawa Singh, Chak No. 159, R. B." At the same page is to be found a translation of a memo. for the receipt of a notice of Wadhawa Singh, dated the 5th May 1916, marked as Exhibit P.6. This is a note alleged to have been made by the plaintiff in his pocket-book on the 5th May 1916 after seeing the Post Office record of receipt by Wadhawa Singh.

Mohan Lal (P. W. No. 1) was called to depose as to receipt No. 447, Exhibit P. 9, and he made the following statements :—

"On No. 447 is record of a registered post card sent to Wadhawa Singh of Chak No. 159, Rakh Branch, acknowledgment due on 1st May 1916. Sunder's name is not mentioned as it is not required. I remember that Ghulam Mahomed, plaintiff, sent this notice. I have taken his house on rent and so I remember it."

Barkat Ram (P. W. No. 2), Sub-Post Master, Chak Jhumra, was called to depose to the circumstances under which the note, Exhibit P.6, was made in the pocket-book of the plaintiff. He stated that about seven months ago the plaintiff went to him making enquiry regarding a notice said to have been sent by him in May 1916, and that the plaintiff told him that the notice had been sent to Wadhawa Singh of Chak No. 159 R. B. The witness further stated that he inspected the village postman's book and told the plaintiff that his notice had been received by the addressee ; that he did not give him a copy as it was not permissible under the rules, that there was a thumb impression of the addressee, Wadhawa Singh, on the postman's book, and that the plaintiff made a note in his pocket-book which the witness did not see. It is true that the postal receipt obtained by the plaintiff for the registered notice has not been produced as the plaintiff has lost it. It is also true that the original entries in the postal register have not been proved, because, admittedly, they have been destroyed under the Post Office Regulations, but if we can believe Mohan Lal (P. W. No. 1) and Barkat Ram (P. W. No. 2) there is sufficient evidence to prove that the plaintiff had sent the notice in reply to Wadhawa Singh's notice of the 25th April 1916. It is argued that it is difficult to believe that Mohan Lal, Sub-Post Master, should have retained in his memory the fact of the plaintiffs sending a notice to Wadhawa Singh so far back as 1st May 1916. The

witness, however, has given reasons for remembering the incident stating that he had taken the plaintiff's house on rent, and that was the reason why he remembered the incident. There is nothing strange or unnatural in this, Mohan Lal being the Sub-Post Master and a tenant of the plaintiff; in all probability the plaintiff told him about the matter at the time, and thus the witness was able to retain this in his memory. We see no reason to disbelieve the evidence of Mohan Lal. The evidence of Barkat Ram, Sub-Post Master, as to the circumstances relating to the note made in the pocket-book also appears to be straightforward and convincing, and we are inclined to believe that in all probability the plaintiff had made a note of the entry as to the delivery of the notice to Wadhawa Singh, addressee. This fact is made quite clear by a reference to the contents of the notice of the 23rd of May admittedly sent by Wadhawa Singh to the plaintiff. Wadhawa Singh made the following assertions in the body of the notice:—

"When there was some time to complete the term given in the agreement, you gave me a notice. At that time you ought to have deposited the money in the Government Treasury or paid the same to us, you had given the notice so that you might not be liable for payment of Rs. 1,000. But you did not care about it. Now the time of your promise has expired. Now you should arrange for payment of Rs. 1,000. You should make the settlement with us about the land, etc., etc."

There is a clear admission of the notice being sent by the plaintiff. Objection has been taken by Pandit Sheo Narain as to the correctness of the translation of this notice of the 23rd May 1916, and it has been contended by him that for "you gave him notice" the translation ought to have been "I gave you notice." In the registered post card there is a word which is read by Pandit Sheo Narain as "*tum ko*," while Dr. Iqbal, for the plaintiff-respondent, reads it "*mujhko*." We have scrutinized the writing of the post card carefully, and have considered its contents, and we are unable to say that the translator has made a wrong translation. The translation fits in with general contents of the letter. In addition to this, there is a certain amount of oral evidence given on behalf of the defence to prove that the plaintiff had himself refused to purchase the land. To this effect is the evidence given by Sher Singh, who stated that in the first week of Baisakh he went to the plaintiff along with the vendor and saw him in his garden and that the plaintiff told them that he had no money and asked for the return of the earnest money. The witness is Wadhawa Singh's own brother. The land in question was leased to him. To the same effect is the evidence of Lahna Singh, son of Kishen Singh. He also stated that in the middle of Baisakh last he accompanied Wadhawa Singh to the plaintiff's *baithak* in the city, that Wadhawa Singh asked the plaintiff to pay the sale-money and get the sale registered, and that the plaintiff replied that he did not want to purchase the square and asked for the return of the earnest-money. Bhag Singh also made a similar statement and stated that he, too, had gone to the plaintiff's *baithak* with Wadhawa Singh and had heard the plaintiff saying that he had no money and would not like to purchase the land. This class of evidence is altogether worthless and cannot be believed for a moment. The rest of the evidence for the defence consists of depositions of witnesses who have come forward to prove the plaintiff's indebtedness. The plaintiff has not denied this fact and has admitted his indebtedness to the extent of Rs. 12,000 or Rs. 13,000. On the other hand, the evidence clearly shows that the plaintiff is the owner of at least five squares which is a very valuable property, and that he could easily raise the sum by mortgaging it.

The evidence of Ghulam Rasul (P. W. No. 6) makes it quite clear that he was ready to advance Rs. 7,000 on mortgage to the plaintiff. In fact, this witness went to Lyallpur on the 27th April 1916 with Rs. 7,000 for getting the mortgage executed in his favour, but as Wadhawa Singh did not come the money was kept in deposit with Diwan Dhanpat Shah at Lyallpur.

Ghulm Rasul (P. W. No. 12), son of the plaintiff, is a Barrister at-Law practising at Lyallpur. He has proved the value of the square owned by the plaintiff, his father, and

has made the following statement in his re-examination :—

"Income of the square which we would to mortgage to Ghulam Rasul (P. W.) in lieu of Rs. 7,000 was about Rs. 400 per annum as my father tells me, and the income of the other square intended to be mortgaged for Rs. 5,000 was Rs. 300 per annum. The income from the garden and the rest of three squares is about Rs. 700 per annum, and about Rs. 2,500 per annum respectively."

One of Wadhawa Singh's own witnesses, Mr. J. R. Khosla, Advocate, has stated that if plaintiff and his son mortgaged their squares to him, he would be ready to advance Rs. 20,000 to them. In addition to the above evidence, there is the evidence of Ghulam Ahmad Khan (P. W. No. 10) which also proves that Ghulam Rasul, his step-brother, was ready to take on mortgage one of the squares of the plaintiff for Rs. 7,000.

In our opinion, there is overwhelming evidence on the record to show that the plaintiff could pay the price of the property which Wadhawa Singh had promised to sell to him, and that it was quite easy for him to obtain funds by mortgaging a portion of his property. The evidence produced by the defendants is not sufficient to prove that the plaintiff had refused to purchase the land. On the other hand, there is a good deal of evidence for the plaintiff which goes to show that the plaintiff was ready to make the purchase.

As regards the second contention, there is no question but that delay may, in certain cases, be evidence of abandonment or acquiescence; but, on the other hand, delay which does not amount to waiver, abandonment or acquiescence and in no way alters the position of defendants, does not disentitle the plaintiff to sue for specific performance. This view is fully supported by authorities. See for example *Kissen Gopal Sadaney* v. *Kally Prosonno Sett* (1). The learned Judge, who decided the above case, made the following observation in his judgment :—

"When a right is not in fact actually abandoned, delay to enforce it may induce a reasonable belief that the right is foregone and the party, who acts upon the belief so induced and whose position is altered by this belief to his prejudice, may plead delay as an answer to a claim made against him. But, in my opinion, mere delay is not a sufficient reason for debarring the plaintiff from relief by way of specific performance..... ..... In my opinion delay is not material so long as matters remain *in statu quo*, and it does not mislead the defendant or amount to acquiescence. It must be shown that delay has prejudiced the defendant. To operate as a bar to relief the delay should be such as to amount to a waiver of the plaintiff's right by acquiescence, or where by his conduct or neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him, if the remedy were afterwards to be asserted."

The real question, therefore, which we have to decide in this case is, whether the delay on the part of the plaintiff is evidence of abandonment by him of his rights in the agreement or not. The evidence given by the defendants already referred to does not satisfy us that the plaintiff intended to abandon his rights. On the contrary, as we have already said, he had made preparations to make the purchase and for that purpose had gone to Lyallpur. In the face of direct evidence, we are not prepared to accept the contention of Pandit Sheo Narain that the delay of a year and six months in this case necessarily implied that the plaintiff had given up his intention of enforcing his rights under the agreement.

It has been feebly contended by Pandit Sheo Narain that time was of the essence of the contract in this case and the plaintiff having failed to have the sale completed before the date fixed, it was no more open to him to ask the defendant to execute the sale-deed in his favour. Here the learned Counsel was not able to show how the time was of the essence of the contract in this case. From the circumstances of the case it is not an illegitimate conclusion to draw that the defendant, Wadhawa Singh, himself had resiled from the agreement and was himself guilty of a breach of contract. The present case is fully covered by the rule laid down in

(1) 33 C. 633.

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Chamarti Suryaprakasarayadu v. *Arardhi Lakshminarasimhacharyulu* (2) on which the lower Court has relied.

The third contention also raised by Pandit Sheo Narain cannot prevail. This contention is that, having regard to the long delay on the part of the plaintiff to bring the suit, we ought to refuse to grant the equitable relief claimed by him. The suit is within time, and the delay is not so great as to induce us to hold that the plaintiff has forfeited his right under the agreement.

We see no grounds to differ from the view taken by the lower Court. We accordingly dismiss the appeal with costs.

Z. K. & S. D. *Appeal dismissed.*

(2) 23 Ind. Cas. 560, 26 M. L. J. 518.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2778 OF 1919.

March 16, 1922.

Present:—Justice Sir William Teunon, Kt., and Mr. Justice Newbould.

NORENDRA NATH DEY—PLAINTIFF—APPELLANT

versus

JOTISH CHANDRA PAL—DEFENDANT—RESPONDENT.

Malicious prosecution—Application for sanction to prosecute—Action for damages—Cause of action—Reasonable or probable cause, issue as to, stage at which, can be decided.

The maintainability of a suit for malicious prosecution does not depend on there having been a prosecution in the sense in which the term is used in the Code of Criminal Procedure. [p. 706, col. 1 & 2.]

Crowdy v. *Reilly*, 18 Ind. Cas. 737; 17 C. W. N. 554; 17 C. L. J. 105, relied upon.

An application for sanction to prosecute is a preliminary or initial stage in a criminal prosecution, and whether it is made, according to law, to a Civil or Criminal Court, it can prove the basis of an action for damages for malicious prosecution. Therefore, an allegation in the plaint in such an action that the defendant maliciously and without just, reasonable or probable cause instituted proceedings for sanction and that the plaintiff was obliged to defend the case is sufficient to disclose a cause of action. [p. 706, col. 2.]

De Rozario v. *Gulab Chand Anundjee*, 6 Ind. Cas. 877; 37 C. 353, *Golap Jan* v. *Bhola Nath*, 11 Ind. Cas. 311; 38 C. 880; 15 C. W. N. 917 and *Bishun Pergash* v. *Phulman Singh*, 27 Ind. Cas. 449; 20 C. L. J. 518; 19 C. W. N. 935, distinguished.

The issue as to reasonable and probable cause cannot be decided until after the plaintiff has adduced evidence in support of the allegations in his plaint. [p. 706, col. 1.]

Appeal against a decree of the Subordinate Judge, 24-Parganas, dated the 15th of September 1919, affirming that of the Second Munsif at Baraset, dated the 27th of August 1918.

FACTS appear from the judgment.

Babu *Sarat Chandra Roy Choudhury* (with him Babu *Satya Charan Sinha*), for the Appellant.—The plaintiff is the appellant. The appeal arises out of a suit for damages for malicious prosecution. Both Courts have dismissed the case. The facts briefly are these. I brought a suit for declaration of title against defendant and in support of my case I filed Letters of Administration in my favour. The defendant challenged it and the Court found that there were interpolations in the Letters. The defendant thereupon obtained sanction to prosecute me under section 195, Criminal Procedure Code, which was ultimately set aside by this Court. Thereupon I have brought the present suit. The Courts below have held that my suit is not maintainable as there was reasonable or probable cause in their action. I submit the application for sanction to prosecute is quite enough to base my suit upon. Refers to *Crowdy* v. *Reilly* (1), *Bishun Pergash* v. *Phulman Singh* (2). I submit both Courts have gone wrong in throwing out my suit.

Babu *Amarendranath Bose*, for Babus *Manmothanath Mukerjee* and *Nagendra Nath Bhattacharji*, for the Respondents.—I submit the plaintiff could not establish any malice on my part. The Court found the Letters of Administration to contain interpolations. The Courts were satisfied of it and I submit that is sufficient to exculpate me of any malice. Further there was no prosecution at all. There must be prosecution in a Criminal Court before plaintiff can

(1) 18 Ind. Cas. 737; 17 C. W. N. 554; 17 C. L. J. 105.

(2) 27 Ind. Cas. 449; 20 C. L. J. 518; 19 C. W. N. 935.

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claim damages. Refers to *De Rozario* v. *Gulab Chand Anundjee* (3), *Golap Jan* v. *Bhola Nath* (4).

Babu *Sarat Chandra Roy Chaudhury* replied in brief.

JUDGMENT.

NEWBOULD, J.—The plaintiff who is the appellant before us instituted a suit against the defendant-respondent to recover damages for malicious prosecution. Both the lower Courts have dismissed the suits on findings against the plaintiff on preliminary issues as to his cause of action and the maintainability of the suit.

The main facts of the case as they appear from the pleadings of the parties are as follows: The appellant brought a title suit against the respondent and another person, and in that suit he filed Letters of Administration with copy of the Will annexed. The respondent alleged that there were interpolations in the copy of the Will and applied to the Munsif who tried the title suit for sanction under section 195, Criminal Procedure Code, to prosecute the plaintiff under various sections of the Indian Penal Code. There was a good deal of litigation in connection with this application, and finally an order of sanction which had been passed by the District Judge on appeal was set aside by this Court in revision. After this order was passed the appellant brought the suit out of which this appeal arises claiming Rs. 494-8-0 damages for his expenses in the litigation arising out of the application for sanction to prosecute and also for pain of body and mind and injury to his reputation.

Both the lower Courts have fallen into error in considering the question of reasonable or probable cause at this stage of the case. That issue cannot be decided until after the plaintiff had adduced evidence in support of the allegations in his plaint. The only question now to be decided is the purely legal question whether the application to the Munsif for sanction to prosecute the appellant can prove the basis of an action for damages for malicious prosecution. As was pointed out in *Crowdy* v. *Reilty* (1) the maintainability of suit for malicious prosecution does not depend on there having been a prosecution in the sense in which the term is used in the Code of Criminal Procedure. The application for sanction was a preliminary or initial stage in a criminal prosecution and it is immaterial that this was done, as the law required, in a Civil and not in a Criminal Court. On behalf of the respondent reliance is placed on the decisions of this Court in the cases of *De Rozario* v. *Gulab Chand Anundjee* (3) and *Golap Jan* v. *Bhola Nath* (4) Both those cases have been distinguished and discussed in *Bishun Pergash* v. *Thulman Singh* (2) and they are distinguishable from the present case on the ground that in them no process issued on the plaintiff. We hold that in the present case the allegations in the plaint that the defendant maliciously and without just, reasonable or probable cause instituted proceedings for sanction, and that the plaintiff was obliged to defend the case, are sufficient to disclose a cause of action and consequently the plaintiff's case should not have been dismissed without giving him an opportunity to prove these allegations.

We accordingly decree this appeal. The decrees of the lower Courts are set aside and the case is remanded to the Munsif at Baraset Second Court for trial on the merits. The plaintiff-appellant will get his costs in this Court. He will also have hearing fees in the Courts below which we assess at three gold *mohurs*. Under section 13 of the Court Fees Act we direct that the amount of Court Fee paid on the memorandum of appeal presented to this Court be returned to the appellant.

TEUNON, J.—I agree.

S. D.

Appeal decreed.

(3) 6 Ind. Cas. 877; 37 C. 358.
(4) 11 Ind. Cas. 311; 38 C. 880; 15 C. W. N. 917.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 307 OF 1921.

July 4, 1922.

Present:—Mr. Justice Coutts and Mr. Justice Das.

Saiyid FAZAL KARIM—DEFENDANT—APPELLANT

versus

Musammat BIBI FATMATUL KUBRA—PLAINTIFF—RESPONDENT.

Pre-emption—Non-Muhammadans—Lex loci—Per

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sonal law—Non-Muhammadan of Delhi owning property in Bihar—Sale—Right of pre-emption.

The Muhammadan Law of pre-emption exists in certain parts of India as a *lex loci* where both Muhammadans and non-Muhammadans are entitled under it to claim the right of pre-emption. But nowhere has it been adopted as the personal law of non-Muhammadans, and thus is not carried outside the locality in which it obtains. Therefore, if a non-Muhammadan, who is by custom amenable to the law of pre-emption in a particular locality, is the owner of a property in another locality, where a similar custom exists, he is not amenable to the custom in the new locality, for, although it is a similar custom, it is not the same custom to which he has become amenable by reason of the fact that he is a native of or domiciled in a particular locality. Consequently, a non-Muhammadan of Delhi is not bound by the custom of pre-emption which exists in Bihar, although a custom of pre-emption exists also among non-Muhammadans of Delhi. In other words, the sale of property by a non-Muhammadan in Bihar does not give rise to a right of pre-emption if the vendor is not either a native of or domiciled in Bihar. [p. 707, col. 2; p. 708, col. 1.]

Huree Churn Surmah v. *Mr. Thomas Ackroyd*, 18 W. R. 441, *Byjnath Pershad* v. *Kopilmon Singh*, 24 W. R. 95, *Parsashth Nath Tewari* v. *Dhanai Ojha*, 32 C. 988; 9 C. W. N. 874, relied upon.

Byjnath Pershad v. *Kopilmon Singh*, 24 W. R. 95, distinguished.

Appeal from a decision of the Subordinate Judge, Patna.

Messrs. *Sultan Ahmad* and *Hasan Jan*, for the Appellant.

Mr. *Kulwant Sahai*, for the Respondent.

JUDGMENT.

COUTTS, J.—This is an appeal against a decision of the Subordinate Judge of Patna in a suit for pre-emption. The property which it was sought to pre-empt is in Patna City, the vendor is a Hindu who is a native of and resides in Delhi and the defendants are Muhammadans residing in Patna City. The suit was originally brought by one Hakim Abdul Majid who died during the course of the litigation and his widow has been substituted for him and is continuing the litigation.

The suit was decreed in the Court of first instance and on appeal this decree has been confirmed by the Subordinate Judge. The defendant has appealed to this Court.

It is admitted that if the vendor had been a Hindu who was a native of or domiciled in Bihar the plaintiff would have been entitled to succeed, but it is contended by Mr. Sultan Ahmad for the appellant that the owner of the property being a Hindu who is not either a native of or domiciled in Bihar the law of pre emption does not apply. He also contends that, even if this were not so, and even if the original plaintiff were entitled to succeed, his widow would not be entitled to carry on the litigation. Two questions, therefore, arise in this appeal: (1) Is the plaintiff entitled to pre-empt when the vendor is a Hindu who is neither a resident of nor domiciled in Bihar? and (2) Is the widow of the original plaintiff entitled to carry on the suit after the death of her husband during the pendency of the suit?

In regard to the first point the law as stated in Wilson's Anglo Muhammadan Law, Fifth Edition, 1921, at paragraph 352 is as follows: "Where the custom is judicially noticed as prevailing among non-Muhammadans in a certain local area it does not govern non-Muhammadans who, though holding land therein for the time being, are neither natives of, nor domiciled in the district." This was the view of the law as expressed in *Huree Churn Surmah* v. *Mr. Thomas Ackroyd* (1) and *Byjnath Pershad* v. *Kopilmon Singh* (2). These decisions have been followed in *Parsashth Nath Tewari* v. *Dhanai Ojha* (3) and there can be no doubt that this is the correct view of the law.

Ordinarily, therefore, in a case such as the one now before us the owner, not being a native of, or domiciled in, Bihar the plaintiff would not be entitled to pre-empt. It is contended, however, by Mr. Kulwant Sahai for the respondent that, although this is so, the present case is different because the owner of the property which is the subject-matter of the suit is a native of Delhi where a custom of pre-emption also exists among non-Muhammadans. In these circumstances, he contends:—and this is the view which has been taken by the learned Subordinate Judge, that the law of pre-emption applies. His contention is that in

(1) 18 W. R. 441.
(2) 24 W. R. 95.
(3) 32 C. 988; 9 C. W. N. 874.

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localities where the custom exists it has become a part of the personal law of those non Muhammadans who are natives of or domiciled there, that when such non-Muhammadans leave such locality they carry with them the custom so that in a case such as the one now before us, where the owner is a native of Delhi where the custom exists the custom applies also to property in Patna City of which he is owner. Mr. Kulwant Sahai relies in support of his contention on the following passage in Agarwala's Law of Pre-emption: "It is respectfully submitted that the whole question turns upon whether the Hindus of a particular locality adopted the law of pre emption as part of their personal law or not [Agarwala's Law of Pre emption, Third Edition, 1916, at paragraph 177 (6), page 218]; he also relies on a certain passage in the judgment of Glover, J., in the case of *Byjnath Pershad* v. *Kopilmon Singh* (2) to which I shall presently refer.

With all respect to the opinion which has been expressed by Mr. Agarwala I am unable to accede to the suggestion that the Hindus of Bihar or other localities where the custom exists have adopted the law of pre-emption as part of their personal law and there is no judicial authority for such a proposition. As Mr. Ameer Ali has said: "The Sunni Hanafi Law of Pre-emption was introduced in India with the Muhammadan Government, and in certain places it has become a part of the *lex loci*, for example, in Behar, parts of the Punjab and the United Provinces, both Hindus and Muhammadans are entitled to claim the right of pre-emption. And so well-established is that right, that it is almost invariably recorded in greater or less detail in the village administration papers called the *wajib ul-arz*" (Ameer Ali's Muhammadan Law, Volume I, Fourth Edition, Chapter XXVIII, page 712). The passage on which Mr. Kulwant Sahai relies in the judgment of Glover, J., in the case of *Byjnath Pershad* v. *Kapilmon Singh* (2) runs as follows: "And I think that in the present case the plaintiff was bound, in the first instance, to show that the vendor of the defendant, an inhabitant and native of Lower Bengal where no custom of pre-emption amongst Hindus existed, was subject to the rule of law prevailing amongst Hindus of Bihar, by reason of his being domiciled within that Province." Mr. Kulwant Sahai contends that by this the learned Judge meant that if the vendor in the case had been an inhabitant and a native of a locality where the custom of pre-emption amongst Hindus existed then he would have been subject to that rule of law in respect of the property owned by him in Bihar. This is an ingenious interpretation of the passage but I am unable to accept it as correct. The question was not before the learned Judges and they neither considered nor decided it; and it appears to me that, unless it be that the custom has been adopted as part of the personal law, the contention must fail. If the view were correct, a Hindu who was a native of Bihar and who owned property in Calcutta would be bound in respect of that property by the law of pre-emption but I know of no case in which this has been held nor have I ever heard it suggested that this is so. It seems to me clear that the law of pre-emption has not been adopted as the personal law of non-Muhammadans in Bihar or in the other localities where the custom exists, it is merely a *lex loci*, as Mr. Ameer Ali has said.

If this view then be correct it disposes of the whole question, because if the law of pre-emption is not part of the personal law of non-Muhammadans it is not carried outside the locality in which the custom prevails; and if a non-Muhammadan, who is by custom amenable to the law of pre-emption in a particular locality, is the owner of a property in another locality where a similar custom exists, he is not amenable to the custom in the new locality for, although it is a similar custom it is not the same custom to which he has become amenable, by reason of the fact that he is a native of or domiciled in a particular locality.

In the present case, therefore, the owner being a native of Delhi he is not bound by the custom which exists in Bihar even although there is a similar custom in Delhi. The appeal, therefore, succeeds on the first point which has been urged by Mr. Sultan Ahmad and it is unnecessary to discuss the other point. I would accordingly set aside the decision of the lower Appellate Court,

The appeal is decreed and the suit is dismissed with costs throughout.

DAS, J.—I agree.

S. D.

Appeal decreed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1507 OF 1920.

March 14, 1922.

Present:—Mr Justice Newbould.

Srimati KRISHNA PRAMADA DASI, WIDOW OF LATE SURESH CHANDRA GHOSE—PLAINTIFF—APPELLANT

versus

RASH BEHARI DAS AND OTHERS—RESPONDENTS.

Bengal Patni Taluks Regulation (VIII of 1819), s. 11—Khudkast raiyat—*Ejectment.*

Under section 11, *Third*, Bengal Regulation, VIII of 1819, a *khudkast raiyat* is protected from ejection from the holding including the part he uses for residential purposes as well as the waste land and the land he cultivates. [p. 710, col. 1.]

Jogendra Narain Ray v. *Kiran Chandra Ray*, 50 Ind. Cas. 406; 46 C. 730, 23 C. W. N. 315, distinguished.

A tenant who is found to have been in *khas* possession of the culturable portion of a holding by cultivating the same through labourers and is also found to have taken a lease of the land and built his *bari* on a part of it about 30 years ago, is a *khudkast raiyat* within the meaning of section 11 of the Regulation. [p. 710, col. 1.]

Appeal against a decree of the Additional District Judge, Faridpur, dated the 8th of March 1920, reversing that of the Munsif, First Court at Goalundo, dated the 15th of August 1919.

FACTS appear from the judgment.

Babu *Amarendranath Bose* (with him Babu *Sudhangsu Sekhar Mukerji*), for the Appellant.—I submit that the other side cannot bar an ejectment on any legal ground. Refers to *Jogendra Narain Ray* v. *Kiran Chandra Ray* (1). The law is the same in the Bengal Tenancy Act, see section 160 (c), Bengal Tenancy Act. But no reported case exactly on the point is available. As regards the meaning of the word '*khudkast*', *vide* Mr. Sarada Charan Mitter's 'Landlords of Bengal' (latest Edition) at page 318. He is not a resident cultivator of all the plots, the plots are all distinct and separate.

Babu *Biraimohan Mazumdar*, for the Respondents.—The purchaser under Regulation, VIII of 1819, is not entitled to eject. See clause 3, and Field's Introduction to the Bengal Regulations at page 24, paragraph 20. *Khud* means own and *kast* means cultivator. Here these four plots constitute one holding. The Appellate Court came to a clear finding that my client is a *khudkast* or resident hereditary *raiyat*. All that is necessary under section 11 of the Regulation is that he must be a resident cultivating *raiyat*. In the *khatian* defendant is described as a settled *raiyat*. Section 3, clause (9), of the Bengal Tenancy Act defines what a holding is. You cannot split up the holding now and say 'Walk out of one plot.' *Jogendra Narain Ray* v. *Kiran Chandra Ray* (1), is altogether a different case. It is sufficient if it is found that the *raiyat* is a resident and cultivating *raiyat*.

Babu *Amarendra Nath Bose*, in reply.—One may be a settled *raiyat* without cultivating the land. The mere entry that he is a settled *raiyat* will not make the defendant a settled *raiyat*.

JUDGMENT.—The plaintiff is the purchaser of a *patni* tenure and brought this suit to eject the principal defendant after service of notice under section 15 of the Patni Sale Regulation of 1819. The only question raised in this appeal is whether the defendant is protected from eviction under the proviso to section 11 of that Regulation on the ground that he is a *khudkast raiyat* or resident and hereditary cultivator. The lower Appellate Court has found that defendant No. 1 and his father were in *khas* possession of the culturable portion of the holding by cultivating the same through labourers. It is also found that the defendant's father took lease of the land and built his *bari* on a part of it about 30 years ago. On these findings which I must accept in second appeal I hold that the lower Appellate Court was right.

Khudkast raiyats are described in paragraph 20 of Field's Introduction to the Regulations as *raiyats* cultivating lands in

(1) 50 Ind. Cas. 406; 46 C. 730; 23 C. W. N. 315.

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their own village or in village in which they are residing. On the findings the defendant comes within this description. It is urged that even if he is a *khudkast raiyat* he can be ejected from that portion of the holding which is not actually cultivated by him; and in support of this contention reliance is placed on a decision of a Bench of this Court of which I was a member in the case of *Jogendra Narain Roy* v. *Kiran Chandra Ray* (1). But that was quite a different case. Then the fourth Exception to section 37 of Revenue Sale Law (Act XI of 1859) had to be considered and not that part of it which deals with the cultivating *raiyats*. The fourth Exception relates to land covered by buildings, etc. In section 11 of the Putni Sale Regulation a person who is a *khudkasht raiyat* is protected from ejection from the holding including the part he uses for residential purposes as well as the waste land and the land he cultivates.

I accordingly uphold the decision of the lower Appellate Court and dismiss the appeal.

The only respondents who appear are the minors represented by the Deputy Registrar of this Court whose costs have already been paid. I, therefore, make no order as to costs.

S. D.

Appeal dismissed.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 911 OF 1920.

July 10, 1922.

Present:—Mr. Justice Das.

Maharaja Bahadur KESHO PRASAD SINGH—DEFENDANT—APPELLANT

versus

BHAGWAT SARAN PANDE—PLAINTIFF—RESPONDENT.

Bengal Tenancy Act (VIII of 1885), ss. 105, 109—Matter neither raised nor decided in proceedings for settlement of rent—Jurisdiction of Civil Court—Res judicata.

When a matter has been neither raised nor decided in proceedings for settlement of rent under section 105 read with section 105A of the Bengal Tenancy Act, the jurisdiction of a Civil Court to decide that matter is not barred constructively under section 109 of the Act on the analogy of the doctrine of constructive *res judicata* as laid down in section 11 of the Civil Procedure Code.

Nawab Bahadur of Murshidabad v. *Ahmad Hussain*, 35 Ind. Cas. 695; 21 C. W. N. 1004; 25 C. L. J. 556; 44 C. 783, relied upon.

Appeal from a decision of the Subordinate Judge, Shahabad.

Messrs. *Kulwant Sahai* and *N. N. Sinha*, for the Appellant.

Mr. *S. N. Roy*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit instituted by the respondent for abatement of rent under section 52 (*b*) of the Bengal Tenancy Act. The area of the plaintiff's holding according to the Jamabandi is 3 *bighas* 3 *kathas* and 16 *dhurs* and the Jamabandi shows that the rent payable by the defendant in respect of this holding is Rs. 15-15 0. The Record of Rights, however, shows that the area in possession of the plaintiff is 2 *bighas* 3 *kathas* and 4 *dhurs*. The defendant applied under section 105 of the Bengal Tenancy Act for settlement of fair rent on the ground that there was a rise in the average local price of staple food crops. The Settlement Court gave effect to the contention of the landlord and settled the rent at Rs. 17-13 9. The plaintiff's suit was instituted subsequent to the settlement of rent by the Settlement Court and there is no allegation in the plaint that there has been any diminution in the area of the holding subsequent to the settlement of rent by the Settlement Court. The Courts below have given effect to the contention of the plaintiff and have allowed abatement accordingly.

Two questions have been urged by Mr. Kulwant Sahai on behalf of the appellant in this Court. First, that the judgment of the lower Appellate Court proceeds on a misapprehension in so far as it thought that the defendant did not deny the allegation of the plaintiff that the original settlement of the land was at Rs. 5 per *bigha*, and, secondly, that the present suit is not maintainable in view of the provisions of section 109 of the Bengal Tenancy Act.

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The first question arises in this way: The land was originally settled with the plaintiff by the Government and the Government subsequently sold their proprietary interest in the land to the Dumraon Raj. The plaintiff's case is that the original settlement was at the rate of Rs. 5 per *bigha*. The defendant contends that a consolidated rent of Rs. 15-15-0 was fixed for the holding in the possession of the defendant. It is obvious that if the defendant's case is right then the plaintiff is not entitled to any abatement of rent and the suit must accordingly fail. The question then is this, was the original settlement at the rate of Rs. 5 per *bigha*, or was a consoledated rent fixed in respect of the holding in possession of the defendant? The plaintiff undoubtedly alleged in the plaint that the original settlement was at the rate of Rs. 5 per *bigha*. The learned Judge in the Court of Appeal says that there was no denial of this allegation in the written statement. It appears, however, that there is a clear denial of the allegation in the written statement of the defendant. Mr. Kulwant Sahai has argued before me that this was a vital point in the case, and if there was any misapprehension in the mind of the Court I ought to remand the case to that Court for a decision of the point. I ought to mention that the Court of first instance came to the conclusion that the original settlement was a settlement at the rate of Rs. 5 per *bigha*. It was clearly the duty of the lower Appellate Court to discuss the evidence bearing on this point and to come to a conclusion, not on the pleadings of the parties, but on the evidence adduced before the Court. The question then which I have to consider is, whether I ought to remand the case to the lower Appellate Court for a decision of this point, or whether in order to save a remand, I ought to determine the point in this Court. Only two witnesses have been examined in the case and there is no reason at all why I should not determine this point in this Court.

The witness examined on behalf of the plaintiff is definite on the point that the land was settled at the rate of Rs. 5 per *bigha* and he denies that there was a consolidated rent for the defendant's holding. The defendant examined a Patwari. In his examination-in-chief he did say that the Jama was a consolidated Jama but in cross-examination he had to admit that his knowledge was based on the Jamabandi of the plaintiff. He was not present at the time when the land was settled with the plaintiff by the Government, and obviously his evidence on this point is of no importance whatever. It was urged by Mr. Kulwant Sahai that the Jamabandi of the defendant itself constituted an important evidence in his favour. I am unable to agree with this contention. The Jamabandi in no sense binds the plaintiff and I am of opinion that the Court of first instance was right in coming to the conclusion that the land was settled with the defendant at the rate of Rs. 5 per *bigha*.

I now come to the next question, namely, whether the plaintiff's suit is barred by the provisions of section 109 of the Bengal Tenancy Act. Now, the important point to remember in this connection is this: In those proceedings the defendant claimed an enhancement of rent on the ground that there was a rise in the average local price of the staple food crops. No question was raised by the plaintiff as to whether he was entitled to an abatement of rent under section 52 (*b*) of the Bengal Tenancy Act. Section 109 runs as follows:—"Subject to the provisions of section 109A"—We are not in this suit concerned with the applicability of section 109A—"a Civil Court shall not entertain any application or suit concerning any matter which is or has already been the subject of an application made, suit instituted or proceedings taken under sections 105 to 108, both inclusive." The critical question then is this: has this question, namely, the question whether the plaintiff is entitled to relief under section 52 (*b*) of the Bengal Tenancy Act, been the subject of an application made, suit instituted or proceedings taken under sections 105 to 108, both inclusive? Admittedly it was not directly the subject of an application under section 105 of the Bengal Tenancy Act; but it has been urged by Kulwant Sahai on behalf of the appellant that the question might or ought to have been raised by the plaintiff in the proceeding under section 105 and that accordingly we must assume that constructively it was the subject of an application

made under section 105 of the Bengal Tenancy Act.

Fortunately for me, the question has been decided by two learned Judges of the Calcutta High Court in the case of *Nawab Bahadur of Murshidabad* v. *Ahmad Hussain* (1). In that case the landlord applied for settlement of rent under section 105 of the Bengal Tenancy Act. No question was raised by the defendants as to whether they were *mokarrari maurashi raiyats* or whether the land held by them was one tenure or distinct *raiyati* holdings. The Settlement Court settled the rent on the footing that the land held by the tenants formed one tenure and that they were tenure-holders. In so doing they proceeded on the footing of the Record of Rights which had already been published. It was argued that the tenants should have raised the question in the proceeding under section 105 and that, not having done so, section 109 of that Act operated so as to prevent them from maintaining the action. The learned Judges dealt with the point argued before them as follows: "With regard to the alternative declaration, the appellants contend that as the questions for determination might have been made the subject of controversy in the proceedings under section 105, they cannot be investigated in the present suit. In our opinion, there is no force in this contention. Section 105A, no doubt, authorises the Settlement Officer in the course of proceedings under section 105, for the settlement of fair and equitable rent, to investigate questions which would otherwise be determined at the instance of the aggrieved party in a suit instituted under section 106. But in the case before us no such question was raised or investigated in the proceeding under section 105..... Consequently, on a plain and literal reading of section 109, the position cannot be maintained that the present suit concerns a matter which has already been the subject of an application under section 105. The appellant, however, urges us to put a wider construction upon section 109. He contends that, as in a case where section 11, Civil Procedure Code, is applicable, a question which might and should have been raised is deemed to have been raised and decided, we should hold under section 109 that a matter has been the subject of an application under section 105, whenever it might, if the defendant had so chosen, have been raised and decided under section 105 read with section 105A. We are of opinion that this contention is unsound. If we were to accept the construction put forward by the appellant, we should have to read into section 109 words which are not to be found there; we cannot hold, on the analogy of the doctrine of constructive *res judicata*, that the jurisdiction of the Civil Court has been constructively excluded even when a point has been neither raised nor decided under section 105 read with section 105 A."

I respectfully endorse the view of the learned Judges of the Calcutta High Court in the case already cited. To hold otherwise would be to say that the jurisdiction of the Civil Court is ousted not only when a matter had been the subject of an application made, suit instituted or proceedings taken under sections 105 to 108 both inclusive, but that it is also ousted where the matter might have, but was not, the subject of an application made, suit instituted or proceedings taken under these sections. In my opinion the decision of the learned Judge in the Court below is right and I would dismiss this appeal with costs.

S. D.

Appeal dismissed.

(1) 35 Ind. Cas. 695; 21 C. W. N. 1004; 25 C. L. J. 556; 44 C. 783.

KULSOOMUNNISSA v. RAM PRASHAD.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 155 OF 1921.

March 17, 1922.

Present:—Mr. Justice Walsh and Mr. Justice Ryves.

Bibi KULSOOMUNNISSA—PLAINTIFF—APPELLANT

versus

RAM PRASHAD—DEFENDANT—RESPONDENT.

Remand, order of—Provision under which made not specified—Presumption—Civil Procedure Code (Act V of 1908), O. XLI, r. 23, application of—Appeal.

Per *Ryves, J.*—Where an Appellate Court being of opinion that the Trial Court has jumbled up the issues and misdirected itself *in limine* sends the case back without deciding a single issue in appeal, it is a finding on a preliminary point within the meaning of O. XLI, r. 23, Civil Procedure Code, and the Appellate Court, where it is silent on the point, should be considered to have acted under that provision of the Code, and not under any inherent jurisdiction. [p 714, col. 1.]

Gokul Prasad-Har Prasad v. *Ram Kumar*, 64 Ind. Cas. 878; 19 A. L. J. 971; 44 A. 176, followed.

Per *Walsh, J.*—In the case of an order of remand, it must be presumed, unless the contrary is shown at the time when it is made, to be made under O XLI, r. 23 of the Civil Procedure Code. [p. 714, col. 2.]

First appeal from an order of the Second Additional Subordinate Judge, Aligarh, dated the 21st of June 1921.

Mr. *S. A. Haider*, for the Appellant.

Mr. *Panna Lal*, for the Respondent.

JUDGMENT.

RYVES, J.—This is an appeal from an order of remand. *Musammat* Kulsoomunnissa brought a suit in the Court of the Munsif to eject the defendant on the allegation that the defendant was a tenant of the house in which he lived under a registered lease executed by the predecessor-in-title of the defendant in favour of the husband of the plaintiff who was the Zamindar of the village. The lease was executed in the year 1887 and the plaintiff stated that from that date down till some four years before the suit, the original lessee and his successors had been paying rent according to the lease; that some four years ago the defendant joined a general conspiracy in the village and refused to pay further rent. The suit was for ejectment and for arrears of rent for three years. The defence to the suit was that the defendant had never executed any lease; that the house had been constructed for the defendant, who is a Brahman, by his clients and that he and his ancestors had been in possession for 100 years: that no rent had ever been paid and that possession had been adverse. Further, that the suit was barred because the notice required under section 106 of the Transfer of Property Act had not been duly given. On these pleadings the learned Munsif fixed five issues:—

1 Whether the plaintiff is the owner of the house in dispute and is she entitled to get possession?

2. Whether the defendant is the tenant of the plaintiff and is the plaintiff entitled to get rent and interest?

3. Whether the suit is barred by section 106 of the Transfer of Property Act?

4 Whether the defendant has acquired adverse possession? Who built the house in dispute?

5. Whether the suit is barred by limitation?

The plaintiff filed the original lease and a number of counterfoils and receipts of payment of rent. She also examined some five witnesses. The defendant summoned five witnesses and examined three of them and exempted the remaining two. The learned Munsif in a short but clear enough judgment came to the conclusion at which he arrived and decreed the suit. The defendant appealed. According to his memorandum of appeal he contested the findings of fact come to by the Trial Court. He pleaded that the evidence given on his behalf established his own defence. Nowhere was it suggested that the Court had not given him full opportunity of proving his case or that it excluded any evidence which he wished to produce. The learned Judge has not tried the appeal himself, that is to say, he has come to no conclusion on any single issue raised in the case. He says: "I think the issues do not clearly cover all the points raised." He objects to the learned Munsif having tried the issues together. He says: "I think there ought to be a clear and separate finding on each and every issue raised as required by law. I would set aside the decree, frame the following issues and send the case back for decision of each and every issue separately on the evidence on the record as well as on such other evidence which the parties may deem proper.)

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to adduce and for which an opportunity will be given to them." He then framed five issues. From this order of remand the plaintiff comes in appeal. On behalf of the respondent it is argued strenuously that no appeal lies. It is contended that this order of remand must be taken to have been made under section 107 read with section 99 of the Code and that under section 104, clause (1) an order under these sections is not appealable under O. XLIII. The learned Judge in making his remand does not say under what section he is passing his order. The point was considered recently by a Division Bench of this Court in the case of *Gokul Prasad Har Prasad* v. *Ram Kumar* (1) and I think that the observations of Mr. Justice Piggott from the bottom of page 975 to the top of page 976 should be followed. He says there: "I do not think there is any reason to hold that the learned Judge in this case thought he was exercising any inherent jurisdiction outside that given to him under O. XLI." I think that in fact the Judge thought that he was acting under O. XLI, r. 23. As I have said before, he does not decide any single issue in the appeal. He has come to the conclusion that the First Court had jumbled up the issues and apparently misconceived the real defence and has in fact misdirected itself *in toto* and that, therefore, there has never been any real trial of the case as the pleadings required. It seems to me this really is a finding on a preliminary point within the meaning of O. XLI, r. 23. In my opinion, therefore, an appeal does lie. On the merits it seems to me that the learned Judge should have tried the appeal, that the issues raised by the Munsif adequately represented the pleadings of the parties, and that no other issues were necessary for the trial of the case. As both parties had had full opportunity and had availed themselves of that opportunity of producing all the evidence that they wished, further evidence should not have been admitted. In my opinion the order of the Judge remanding the case was wrong. I would set it aside and direct that the appeal be restored to its original number and disposed of according to law.

(1) 64 Ind. Cas. 878; 19 A. L. J. 971; 44 A. 176.

*Pages of 19 A. L. J.—[*Ed.*].

WALSH, J.—I only wish to add this. With regard to the right of appeal I was a party to the case referred to by my brother and I agree that this case is analogous. In my view in the case of an order of remand, it must be presumed, unless the contrary is shown at the time when it is made, to be made under O. XLI, r. 23. The litigant has to make up his mind whether he has a right of appeal and if so what, and if he finds an order against him of remand that he objects to, like the order before us, and there is nothing to the contrary, the only inference that he can draw is that it is made under the statutory provisions contained in O. XLI, r. 23. An order may be made under that section and yet be wrongly made, but it would nonetheless be appealable, and personally I am not prepared to adopt the view that once an appeal has been filed and admitted in this Court as an appeal against an order of remand under that provision and notice has gone, the respondent can improve his position by satisfying the Court that the order complained of is so bad or so unintelligible that it is impossible to bring it under any provision and, therefore, it is not appealable at all. I think that this is the substantial answer to what Mr. Panna Lal calls his preliminary objection. It is not a preliminary objection. The order was *prima facie* appealable as a remand order. It does not make it less appealable to say that the order is an indefensible one. Costs must abide the result of the suit.

N. H. *Appeal allowed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2761 OF 19.9.

March 3, 1922.

Present:—Justice Sir N. R. Chatterjea, Kt., and Mr. Justice Pearson.

MANGOBINDA DUTTA AND ANOTHER —PLAINTIFFS—APPELLANTS

versus

J. BAISOGOMAFF—DEFENDANT—RESPONDENT.

Contract, repudiation of—Deposit—Earnest—Forfeiture.

MANGOBINDA DUTTA v. BAISOGOMAFF.

A purchaser who repudiates the contract on his part forfeits the deposit money and is not entitled to its refund even if the other party has not suffered any loss. [p. 718, col. 1.]

Barrell, Ex parte, Parnell, In re, (1885) 10 Ch. App. 512; 44 L. J. K. B. 138; 33 L. T. 115; 23 W. R. 846 and *Howe* v. *Smith*, (1884) 27 Ch. D. 89 at p. 95; 53 L. J. Ch. 1055; 50 L. T. 573; 32 W. R. 802; 48 J. P. 773, relied upon.

Alokeshi Dassi v. *Hara Chand Dass*, 24 C. 897; 1 C. W. N. 705; 12 Ind. Dec. (N. s.) 1267, distinguished.

Sprague v. *Booth*, (1909) A. C. 576; 78 L. J. P. C. 164; 101 L. T. 211, *Bishan Chand* v. *Radha Kishan Das*, 19 A. 489; A. W. N. (1897) 123; 9 Ind Dec N. s.) 316, *Roshan Lal* v. *Delhi Cloth and General Mills Co. Limited*, 7 Ind. Cas. 794; 33 A. 166 at p. 169; 7 A. L. J. 1019, *Raghu Nath Sahay* v. *Chandra Protap Singh*, 15 Ind. Cas. 268; 17 C. W. N. 100, *Habibullah* v. *Arman Dewan*, 53 Ind. Cas. 875; 30 C. L. J. 113 at p. 115; 24 C. W. N. 40 and *Natesa Aiyar* v. *Appavu Padayachi*, 19 Ind. Cas. 462; 38 M. 178; 24 M. L. J. 488; 13 M. L. T. 391; (1913) M. W. N. 341, referred to.

A deposit serves two purposes—if the purchase is carried out it goes against the purchase-money but its primary purpose is that it is a guarantee that the purchaser means business. [p. 716, col. 2; p. 717, col. 1.]

Soper v. *Arnold*, (1889) 14 App. Cas. 429 at p. 435; 59 L. J. Ch. 214; 61 L. T. 702; 38 W. R. 449 and *Collins* v. *Stimson*, (1883) 11 Q. B. D. 142 at p. 143; 52 L. J. Q. B. 440; 48 L. T. 828; 31 W. R. 920; 47 J. P. 439, relied upon.

Even when there is no clause in the contract as to forfeiture of the deposit, if the purchaser repudiates the contract he cannot get back the money as the contract has gone off through his default. [p. 717, col 1.]

Barrell, Ex parte, Parnell, In re, (1875) 10 Ch. App. 512; 44 L. J. K. B. 138; 33 L. T. 115; 23 W. R. 846, relied upon.

In the absence of any specific provision the question whether the deposit is forfeited depends upon the intent of the parties to be collected from the whole instrument. [p. 717, col. 1.]

Palmer v. *Temple*, (1839) 9 A. & E. 508; 1 P. & D. 379; 8 L. J. Q. B. 179; 48 R. R. 568; 112 E. R. 1304, relied upon.

A deposit is not merely a part payment but is also an earnest to bind the bargain and creates by the fear of its forfeiture a motive in the payer to perform the rest of the contract. [p. 717, cols. 1 & 2.]

Howe v. *Smith*, (1884) 27 Ch. D. 89 at p. 95; 53 L. J. Ch. 1055; 50 L. T. 573; 32 W. R. 802; 48 J. P. 773, relied upon.

Appeal against a decree of the Subordinate Judge, Burdwan, dated the 12th of November 1919, reversing that of the Munsif, Asansol, dated the 14th of December 1918.

FACTS appear from the judgment.

Babu *D. N. Chakerbutty* (with him Babu *Gopal Chandra Das*), for the Appellants.—The facts are shortly these. We entered into three contracts for the purchase of steam coal and rubble on the 20th, 25th December 1916 and 2nd January 1917 respectively. We made payments of Rs. 152-8 0 and Rs. 5-0 on the last two dates which were to remain in deposit with the defendants which would be eventually credited against the final order. The defendants sued for damages for the last two contracts but the suits were dismissed. We also brought the present suit for the recovery of the money in deposit. Our suit was decreed by the First Court but has been dismissed on appeal. Hence the present appeal against that decision. My points are that we are not at all liable for not placing our orders under the last two contracts because the defendants themselves failed to deliver coal under the first contract. The Government stopped the waggons. Further, the performance of the last two contracts was conditional upon the due performance of the first contract. Refers to *Howe* v. *Smith* (1). There is no statutory provision as to the retaining of the deposit money by the vendor. They have not suffered any loss or damage whatsoever. On principles of equity and justice they should not make this additional gain. Further, there is no clause of forfeiture in the contracts. They could have sent a notice that the money would be forfeited on non fulfilment of the contract. Refers to *Roshan Lal* v. *Delhi Cloth and General Mills Co. Limited* (2), *Alokeshi Dassi* v. *Hara Chand Dass* (3). They admittedly were not willing to perform their part of the contract and their defence practically amounts to a justification for repudiation of the contracts. Under the circumstances I submit the decree of the Court of first instance ought to be restored.

Babu *Monmatha Nath Mukerjee* (with him Babu *Satindra Nath Mukerjee*), for the Respondent.—The two payments were made by way of deposit. The findings of the lower Appellate Court conclude the matter. Whether it was part payment or earnest money depends on the intention of the

(1) (1884) 27 Ch. D. 89 at p. 95; 53 L. J. Ch. 1055; 50 L. T. 573; 32 W. R. 802; 48 J. P. 773.

(2) 7 Ind. Cas. 794; 33 A. 166 at p. 169; 7 A. L. J. 1019.

(3) 24 C. 897; 1 C. W. N 705; 12 Ind Dec. (N. s.) 1267.

parties. The stipulation that the amount would be deducted on the fulfilment of the contract clearly shows that it was by way of deposit. Refers to section 75 of the Indian Contract Act. That money I received independently of the contract because I would have derived no benefit on the fulfilment of the contracts. The question of the payment of the earnest money has not been dealt with in the Indian Contract Act. On the findings, justice is not on his side. Principles of English Law do not apply. The case in *Natesa Aiyar* v. *Appavu Padayachi* (4) is distinguishable. The earnest-money is, no doubt, referable to the contract but is not under the contract itself. I derive no benefit from the deposit on the fulfilment of the contract. Refers to Ramfry's Sale of Goods (Tagore Law Lectures, 1910) p. 127. My submission is that the Indian Contract Act will not apply at all.

[CHATTERJEA, J.—Look at *Manian Patter* v. *Madras Railway Company* (5)].

There they hold that although section 74 of the Contract Act would not apply, the principle laid down in that section would apply. Refers to *Roshan Lal* v. *Delhi Cloth and General Mills Co. Limited* (2). On their own admission it is a case of repudiation. The case in *Raghu Nath Sahay* v. *Chandra Protap Singh* (6) is of no help to the present case. Refers to *Habibuliah* v. *Arman Dewan* (7). The Subordinate Judge found that the money paid was earnest money and not part payment and that there was a repudiation of the contract. I submit these findings are conclusive.

Babu *D. N. Chakerbutty* replied in brief.

JUDGMENT.—The appellants agreed to purchase certain quantities of steam coal and rubble from the respondent under three several contracts dated the 20th December 1916, 25th December 1916 and 2nd January 1917 respectively. At the time of entering into the two last named contracts the appellants paid to the respondent the respective sums of Rs. 152-8-0 and Rs. 520, the agreement being that those amounts were to remain in deposit with the respondent, they paying cash for the earlier orders to be given under the contracts, and the deposits being eventually credited as payments or part payments against the final order.

In regard to the last two contracts the respondent sued to recover damages but the suits were dismissed on the finding that in the state of the market he had suffered no damage. The appellants also sued for the recovery of the two sums mentioned above, namely, Rs. 152-8 0 and Rs. 520 and it is with these that we are concerned in the present appeal. The first Court decreed the amount, and the lower Appellate Court has reversed that decree and dismissed the suit.

Various contentions were put forward by the appellants. Firstly, that it was in consequence of the default of the respondent in respect of the deliveries under the first contract that they failed to place orders under the other two contracts. Secondly, that the supply of waggons was stopped by Government, and, thirdly, that the performance of the last two contracts was conditional upon the due performance of the first on the part of the respondent. It is, however, found by the lower Appellate Court that there is not sufficient evidence of the interdependence of the contracts in the way alleged: it is also found that there is not sufficient evidence as regards the stoppage of waggons: that the appellants were dissatisfied with the respondent and did not act and were not willing to act according to the contracts: and, that, in these circumstances, it must be held that the contracts were broken by the appellants.

The question, therefore, is whether under these circumstances the plaintiffs are entitled to a refund of the deposit.

So far as the English Law is concerned, the law is well-settled. As pointed out by Lord Macnaghten in *Soper* v. *Arnold* (8):—"The deposit serves two purposes—if the purchase is carried out it goes against the purchase-money but its primary purpose

(4) 19 Ind. Cas. 462; 38 M. 178; 24 M. L. J. 488; 13 M. L. T. 392; (1913) M. W. N. 341.
(5) 29 M. 118; 16 M. L. J. 37.
(6) 15 Ind Cas. 268; 17 C. W. N. 100.
(7) 53 Ind. Cas. 875; 30 C. L. J. 113 at p. 115; 24 C. W. N. 40.

(8) (1889) 14 App. Cas. 429 at p. 435; 59 L. J. Ch. 214; 61 L. T. 702; 38 W. R. 449.

is this, it is a guarantee that the purchaser means business." In the case of *Barrell, Ex parte, Parnell, In re* (9) it was held that where a contract for sale goes off for default of the purchaser the vendor is entitled to retain the deposit: James, L. J., remarked that the money was paid to the vendor as a guarantee that the contract should be performed: the trustee refuses to perform the contract, and then says "give me back the deposit,"—there is no ground for such a claim. Mellish, L. J., said: "It appears to me clear that, even when there is no clause in the contract as to the forfeiture of the deposit, if the purchaser repudiates the contract he cannot get back the money as the contract has gone off through his default." In *Collins* v. *Stimson* (10) Baron Pollock said: "According to the law of vendor and purchaser the inference is that such a deposit is paid as a guarantee for the performance of the contract and where the contract goes off by default of the purchaser the vendor is entitled to retain the deposit," and in *Palmer* v. *Temple* (11) it was held that "in the absence of any specific provision the question whether the deposit is forfeited depends on the intent of the parties to be collected from the whole instrument."

The question was discussed in *Howe* v. *Smith* (1) where Fry, L. J, traced the history of earnet and deposit and at page 101 observed:—

"Money paid as a deposit must, I conceive, be paid on some terms implied or expressed. In this case no terms are expressed, and we must, therefore, inquire what terms are to be implied. The terms must naturally to be implied appear to me in the case of money paid on the signing of a contract to be that in the event of the contract being performed it shall be brought into account, but if the contract is not peformed by the payer it shall remain the property of the payee. It is not merely a part payment but is then also an earnest to bind the bargain so entered into, and creates by the fear of its forfeiture a motive in the payer to perform the rest of the contract."

The rule was approved by the Judicial Committee in *Sprague* v. *Booth* (12).

The principle has been followed in this country, see *Bishan Chand* v. *Radha Kishan Das* (13), *Roshan Lal* v. *Delhi Cloth and General Mills Co Limited* (2), *Raghu Nath Sahay* v. *Chandra Protap Singh* (6), (express agreement for refund of the deposit) *Habibullah* v. *Arman Dewan* (7), *Natesa Aiyar* v. *Appavu Padayachi* (4) (express agreement for forfeiture of the deposit).

It is contended, however, on behalf of the appellant that the rule is not an inflexible one, that in the absence of any statutory provisions on the point we should decide the case according to the principles of justice, equity and good conscience, and that as the defendant had not suffered any loss, he should not be allowed to make a gain by retaining the deposit. We were referred to the observations of Cotton, L. J. in *Howe* v. *Smith* (1) in support of the contention. In that case Cotton, L. J. observed as follows:—

"I do not say that in all cases where this Court would refuse specific performance, the vendor ought to be entitled to retain the deposit. It may well be that there may be circumstances which would justify this Court in declining, and which would require the Court, according to its ordinary rules, to refuse to order specific performance, in which it could not be said that the purchaser had repudiated the contract or that he had entirely put an end to it so as to enable the vendor to retain the deposit. In order to enable the vendor so to act, in my opinion, there must be acts on the part of the purchaser which not only amount to delay sufficient to deprive him of the equitable remedy of specific performance, but which would make his conduct amount to a repudiation on his part of the contract."

There is no doubt that it is not in every case of default on the part of the purchaser, that the vendor is entitled to retain the deposit, but the observations of Cotton, L. J.,

(9) (1885) 10 Ch. App. 512; 44 L. J. K. B. 138; 33 L. T. 115; 23 W. R. 846.

(10) (1883) 11 Q. B. D. 142 at p. 143; 52 L. J. Q. B. 440; 48 L. T. 828; 31 W. R. 920; 47 J. P. 439.

(11) (1839) 9 A. & E. 508; 1 P. & D. 379; 8 L. J. Q. B. 179; 48 R. R. 568; 112 E. R. 1304.

(12) (1909) A. C. 576; 78 L. J. P. C. 164; 101 L. T. 211.

(13) 19 A. 489; A. W. N. (1897) 123; 9 Ind. Dec. (N. S.) 316.

apply to cases where there is a suit for specific performance of a contract and there is no repudiation on the part of the purchaser. In the case of *Alokeshi Dassi* v. *Hara Chand Dass* (3), which was also relied upon by the appellants, the learned Judges observed :—" It is admitted that there is nothing either in the Specific Relief Act or in the Contract Act which touches the question. We have, therefore, to consider what is just and equitable and may fairly consider the law in England upon the subject," and referred to the observations of Cotton, L. J. in *Howe* v. *Smith* (1) quoted above. In the case of *Alokeshi Dassi* v. *Hara Chand Das* (3), however, the defendant denied the contract *in toto*, and it was found that there was no repudiation of the contract by the plaintiff who brought the suit for specific performance of the contract and it was held that he was entitled to a refund of the deposit. We have not been referred to any case in which the plaintiff has been held entitled to refund of the deposit money even where there was repudiation of the contract on his part. In the present case the appellants were dissatisfied with the dealings of the respondent under the first contract, and they accordingly did not place any orders under the second and third contracts. They admittedly were not willing to perform their part of the contracts and their defence practically amounts to a justification for repudiation of the contracts. The findings of the Court of Appeal below, however, are against them.

It may be hard that the plaintiffs should forfeit the deposit although the defendant did not suffer any loss, but having regard to the findings arrived at by the Court of Appeal below, and to the authorities on the point, we feel constrained to dismiss the appeal. We direct, however, that each party do bear his own costs in all the Courts.

S. D.

Appeal dismissed.

LAHORE HIGH COURT.

MISCELLANEOUS SECOND CIVIL APPEAL No. 605 OF 1919.

December 23, 1921.

Present :—Mr. Justice Broadway and Mr. Justice Martineau.

MOHNA MAL—DECREE-HOLDER—APPELLANT

versus

TULSI RAM AND ANOTHER—JUDGMENT-DEBTORS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 47, 102—Decree for sum exceeding Rs. 500—Execution for sum less than Rs. 500—Appeal, second, whether lies—Redemption of Mortgages (Punjab) Act (II of 1913), s. 15—Money deposited, whether can be attached in execution of decree against mortgagee.

In determining whether a second appeal lies from an order passed in execution proceedings, the amount of the subject-matter of the suit, and not the amount sought to be recovered in that particular execution must be taken into consideration. [p. 719, col. 1.]

Khazan Singh v. *Khushal Singh*, 29 P. R. 1902; 83 P. L. R. 1902, *Mavula Ammal* v. *Mavula Maracoir*, 30 M. 212; 17 M. L. J. 876, relied upon.

Where in execution of a decree for a sum over Rs. 500, an order is passed in respect of a sum less than Rs. 500, the order is open to second appeal. [p. 719, col. 1.]

The provisions of section 15 of the Redemption of Mortgages (Punjab) Act, 1913, are meant primarily for the protection of the person depositing the money. The intention of the Legislature was that the money deposited under the provisions of this Act should be exempt from attachment in execution of a decree against the depositor. But as soon as the money has become the property of the mortgagee there is nothing to prevent its being attached in execution of a decree against the latter. [p. 719, cols. 1 & 2.]

Miscellaneous second appeal from an order of the District Judge, Ferozepore, dated the 14th March 1919, affirming that of the Subordinate Judge, First Class, Ferozepore, dated the 20th July 1918.

Lala *Fakir Chand*, for the Appellant.

JUDGMENT.—The appellant, Mohna Mal, held a decree against Tulsi Ram, etc., for Rs. 4,779-9-0. This decree had been passed by a Subordinate Judge. In the course of executing this decree Mohna Mal attached a sum of Rs. 240 which had been deposited in the Court of the Revenue Assistant, under the provisions of Act II of 1913, by Miran Bakhsh who desired to redeem the land mortgaged by him to Tusli Ram, etc. It appears that the mortgage had been redeemed and Miran Bakhsh had been given possession of the mortgaged property. Objection was taken

by Tulsi Ram, etc., to the effect that this money was not attachable in view of the provisions of section 15 of Act II of 1913. This objection was given effect to by the Executing Court whose decision was upheld on appeal by the District Judge. Mohna Mal then preferred a second appeal to this Court through Mr. Fakir Chand which came up before Rattigan, J., on the 10th July 1919. Objection was taken on behalf of the respondents that no second appeal was competent as the order refusing attachment of the sum of Rs. 240 must be taken to be a decree in a Small Cause of a value under Rs. 500. Rattigan, J., by an order, dated 11th July 1919, referred the case to a Division Bench for decision both as to the competency of the second appeal and on the question whether the sum of Rs. 240 referred to was liable to attachment.

Before us the appellant has been represented by Mr. Fakir Chand. The respondents though served are absent, their former Vakil, Mr. Durga Das, having sent in a withdrawal slip. After hearing Mr. Fakir Chand we are of opinion that a second appeal is competent and that the sum of Rs. 240 in question is liable to attachment. In *Khazan Singh* v. *Khushal Singh* (1) it was held by Reid, J. that where an appeal from the decree in the original suit lay to the Divisional Court, the appeal from an order in execution of that decree lay to the same Court. This view is further supported by a decision of the Madras High Court in *Mavula Ammal* v. *Mavula Maracoir* (2), where it was held that in determining whether second appeal lies in such cases in execution proceedings, the amount of the subject-matter of the suit and not the amount sought to be recovered in execution must be taken into consideration. With this view we are in accord. Further, the execution proceedings were being taken in the Court of the Subordinate Judge, and an appeal from an order passed by a Subordinate Judge would lie under section 39 (1) (*a*) of the Pabjab Courts Act to the District Judge, and in fact the appeal in this case was lodged in the Court of the District Judge. A second appeal is, therefore, competent.

Coming now to the second point, it seems to us that the provisions of section 15 of Act II of 1913 are primarily for the protection of the person depositing the money, and that the intention of the Legislature was that the money deposited under the provisions of this Act should be exempt from attachment in execution of a decree against the depositor. In the present case, the depositor, Miran Bakhsh, had had his mortgage redeemed and had been given possession of his property. The money thus belonged to Tulsi Ram, etc., and we are unable to see any reason for thinking that it was not attachable as such.

We accordingly accept this appeal with costs and declare that the sum of Rs. 240 in question is liable to attachment in the decree passed in Mohna Mal's favour.

Z. K.

Appeal accepted.

(1) 29 P. R. 1902; 83 P. L. R. 1902.
(2) 30 M. 212; 17 M. L. J. 376.

CALCUTTA HIGH COURT.
APPEAL FROM APPELLATE DECREE
No. 2627 OF 1919.
March 2, 1922.
Present:—Justice Sir John Woodroffe, Kt., and Mr. Justice Ghose.
SWARNA KUMAR GHOSH—DEFENDANT No. 7—APPELLANT
versus
PRAHLAD CHANDRA SARKHEL AND OTHERS—PLAINTIFFS AND DEFENDANTS—RESPONDENTS.

Perpetuity, rule against—Lease—Covenant not to transfer without lessor's permission.

A covenant in a lease offends against the Rule of Perpetuity, when it provides that, if the lessee or any of his representatives intend to transfer the whole or any portion of the lease, the transfer would be made in favour of the lessors for proper price and that the lessee would not be able to transfer in favour of a third party without the lessor's permission or wishes. [p. 720, col. 2.]

Appeal against a decree of the Subordinate Judge, Second Court, Bakarganj, dated the 4th of September 1919, affirming that of the Munsif, First Court at Perajpur, dated the 20th of January 1919,

SWARNA KUMAR GHOSH v. PRAHLAD CHANDRA SARKHEL.

FACTS appear from the judgment.

Babu *Avinash Chandra Guha*, for the Appellant.—The covenant not to transfer without satisfying the conditions contained in the agreement is bad for remoteness. Even if the covenant were a good one, it cannot be a covenant running with the land, and, consequently, it cannot be enforced against one who is an assignee of the lessee who entered into the agreement. Refers to *Nobin Chandra Soot* v. *Nabab Ali* (1).

Babu *Mohendra Nath Roy* (with him Babu *Nil Kanta Ghose*), for the Respondents.—Reads *Haris Paik* v. *Jahuruddi Gazi* (2). A covenant in respect of a right of pre-emption does not offend against the rule against perpetuities and runs with the land. See *Madhu Sudan Mahato* v. *Midnapore Zemindari Co.* (3). See also section 179 of the Bengal Tenancy Act. A perpetual right of pre-emption is not bad for remoteness. See *Karim Bakhsh Khan* v. *Phula Bibi* (4). That case has been followed in *Bahadur Singh* v. *Ram Singh* (5). The case in *Nobin Chandra Soot* v. *Nabab Ali* (1) is distinguishable. Reads section 10 of the Transfer of Property Act.

Babu *Avinash Chandra Guha* was not called upon to reply.

Babu *Biraj Mohan Mojumdar*, for the Deputy Registrar.

JUDGMENT.—This is an appeal arising out of a suit brought for a declaration that a certain *kabala* in favour of defendant No. 7, who is the contesting defendant, and executed by defendants Nos. 1 to 6 in 1323 is invalid, and that the same should be set aside.

The First Court decreed the suit against defendants Nos. 1 to 7 and on appeal it was held that the appeal failed. We should also mention that, besides the prayer for a declaration, the plaint also asked for a specific performance of a contract for sale.

Before us, in appeal by defendant No. 7, three points have been urged. First of all, that the covenant is fraudulent as referred to in the judgment of the Subordinate Judge, namely, that if the lessee or any of his representatives intend to transfer the whole or any portion of the lease, the transfer would be made in favour of the lessors for proper price, that the lessee would not be able to transfer in favour of a third party without lessor's permission or wishes, that in the case of transfer to a co-sharer of the lessee, lessor's permission would not be necessary, that in case of any act against the aforesaid conditions, the said act would be invalid.

It was contended that this covenant was bad as offending against the Rule regarding Perpetuity. Secondly, if the covenant were a good one, it is not a covenant running with the land, and thirdly, in any event, it could not be enforced against the appellant as he was an assignee of the lessee who entered into the covenant. It is unnecessary to consider the second and the third of these grounds, for, we think the appeal succeeds upon the first ground. We have been invited to consider in this connection certain cases which have been decided by the Allahabad High Court upon the law of pre-emption. It is not clear whether the cases are relevant but, in any event, as it is observed, these cases of pre-emption stand on their own peculiar law. In the present case we think it is clear that the covenant offends against the Rule of Perpetuity, and the appeal succeeds and the suit is dismissed with costs.

The defendant No. 7 will be entitled to his costs from the plaintiffs in the First Court, and in the lower Appellate Court and he is entitled to his costs in this Court as against the plaintiffs-respondents.

N. K.

Appeal accepted.

(1) 5 C. W. N. 343 at p. 345.
(2) 2 C. W. N. 575.
(3) 46 Ind. Cas. 129; 27 C. L. J. 511; 45 C. 940.
(4) 8 A. 102; A. W. N. (1886) 24; 4 Ind. Dec. (N. S.) 1115.
(5) 27 A. 12; A. W. N. (1904) 149; 1 A. L. J. 353.

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 885 OF 1921.
February 9, 1922.
Present:—Mr. Justice Harrison.
KALLU—CONVICT—APPELLANT
versus
EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 147, 333—Rioting—Assaulting and obstructing public servant—Separate convictions, legality of—Identification—Presumption—Evidence Act (I of 1872), s. 114 ill. (e).

Several persons were convicted under section 147 of the Penal Code of rioting with a view to attacking and obstructing the Police in the discharge of their duties and were also convicted under section 333 of the Code of the substantive offence of so attacking and obstructing them:

Held, that both convictions could not stand and that the conviction under section 147 must be set aside [p. 722, col 1]

Although it has to be presumed under section 114 illustration (*e*) of the Evidence Act that every official act is properly performed, yet this presumption is hardly sufficient to satisfy a Court that such precautions have been taken at an identification as to render it truly valuable. [p. 721, col. 2.]

Appeal from an order of the District Magistrate, Gurgaon, dated the 10th September 1921.

The Public Prosecutor, for the Respondent.

JUDGMENT.—Seven men have been convicted under sections 147, 149/333 and 149/225 and six out of the seven appeal.

The facts are that on the 8th of June 1921, two Sub-Inspectors, Muhammad Masih and Nawab Ali accompanied by four Policemen and a man, Panji, who was under arrest, came to the village of Bhuriaki in the Gurgaon District to carry out some searches for stolen property. Three houses were searched and Sub-Inspector Nawab Ali was seated on a *charpoy* holding the chain on Panji's handcuffs when a mob attacked him and beat him severely with *lathis* and sticks, Sub-Inspector Muhammad Masih, tried to come to his assistance, but the Police were overwhelmed and severely beaten, Sub-Inspector Nawab Ali having his arm broken and having to be carried away on a *charpoy*. The reason for the attack is said to have been that the Sub Inspector, Nawab Ali was extremely unpopular in the village on account of his having secured the conviction of four of the people who attacked him and it is found by the Magistrate that the common object was to stop the Police from continually visiting the village and interfering with the criminal activities of the inhabitants as well as to revenge themselves for what had happened in the past. The only question which presents considerable difficulty to my mind is as to who actually took part in the assault. It appears that the village was wholly deserted after the incident and it was not till the 11th, or 3 days later, that the first witness appeared and named six out of the seven men who have been convicted, that is to say, he named all except Badhi. The Sub-Inspector had recovered his wits sufficiently on the same day to be able to make a statement and, knowing the village as he did, he named all the present accused. Two days later two more witnesses appeared on the scene. The accused have been chiefly convicted on an identification parade which was held by Inspector Abdul Jalil, P. W. No. 26, the facts of which he incorporated in the three statements shown as PO., PP. and PQ. This Inspector has been produced as a witness, but, although he does say that he prepared the lists, he does not say, and was apparently not asked, whether they contain a full and true account of what actually happened and that he can vouch for their correctness, nor was he asked to explain what precautions, if any, were taken at the time of the identification. No doubt it has to be presumed under section 114 of the Evidence Act that every official act is properly performed, but this presumption is hardly sufficient to satisfy a Court that such precautions have been taken as to render an identification truly valuable, for instance, it depends very largely on whether 30 men or three are added to the accused and whether care is taken to see that they are all similarly dressed and that there is no possibility of the witnesses being able to select the accused by any possible means of identification. The report written by the Inspector states that all proper precautions were taken but, in the first place, he does not repeat this in Court and, in the second, it is for the Court to decide the question of the sufficiency of the precautions taken and the consequent value of the evidence of identification and not for the Inspector. One of the constables states in Court that he identified five out of the six men who are now

appealing and says that he did not identify Akbar. As a matter of fact, the identification report shows that he did not identify Chahat. He does not state, and he was asked, whether he actually identified them and could remember at the time he gave his evidence; and the necessity of putting this question to other witnesses also was overlooked. As to three of the men, there is no sort of doubt whatever that they took a very active and leading part in the assault on the Police and these are Chahat, Chatar Khan and Kallu. They were specially recognised by the two Sub-Inspectors, and there is no question of their guilt. As to the remaining three I am not satisfied as to their identity. The evidence of their fellow villagers was given after the lapse of several days. I do not know what value to attach to the identification nor what precautions were taken at the time and, under the circumstances, I am not prepared to uphold their conviction. The seventh man, Ashraf, has been convicted under section 147 only and has been ordered to give security under section 562. I can find no sort of reason on the record why he should have been convicted at all of any offence. Present he doubtless was in his village, but this is no offence, and it is clear to my mind that he took no part in the affray and indeed the District Magistrate has apparently convicted him for being an enemy rather than for acting as such. I, therefore, take cognizance of his case on revision, set aside the conviction and acquit him.

As to three guilty men it has to be seen what offence they have committed. They have been convicted of rioting with a view to attacking the Police and obstructing them in the discharge of their duties and have also been convicted of the substantive offence of so attacking them and obstructing them. The two convictions cannot, in my opinion, stand, and I, therefore, set aside the conviction under section 147 and maintain that under section 333. In addition to this they have been convicted under section 225 because, as a result of their attack upon the Police, the man Panji escaped from custody or rather ceased to be in custody and proceeded to give himself up again as soon as possible. The attack on the Police was not made with a view to freeing Panji nor have the accused any interest whatever in him and, therefore, the convictions under this section are, in my opinion, also bad, and I set them aside. The sentences awarded under section 333 are seven years' rigorous imprisonment. These are, I think, somewhat excessive although the offence is doubtless very serious and has to be severely punished. At the time the attack was made upon the Police it appears to have been a spontaneous and sudden outbreak, and the circumstances are certainly not as serious as they might be where an offence is committed under this section. I, therefore, accept the appeal of these three men in so far as to reduce their sentences under section 333 to four years' rigorous imprisonment each without any solitary confinement.

Z. K. *Appeal partially accepted.*

BOMBAY HIGH COURT.

CRIMINAL APPLICATION FOR REVISION No. 91 OF 1922.

April 4, 1922.

Present:—Sir Norman Macleod, Kt., Chief Justice and Mr. Justice Shah.

KALYANCHAND GOPALCHAND GUJARATI—ACCUSED—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Arms Act (XI of 1878), s. 19—Marriage procession—Public assemblage—Carrying gun without license—Offence.

Accused was convicted under section 19 of the Arms Act for carrying a gun in a marriage procession. Under the terms of the license, the licensee was forbidden to take the gun to a public assemblage, and it was contended that a marriage procession was not such an assemblage:

Held, that the conviction was justified, as the marriage procession was a public assemblage, because the moment such a procession emerges from private premises and goes down the public street, it is open to the public to join the procession, and the procession becomes a public assemblage. [p. 723, col. 1.]

TARA CHAND v. EMPEROR.

Application for revision of the order of the First Class Magistrate, Yeola.

Mr. *A. G. Desai*, for the Applicant.

JUDGMENT.

MACLEOD, C. J.—This is an application in revision made by the petitioner who was convicted by the First Class Magistrate of Yeola under section 19 of the Indian Arms Act which provides a penalty for the offence of going armed in contravention of the provisions of section 13. Section 13 directs that no person shall go armed with any arms except under a license and to the extent and in the manner permitted thereby.

The accused is not a licensee, but his cousin handed over the gun for which he held a license to the accused while proceeding in a marriage procession. The accused fired some shots during the procession, with the result that some persons were accidentally injured. It is contended that the license permitted the licensee to go armed in the marriage procession. Clause 4 of the license reads as follows :—

"The licensee or any retainer acting under this license shall not go armed with any arms covered thereby otherwise than in good faith for the purpose of sport, protection or display, and save where he is specially authorised in this behalf in any Presidency town or Rangoon by the Commissioner of Police or in any other place by the District Magistrate or Sub-Divisional Magistrate specially empowered by the Local Government to grant licenses, he shall not take any such arms to a fair, religious procession or other public assemblage.'

The argument is that a marriage procession is not a public assemblage, but it is clear from the terms of the clause that a religious procession is considered a public assemblage, and. therefore, the suggestion that because a procession only consists of persons of a particular persuasion, or of persons invited to a particular ceremony, it is not a public assemblage, cannot be accepted. When a marriage procession emerges from private premises and goes down the public street, then it is open to the public to join the procession, and the marriage procession becomes a public assemblage, It seems to me, therefore, that the Magistrate was right in convicting the petitioner under section 19 of the Indian Arms Act. The application is rejected.

SHAH, J.—I agree. It may be that on this particular occasion the gun was taken by the applicant merely for the purpose of display but even then I think that under the terms of the license, unless he is specially authorised, he is prevented from using it even for that purpose in a public assemblage. It may be that this was quite innocently done for mere display as it is sometimes done: but whether that is in accordance with the terms of a particular license or not, must be decided when the point is raised. It is clear on the terms of this license that he could not do it in a marriage procession which was in the nature of a public assemblage without contravening the terms of the license.

W. C. A.

Application rejected.

LAHORE HIGH COURT.

CRIMINAL REVISION PETITION No. 1143 OF 1921.

February 3, 1922.

Present:—Mr. Justice Martineau.

TARA CHAND—ACCUSED—PETITIONER

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 476—"Such Court" meaning of—Court of Subordinate Judge, whether permanent Court.

The use of the words "such Court" in section 476 of the Criminal Procedure Code makes it clear that the Court empowered to take action under that section is the same Court before which the offence has been committed or under whose notice the offence has been brought in the course of a judicial proceeding. [p. 724, col 1.]

The Court of a Subordinate Judge is a permanent Court. Therefore, a Subordinate Judge is competent to continue an enquiry under section 476 begun by his predecessor. [p 724, col. 1.]

Muhammad Ishaq v. *Muqim-ud-din*, 19 Ind. Cas. 178; 7 P. R. 1913 Cr.; 14 Cr. L. J. 178; 207 P. L. R. 1913, dissented from.

Phina Singh v. *Empress*, 25 P. R, 1889 Cr referred to.

Petition under section 439, Criminal Procedure Code, for revision of an order of the Sessions Judge, Amritsar, dated the 7th June 1921, affirming that of the Subordinate

CHHIDDA v. EMPEROR.

Judge and Magistrate, First Class, Amritsar, dated the 5th November 1920.

Mr. *Shamair Chand*, for the Petitioner.

JUDGMENT.—The question in this application for revision is whether Sheikh Ali Muhammad, Subordinate Judge of Amritsar, is competent to continue an inquiry under section 476, Criminal Procedure Code, commenced by his predecessor, Lala Suraj Narain, regarding an alleged resistance by Tara Chand to the execution of a decree.

It is clear from the use of the word "such Court" in section 476 that the Court empowered to take action under that section is the same Court before which the offence has been committed or under whose notice the offence has been brought in the course of a judicial proceeding, and Mr. Shamair Chand on behalf of the petitioner contends that the Court of Sheikh Ali Muhammad is not identical with the Court of Lala Suraj Narain, relying on *Muhammad Ishaq* v. *Muqim-ud-din* (1). In that case Beadon, J., applying to the Court of a Subordinate Judge the same argument which Plowden, J., had applied in *Phena Singh* v. *Empress* (2) to the Court of a Magistrate of the First Class, held that the Court of a Subordinate Judge was not a permanent Court with a perpetual succession of Judges, and that the Court presided over by any particular Subordinate Judge was not identical with the Court presided over by the Judge who succeeded him. With all respect I venture to differ from this view. It is true that there may be more than one Subordinate Judge in a district, as there is in Amritsar, and that the Court of one of the Judges might at any time cease to exist if he were transferred and no one sent to replace him, the work of his Court being made over to the Court of another Judge. But I cannot see how the fact that the Court is not a permanency, but may at any time be abolished, affects the question. The theory that every time one Subordinate Judge is transferred and another takes his place the Court over which the former presided ceases to exist and a new Court is created, appears to me very far-fetched.

(1) 19 Ind. Cas. 178; 7 P. R. 1913 Cr.; 14 Cr. L. J. 178; 207 P. L. R. 1913.
(2) 25 P. R. 1889 Cr.

In my opinion the Court of Sheikh Ali Muhammad is identical with the Court of Lala Suraj Narain, whom he succeeded. I hold, therefore, that he is competent to continue the inquiry begun by his predecessor, and I dismiss this application.

Z. K.

Application dismissed.

ALLAHABAD HIGH COURT.
CRIMINAL APPEAL No. 343 OF 1922.
May 31, 1922.
Present:—Mr. Justice Lindsay and Mr. Justice Kanhaiya Lal.
CHHIDDA—ACCUSED—APPELLANT
versus
EMPEROR—RESPONDENT.

Murder—Accused seen last with the deceased—No direct or circumstantial evidence—Acquittal.

Accused was charged with murder and the only evidence against him was that he was seen last in the company of the deceased at about 8 o'clock in the night and, that when the body of the deceased was discovered the next morning, he was unable to give any explanation about the cause of the death:

Held, that in the absence of other evidence, circumstantial or direct, tending to show that he was concerned in the crime, the accused was entitled to an acquittal. [p 726, col. 2.]

Criminal appeal from an order of the Sessions Judge, Bulandshahr.

Mr. *S. N. Varma*, for the Appellant.

Mr. *Lalit Mohan Banerji*, (Government Advocate), for the Crown.

JUDGMENT.—The appellant in this case is a *chamar* named Chhidda whose age is given as thirty years. He has been convicted in the Court of the Sessions Judge of Bulandshahr on a charge of having murdered Ram Prasad on the night of the 7th-8th December 1921.

Several other accused were put on their trial in the Sessions Court along with the appellant Chhidda. These, however, were acquitted.

The deceased man, Ram Prasad, lived in the same village as the accused, namely

the village of Dhakar, which appears to be a place of considerable size situated close to the town of Khurja.

Ram Prasad was a Brahman and a number of witnesses in the case describe him as having been a man likely to give trouble in the village. They speak of him as having been *sarkash* (aggressive).

Briefly put, the story for the prosecution is that late in the evening of the 7th of December 1921 Ram Parsad left the village with the accused Chhidda. It is stated by Ram Prasad's mother that Chhidda took Ram Prasad away on the pretext of cutting some Babul trees near the Canal Distributary.

Ram Prasad was never seen alive again. Early the next morning his dead body was found on the Railway line which runs at some little distance from the village. The body had been laid across the rails and had been cut right in two by a passing train.

There is no evidence on the record to show who was the first person who made this discovery. We find, however, by a reference to the papers in the case that the body was discovered by a pointsman, named Balmakund, who has not been called as a witness. The discovery was made in the very early hours of the morning and the Station Master apparently made a report to his superior officer, saying that a man had been run over.

The mother of the deceased man is a woman named *Musammat* Chandania, and from her evidence it appears that when her son failed to return on the night of the 7th of December last, she became alarmed. She went to the house of the headman, Dabi Singh, who instructed her to go and ask the accused Chhidda what had happened to Ram Prasad. Her story is that she went to Chhidda at about midnight and that the latter told her that he had parted company with her son and that he must be sleeping out somewhere.

Musammat Chandania then went to Khurja where she communicated the news to another son of hers named Chimman, who made a report at the Khurja Police station at 8-30 in the morning. In this report it was stated that Chhidda had taken away Ram Prasad the night before and that Ram Prasad had not yet returned.

Meanwhile, the names of four persons were mentioned, it being alleged that they had murdered Ram Prasad.

The Police took up the inquiry but after some investigation had been made, the Sub-Inspector came to the conclusion that the matter was one for the Railway Police. The papers were accordingly sent to the Railway Police. A Sub Inspector of that branch of the Police made some inquiry and then returned the papers to the Civil Police.

Eventually, it appears that the Police sent up a report to the Magistrate, saying that there was no case, and Chhidda was discharged.

In the beginning of January a complaint was made in Court by Ram Prasad's widow and an inquiry was again opened which led to the commitment of Chhidda and others to the Sessions Court, as has already been mentioned.

A great deal of the evidence which was produced at the trial in the Sessions Court has been rejected by the learned Judge, and we think rightly. There can, we think, be no doubt that, from the time the death of Ram Prasad was discovered up to the time when the case was tried out in Court, a lot of evidence had been probably manufactured for the purpose of bringing the murder home to the accused.

In substance, all that has remained of the case in the Court below is that the Judge has believed that on the night of the 7th December the deceased man, Ram Prasad, left the village in company with the accused Chhidda.

As to this we think there can be no reasonable doubt, for there is on the record the evidence of a number of witnesses, who were sitting at a *chaupal* in the village at about 8 o'clock on the night of the 7th December, and these people including the headman all say that the accused Chhidda came up to the *chaupal* and said that he had business with Ram Prasad and went away with Ram Prasad.

Nor do we think there is any reasonable doubt regarding the truth of that part of the prosecution story deposed to by *Musammat* Chandania, namely, that the accused came to the house with Ram Prasad and then went away with him. *Musammat* Chandania's statement is that Ram Prasad had his meal before he left in company with the accused.

Apart from her statement we have the fact that the *post mortem* examination revealed that the stomach of the deceased man contained half digested food, a fact which leads us to believe that Ram Prasad came by his death some two or three hours after he had left his home.

Beyond this evidence there is really nothing more upon which reliance can be placed except the statement made by *Musammat* Chandania that at about midnight of 7th December she went to make an inquiry from Chhidda regarding what had happened to her son. This fact is admitted by Chhidda himself. The evidence of Matru and Kunni stands largely discredited.

As regards the cause of death we think there can be no doubt that Ram Prasad was murdered before his dead body was laid on the Railway line. The medical evidence on this part of the case is quite convincing and goes to show that the deceased man had been probably killed by spear wounds. It is shown that there were punctured wounds in the region of the ribs and that the right lung had been pierced in two places. There was also evidence to show that several ribs had been broken, and reading the medical evidence as a whole, there can be little doubt that these injuries must have been inflicted before death. We may mention that the body, when it was discovered, had been cut in two by the passing of the train.

We do not deem it necessary to refer to those portions of the evidence which the learned Judge has rejected, showing that the accused and others had been seen in the neighbourhood of the Railway carrying a heavy body on a *charpoy*; all this has already been disposed of by the learned Judge of the Court below.

The question is, therefore, whether, given the facts as we have stated them, the Court below was justified in holding that Ram Prasad was murdered by the accused Chhidda and others.

On his findings the learned Judge was satisfied that no other course was open to him than to convict. In other words, he found that it was proved that because Ram Prasad and Chhidda had been seen together at about 8 o'clock in the evening and because the dead body of Ram Prasad had been discovered the next morning and, further, that no explanation had been given by Chhidda regarding the death of Ram Prasad, therefore, Chhidda must be deemed to have taken a part in the murder. We are not able to accept this conclusion. In the absence of other evidence, circumstantial or direct, tending to show that the accused was concerned in this crime, we think that he is entitled to an acquittal. We have little doubt from what the witnesses have stated in this case that Ram Prasad was a person who was by no means popular in the village and we have further little doubt that he must have been murdered by some of his enemies on the night in question. But we are not prepared to draw the conclusion that, because the accused Chhidda was last seen in the company of Ram Prasad at about 8 o'clock at night, Chhidda must necessarily be considered to be one of the persons responsible for Ram Prasad's murder. We must, therefore, allow the appeal, set aside the conviction and sentence and we do so accordingly. We direct that the accused Chhidda be acquitted and released.

N. H.

Conviction set aside.

LAHORE HIGH COURT.

CRIMINAL MISCELLANEOUS PETITION No. 129 OF 1921.

February 6, 1922.

Present:—Mr. Justice Abdul Qadir.

QAMAR DIN—PETITIONER

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 87, 110, 118, 123, 406—Applicability of s. 87—"Absconder," who is—Security required for period longer than one year—Failure to furnish security—Procedure—Appeal—Reference to Sessions Judge.

Action under section 87 of the Criminal Procedure Code can be taken only when a Court has reason to believe that any person against whom a warrant has been issued has absconded or is concealing himself so that such warrant cannot be executed. A person

QAMAR DIN v. EMPEROR.

however, who files a petition against the order issuing the warrant and takes steps to procure an order of a superior Court that he should be allowed to remain on bail after such warrant has been issued, can neither be said to be absconding nor concealing himself. [p. 728, cols 1 & 2.]

The provisions of section 123, Criminal Procedure Code, are clear on the point that if security is not furnished and security for a period of more than one year has been ordered, the case must be referred to the Sessions Judge, who alone is empowered to pass orders under that section for the imprisonment of the person who has failed to furnish security. [p. 727, col. 2]

Obiter—Though section 406, Criminal Procedure Code, is so worded that an appeal may be preferred under the section to the District Magistrate in every case by any person ordered to give security for good behaviour under section 118 by a Subordinate Magistrate, yet ordinarily it seems that the section is meant for cases in which a reference to the Sessions Judge is not necessary, *i. e.*, where a man has been either ordered to furnish security for one year or having been ordered to furnish security for more than a year has furnished it and wants to appeal In such cases he would go to the District Magistrate in appeal and there would then be no reference to the Sessions Judge, who could deal with such cases only as a Court of revision. [p. 727, col. 2; p. 728, col. 1.]

Petition, under section 439, Criminal Procedure Code, for cancellation of the non-bailable warrants for the arrest of the petitioner issued by the District Magistrate, Lahore, on the 9th August and 3rd September 1921.

Mr. *J. G. Sethi*, for the Petitioner.

The Assistant Legal Remembrancer, for the Respondent.

ORDER.—Qamar Din, the petitioner, was ordered by the Sub Divisional Magistrate, Kasur, to give security of Rs. 10,000 for three years under section 110, Criminal Procedure Code. He failed to furnish security and the case was referred to the Sessions Judge, Lahore, under section 123, Criminal Procedure Code, and the petitioner was detained in Jail by the order of the Sub Divisional Magistrate. The learned Sessions Judge sent the case back to the Sub Divisional Magistrate for recording defence evidence and ordered the petitioner to be released on bail. When the case came up again before the Sessions Judge he informed the petitioner that he was entitled to file an appeal to the District Magistrate, under section 406, Criminal Procedure Code. If the result of the appeal went against the petitioner the case was to come up before the Sessions Judge again for a decision of the reference under section 123, Criminal Procedure Code. The petitioner accordingly filed an appeal in the Court of the District Magistrate, Lahore, which was heard on the 5th of August 1921, but orders were reserved, no date being fixed for their announcement. On the 9th August, however, the learned District Magistrate rejected the appeal and issued non bailable warrants for the attendance of the petitioner "for furnishing security". When the petitioner learnt that non-bailable warrants had been issued against him he made an application to the Sessions Judge, which was decided on the 24th August, the orders being that the applicant should be allowed to remain on bail on the security already given But in spite of this order fresh non-bailable warrants were issued on the 3rd September 1921, and on the 13th October 1921, an order purporting to be under section 87, Criminal Procedure Code, was passed to the effect that a proclamation be issued for attaching the property of the petitioner. A proclamation was issued on the 15th October ordering the petitioner to appear on the 15th November. But before that date the petitioner's property was attached on the 6th November 1921. The petitioner has filed a petition for revision against the orders of the District Magistrate issuing non-bailable warrants and attaching his property. Mr. Jai Gopal Sethi appears for the petitioner and the Assistant Legal Remembrancer for the Crown. I have heard them and have come to the conclusion that the orders in question cannot be upheld.

The provisions of section 123, Criminal Procedure Code, are clear on the point that if security is not furnished and security for a period of more than one year has been ordered, the case must be referred to the Sessions Judge, who alone is empowered to pass orders under that section for the imprisonment of the person who has failed to furnish security. This case had been referred to the Sessions Judge under section 123, Criminal Procedure Code, and I think it was hardly necessary that this case should have gone in appeal to the District Magistrate. Though section 406, Criminal Procedure Code, is so worded that an appeal may be preferred under this section to the

District Magistrate in every case by any person ordered to give security for good behaviour under section 118 by a Subordinate Magistrate, yet ordinarily, it seems that this section is meant for cases in which a reference to the Sessions Judge is not necessary, *i.e.*, where a man has been either ordered to furnish security for one year or having been ordered to furnish security for more than a year has furnished it and wants to appeal. In such cases he would go to the District Magistrate in appeal and there would then be no reference to the Sessions Judge, who could deal with such cases only as a Court of revision. These remarks are, however, made in passing and do not affect the points in dispute before me. An appeal could be preferred to the District Magistrate under section 406, Criminal Procedure Code, as it is worded at present, and was so preferred. The contest in this case relates to the stage when the appeal was decided. As we have seen, there was no date fixed for the announcement of orders and Qamar Din could not be expected to be present on the 9th August, when the orders were passed. If his presence was required simply to hear the orders, there was apparently no reason to suppose that he would not attend in order to hear them if summoned to do so. He had, up to that stage, been appearing before the various Courts that had dealt with his case. There was no justification, therefore, for issuing non-bailable warrants at the time. If his presence was required in order to tell him that he must furnish security, that was unnecessary because it was known that he has already professed himself unable to do so; and the sole question for decision by the Sessions Judge was whether the petitioner should be imprisoned for failure to furnish security, if he found that there was material on the record for upholding the order as to security.

In view of what has been observed above as regards the impropriety of the order issuing non-bailable warrants, it need hardly be said that further proceedings taken against the petitioner culminating in the attachment of his property were not called for. Action under section 87 can be taken only when a Court has reason to believe that any person against whom a warrant has been issued has absconded or is concealing himself so that such warrant cannot be executed. But a man, who files a petition against the order issuing the warrant and takes steps to procure an order of a superior Court that he should be allowed to remain on bail after such warrant has been issued, can neither be said to be absconding nor concealing himself. I think it unnecessary to make any further remarks as to certain irregularities in the procedure adopted concerning the attachment of property etc. The procedure adopted throughout appears to be based on some misapprehension as to the attitude of the petitioner, and in the same way the petitioner seems to have been somewhat unduly afraid as to the treatment that he might receive in case he presented himself before the District Magistrate. The learned Assistant Legal Remembrancer, on behalf of the Crown, admits his inability to support the orders passed by the learned District Magistrate under the circumstances discussed above. I, therefore, set aside those orders so that the non-bailable warrants issued against Qamar Din are hereby cancelled and the attachment of his property removed. He will, however, appear before the District Magistrate, if ordered to do so, to enable the latter to formally announce to him the order passed in appeal. He need not, however, be taken before the District Magistrate in custody as the Sessions Judge has allowed him to remain on bail which has already been furnished by him. The record will then be sent to the Sessions Judge for disposal of the reference according to law.

Z. K.

Revision allowed;
Case remanded.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 178 OF 1922.
May 31, 1922.
Present:—Mr. Justice Stuart

HASAN RAZA AND OTHERS—ACCUSED APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Practice—Criminal appeal before Sessions Judge—Case triable by Sessions Court—Committment.

KARAM SINGH v. EMPEROR.

When a Sessions Judge on appeal finds that the case against the accused is in reality one triable by a Court of Session, it is not open to him to modify the charge and alter the sentence The proper course for him is to direct that the accused be committed for trial to the Court of Session on the new charge.

Criminal revision from an order of the Additional Sessions Judge, Gorakhpur.

Mr. *Kirpa Ram Dang*, for the Applicants.

Mr *R. Malcomson* (Assistant Government Advocate), for the Crown.

JUDGMENT. The order of the Additional Sessions Judge cannot be supported. The facts are these:—The applicants are alleged to have attacked the house of Lachman, to have assaulted several persons there and to have stolen grain. On the facts this was a case of dacoity triable by a Court of Session. The Police erroneously sent it up as a case under sections 452 and 147 of the Indian Penal Code. The Magistrate convicted on those charges. The Sessions Judge rightly found the case to be a case of dacoity but took a course which cannot be supported. He changed the charges into a charge under section 395 of the Indian Penal Code and made certain alterations in the sentences. His proper course was to have directed the appellants to be committed for a trial on a charge under section 395 of the Indian Penal Code. This must be done now. I set aside the convictions and sentences and direct that the appellants shall remain in custody and be committed to the Court of Sessions Judge of Gorakhpur (the Additional Sessions Judge having already expressed his opinion on the merits cannot now hear the case) and be tried on a charge under section 395 of the Indian Penal Code to the effect that they on the 11th of December 1921, being more than five in number, did commit dacoity at the house of Lachman in the village of Darandiah in the Basti District. In the event of any of the appellants being found guilty, it will be open to the Sessions Judge to consider, in passing sentence, the imprisonment which they have already undergone.

R. N.

Order modified.

LAHORE HIGH COURT.

CRIMINAL REVISION PETITION No. 1327 OF 1921.

January 17, 1922.

Present:—Mr. Justice Harrison.

KARAM SINGH AND OTHERS—CONVICTS—PETITIONERS

versus

EMPEROR—RESPONDENTS.

Penal Code (Act XLV of 1860), ss. 147, 355—Offences committed in same transaction—Separate sentences, legality of—Criminal Procedure Code (Act V of 898), s 106 (3), order under, whether can be passed on appeal from order of Second Class Magistrate.

In order to carry out a sentence imposed by a private *panchayat* upon the complainant, the accused blackened the complainant's face and made him ride a donkey round the village. They were convicted of offences under sections 147 and 355 of the Penal Code and separate sentences were awarded in respect of each offence:

Held, that the acts committed by the accused formed part of the same transaction and that, therefore, separate convictions and separate sentences under section 147 and section 355 were illegal [p. 730, col .]

An order requiring security under section 106 (3) of the Criminal Procedure Code cannot be passed by an Appellate Court in an appeal from an order of a Second Class Magistrate. [p 730, col. 1]

Lal Khan v. *Emperor*, 44 Ind. Cas. 352: 5 P R. 1918 Cr; 19 Cr. L. J. 336; 185 P. L. R 1918, followed.

Petition, under section 439, Criminal Procedure Code, for revision of an order of the District Magistrate, Jullundur, dated the 21st September 1921, modifying that of the Honorary Magistrate, Second Class, Phillaur, District Jullundur, dated the 22nd August 1921.

Mr. *Bhagat Ram Puri*, for the Petitioners.

Mr. *Aziz Ahmad*, for the Government Advocate, for the Respondents.

JUDGMENT.—The facts as found to be established in this case are that one Kartara was found guilty by a *panchayat* of having enticed away a married woman, and was sentenced to pay a fine or in default to have his face blackened and to ride round the village on a donkey. He escaped. He was caught some days later, was confined in a house by the present accused, had his face blackened and was made to ride a donkey round the village. The Magistrate, who tried the case, found the accused guilty under sections 147, 342 and 504, Indian Penal Code, and a separate sentence was passed under each section. On appeal the District Magistrate upheld the conviction under section

147, quashed the conviction under section 342, altered the third conviction to one under section 355 and passed separate sentences both under section 147 and section 355 to run consecutively. He also passed an order under section 106 (3), Criminal Procedure Code, and ordered each of the accused to execute a bond for a period of three years.

On revision it is urged that all the acts committed formed part of one and the same transaction. The sentence had been passed by the *panchayat* and the offence committed by the accused consisted of forcibly carrying out that sentence. It is, therefore, contended that no separate offenses had been committed under sections 147 and 355, inasmuch as the only object in catching the complainant and confining him until a donkey could be procured was part and parcel of compelling him to obey the orders of the *panchayat*. This contention is, I think, quite sound and I, therefore, find that separate sentences should not have been passed and are illegal. I uphold the conviction under section 147 and cancel that under section 355.

As to the order under section 106 (3), Criminal Procedure Code. As pointed out in *Lal Khan* v. *Emperor* (1), this order was illegal and *ultra vires*, inasmuch as the Trial Court was that of a Second Class and not that of a First Class Magistrate.

This view of the law agrees with that taken by the Calcutta High Court and also with several previous decisions of the Punjab Chief Court, and although a different view has been taken by other High Courts the position in this Province is quite clear. I, therefore, set aside the order demanding security under section 106 (3). The result is that the accused will be released immediately.

Z. K.

Revision allowed.

(1) 44 Ind. Cas. 352; 5 P. R. 1918 Cr; 19 Cr. L. J. 336; 135 P. L. R. 1918.

CALCUTTA HIGH COURT.

CIVIL REVISION No. 18 OF 1920.

August 30, 1920.

Present :—Justice Sir N. R. Chatterjea, Kt., and Mr Justice Cuming.

BHOLA NATH KHANRA AND OTHERS—PETITIONERS

versus

PURNA CHANDRA BANERJEE AND OTHERS—OPPOSITE PARTY

Criminal Procedure Code (Act V of 1898), s. 195—Proceeding for sanction taken in Civil Court—Court, whether has power to give costs.

The powers of the Civil Procedure Code as to costs cannot be imported into a criminal proceeding *Mahomed Dustagir Sahib* v *Mahomed Karimuddeen*, 2 Weir 196, *Bishen Das* v *Rahmat Khan*, 28 Ind. Cas. 329; 5 P. R. 1915 Cr; 60 P. W. R. 1915 Cr.; 16 Cr. L. J. 281, relied upon.

A proceeding for sanction under section 195 of the Criminal Procedure Code, though taken in a Civil Court, relates to a criminal matter and the Court has no power to give costs as there is no provision in the Criminal Procedure Code for awarding costs in such a matter.

Babus *Sib Chander Palit* and *Sachindra Nath Basu*, for the Petitioners.

Babu *Apurba Chandra Mukherjee*, for the Opposite Party.

JUDGMENT.—The petitioners before us have been directed to pay costs in a proceeding by which the lower Appellate Court revoked the sanction obtained by the petitioners to prosecute certain persons.

The petitioners applied for sanction to prosecute three persons. The Court of first instance disallowed the application in respect of two, and granted sanction in respect of one of them. On appeal, the sanction was revoked by the lower Appellate Court but, as stated above, in doing so that Court directed the petitioners to pay costs.

Section 195, Criminal Procedure Code, does not provide for awarding costs and we do not find any other provision in the Criminal Procedure Code for awarding costs in such a matter.

On the other hand, our attention has been drawn on behalf of the petitioners to two cases—one in Weir's Criminal Rulings Vol. II, 4th Edition, 196 [See the case of *Mahomed Dustagir Sahib* v. *Mahomed Karimuddeen* (1)] in which Collins, C. J., is reported to have held that the powers of the Civil Procedure Code as to costs

(1) 2 Weir 196.

cannot be imported into a criminal proceeding, that the proceeding, though taken in a Civil Court, relates to a criminal matter and was taken under the Criminal Procedure Code, and that the Court had no power to give costs under section 195, Criminal Procedure Code. A similar view appears to have been taken in a case in the Punjab Chief Court. [*Bishen Das* v. *Rahmat Khan* (2)]

We agree in the view taken in those cases and accordingly set aside the order as to costs passed by the lower Appellate Court.

B. N.

Order set side.

(2) 28 Ind. Cas 329; 5 P. R. 1915 Cr.; 60 P. W. R. 1915 Cr.; 16 Cr. L. J. 281.

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 210 OF 1921.

June 10, 1921.

Present:—Mr. Justice Moti Sagar.

CHANDU SINGH AND ANOTHER—CONVICTS—APPELLANTS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 366, 394—Abduction—Intention—Inference—Robbery and abduction—Separate convictions.

The intent with which a woman is abducted or kidnapped is more or less a matter of inference. There may be some cases in which the matter is capable of direct proof, but very generally one has to infer from the circumstances of the case and the subsequent conduct of the accused as to what was the intention with which the kidnapping or the abduction had been brought about. In such cases it is for the accused to explain away the incriminating circumstances and to prove that he had no improper or sinister object in view. [p. 733, col. 2.]

Where a woman going peaceably with her husband on the road is robbed of her ornaments and then carried off to a distant village and is kept confined in a house to which no other person could have access except the accused, the only inference that is possible is that she was carried off with the object that she may be forced or seduced to illicit intercourse, and it is for the accused to prove that they had some other object in view. [p. 733, col. 2; p. 734, col 1.]

Where a woman is first robbed of her ornaments and is then carried off, the abduction although immediately following the robbery is no part of that offence, it not being necessary to complete the offence of robbery that the woman should also be abducted. In such a case separate convictions and sentences of the accused under the two offences are right and proper. [p. 734, cols 1 & 2.]

Criminal appeal from an order of the Magistrate, First Class, Amritsar exercising enhanced powers under section 30, Criminal Procedure Code, dated the 31st January 1921.

Dr. *Nand Lal* and Lala *Harbhajan Das*, for the Appellant.

Diwan *Khilanda Ram*, R. S., Public Prosecutor, for the Respondent.

JUDGMENT.—The three appellants, Chanda Singh, Mangal Singh and Dewa Singh, have been found guilty of highway robbery and abduction by Mr. Connor, Magistrate, exercising enhanced powers under section 30 of the Criminal Procedure Code, at Amritsar, and sentenced under sections 394 and 366 of the Indian Penal Code to various terms of imprisonment. Chanda Singh has been sentenced to seven years' rigorous imprisonment under section 394, and to a further period of seven years under section 366 of the Indian Penal Code. Mangal Singh has been sentenced to six years on the first count, and to five years on the other. Dewa Singh has been awarded six years rigorous imprisonment altogether; five years' under the first charge and one year under the second charge. In each case the sentences are to run consecutively.

The material facts necessary to understand the story for the prosecution are briefly as follows:—Ram Das, the complainant, is a Brahmin of Mauza Patti in the Kasur Tahsil, and *Musammat* Vidya, his wife, is a girl of about 19 years of age. On the morning of the 26th September last both of these persons set out on foot from their house for the village Kot Mahmud Khan. When they were nearing the village Nandpore at about 9-30 A. M., they were overtaken by the three convicts who were armed with *dangs* and *chhavis*. About half a mile further, the three convicts suddenly came out of a cotton crop, and one of them attacked Ram Das with a *chhavi*. Ram Das was thrown on the ground with a piece of cloth twisted round

his neck, and robbed of all the cash and jewellery which he had in his possession. He was told to keep quiet and not to raise an outcry or he would be killed. In the meantime, the other two culprits forcibly carried off his wife and robbed her of all the ornaments and the jewellery which she had on her person. She was then concealed in a maize crop which was growing close by to await the arrival of a mare to fetch which one of the culprits had in the meantime been despatched. As there was some delay in the arrival of the mare, the two men who were left in charge of the woman did not think it advisable to wait any longer, and marched her off under threats of taking her life. At about midnight they arrived at a village called Dhariwal where the woman was put into a house and here she remained till rescued by the Police and her husband the following morning.

After the culprits had left, Ram Das raised an outcry and with the help of some persons made a search for his wife in the neighbourhood, but was unsuccessful in tracing her. He then went to the Sirhali Thana, and reported the matter to the Police. In this report he gave a full description of his assailants, which tallied in almost all respects with the description of the accused subsequently apprehended and identified. It appears that while the report was being recorded, one Sri Ram, Head-Constable, was present, and on hearing the description given by the complainant of a tall black man as one of the culprits, he at once suspected Chanda Singh of Chaudhriwala, a restricted habitual offender and an absconder in a murder case, as being concerned in this crime. Investigation was, therefore, started by the Police, who at first proceeded to Chaudhriwala. After obtaining some information at that place, the Police went to a place called Kairon, where they learnt that a man on a very fast mare had passed the village that day and returned the same evening at dusk. This confirmed the suspicions of the Police, and they proceeded to the house of Sunder Singh where they found a mare tethered. This mare was said to belong to Chanda Singh, and it was stated that the man who had ridden it that day was sleeping on the roof of the house. The Police, therefore, went to the roof, and found a man sleeping on a *charpoy* with a *lathi* under the head, and a *chhavi* blade in a haversack near the bed. The man whose name was Dewa Singh was at once identified by Ram Das as one of the three assailants. After obtaining some useful information from this man, the Police proceeded to Dhariwal where they reached in the morning. On reaching Dhariwal the Police went to the house of one Khudda Singh, brother of Mangal Singh accused, whose name had been mentioned by Dewa Singh, and surrounded his house. Two men came out of the house armed with *chhavis*, but finding that they would in all probability be overpowered, fled to the roofs. In the meantime, the wife of Ram Das came out of the house, and rushed into her husband's arms. The two culprits jumped down on the other side of the house, were pursued by the Police and caught. Both of them were identified by Ram Das and his wife as the remaining two culprits. The Police learnt from Chanda Singh that he had disposed of the jewellery and sold it to one Surain Singh, a goldsmith of Nandpore. Surain Singh was traced out, and deposed to his having purchased some jewellery from Chanda Singh, but said he had melted it. He produced the gold, and also an entry in his *bahi* dated the 26th September 1920, admittedly thumb-marked by Chanda Singh, showing that his statement with regard to the said purchase was correct.

This is in brief the story as unfolded by the prosecution witnesses. That a robbery in broad day light was committed, and that the wife of Ram Das, complainant, forcibly carried off is beyond dispute. Two questions arise for the consideration of the Court:—

1. Whether the evidence on the record is sufficient to prove participation of the accused in this crime, and

2. Whether a conviction under section 366, Indian Penal Code, can be sustained in view of the fact that there is no direct evidence on the record in proof of any criminal intent on the part of the accused.

Now, with regard to the first question it is to be observed that the conviction rests mainly on the evidence of Ram Das and his wife *Musammat* Vidya, both of whom have identified the accused, and have deposed to the latter having committed the assault and the robbery. I have carefully read

their evidence, and have no reason to differ from the conclusions at which the learned Magistrate has arrived. The robbery, as already stated, was committed in broad daylight, and the prisoners were arrested shortly after the occurrence. The complainant Ram Das and especially his wife, Vidya, who remained with at least two of the accused for more than 34 hours, must have had ample opportunities to have seen their faces, and would in consequence have no difficulty in identifying them. The evidence of Surain Singh and the entry in his *bahi* thumb-marked as it was by Chanda Singh himself leaves no doubt that some jewellery was disposed of by the latter on the 26th September 1920, the very day the robbery was committed, and no satisfactory explanation has been given by Chanda Singh as to how he came into possession of this jewellery. His statement before the Court that the Police made him give the two thumb-impressions to the *bahi* entry when the mare in question in this case was returned to his son is absurd, and has been rightly rejected by the learned Magistrate. Moreover, Chanda Singh was admittedly arrested near the Dhariwal village, where the woman was also found, and it has not been explained how the woman came to be present in this village that morning where she had absolutely no friends and connections. His explanation with respect to himself that he was on his way to his village, and got out of the train at Boparai, and was on his way when he was arrested by some of his enemies is false, and entirely unworthy of credit. The statement of Mangal Singh that the woman was not in his house, but appeared from somewhere else is on the face of it absurd, and no reliance can be placed on this statement. Dewa Singh denies to his having been arrested at midnight with a *chhavi* as stated by Sri Ram, the Head-Constable (P. W. No. 18) and states that he was arrested near a watercourse in the day near the village Kairon. In support of this story he has produced two witnesses who have been disbelieved by the learned Magistrate, and after reading their evidence, I have no hesitation in holding that the learned Magistrate was right in rejecting their evidence. In my opinion the evidence produced clearly proves the participation of the prisoners in this crime, and there is no reason to disbelieve it. I accordingly hold that the guilt of all the three accused has been fully established and that their conviction is fully justified under section 394, Indian Penal Code.

With ragard to the second question it has been contended that there is no evidence on the record that *Musammat* Vidya was carried off by the offenders with the intention of marrying her against her will, or of forcing or seducing her to illicit intercourse or that it was known to be likely that she will be so forced or seduced. I do not see any force in this contention. There is no doubt that there are two ingredients of an offence under section 366. Firstly, there must be a kidnapping or an abduction as defined in section 361 or section 362 of the Indian Penal Code, and, secondly, the kidnapping or the abduction must be done with the intent or with the knowledge or with the object that certain things will happen as specified in section 366. That the woman was abducted by force while her husband was being attacked and relieved of his cash and jewellery cannot be disputed for a moment. The question I have to consider is whether she was abducted in order that she might be forced or seduced to illicit intercourse. Now the intent with which a woman is abducted or kidnapped is more or less a matter of inference. There may, of course, be some cases in which the matter is certainly capable of direct proof, but very generally one has to infer from the circumstances of the case and the subsequent conduct of the accused as to what was the intention with which the kidnapping or the abduction had been brought about. Again it must not be forgotten that the circumstances of the case which though incriminating to outward appearances may yet be capable of a perfectly good and reasonable explanation, and may be fully compatible with the innocence of the accused. In such cases it would be for the accused to explain away the incriminating circumstances and to prove that he had no improper or sinister object in view. The circumstances of the present case are such that, in my opinion, no other inference is possible except that the woman was carried off with the object that she may be forced or seduced to illicit intercourse. The woman was going peaceably with her husband on the road, was robbed of all her ornaments

and jewellery, and carried off by force to a distant village where she was kept confined in a house to which no other person could have any access except the accused themselves. The presumption is clear that she was abducted with the intent indicated above. If the object was merely robbery, it was complete as soon as the ornaments had been removed from the person of the woman; why should the woman be then carried off? If the object was to shut out evidence as to their having committed the robbery as suggested by the Counsel for the appellant, why should the husband have been left alone and not carried off too? There is evidence on the record to show that the woman begged the culprits to take her jewellery and to leave her alone but that they would not agree. While in the witness-box the woman begged the Court not to question her as to what happened to her at night in the house where she was confined by her abductors. This was done in all probability to save her honour and to avoid a scandal, but the inference is clear that the woman must either have been raped or subjected to some such indignities as a sensitive woman would naturally feel disinclined to mention before the public. There can be no doubt that the culprits had some other object in view than mere robbery and that object appears to be unquestionably the one I have above mentioned. It would have been, of course, quite open to the accused, if they had admitted the abduction to prove that they had carried off the woman with some object other than those specified in section 366, Indian Penal Code, but they have not done so. They have totally denied their presence at the scene of the occurrence and have also denied the abduction. In my opinion they are not stating the truth, and under the circumstances I have no hesitation in holding that the offence of abduction with the intent above specified has been fully brought home to the accused and that they have been rightly convicted of the offence as defined in section 366 of the Indian Penal Code.

Before concluding I must refer to one other point raised by the learnad Counsel for the appellant, *viz*, that separate convictions under sections 394 and 366 were bad in law. His contention was that abduction which immediateley followed the robbery was a part and parcel of one act, and that two acts were so connected together as to form really one transaction, and that consequently even if the accused were found guilty there should have been one conviction and not two. It is sufficient to say in reply that the abduction of the woman was not part of the offence of robbery which was complete as soon as the complainant and his wife had been robbed of their jewellery. In order to complete the offence of robbery it was not necessary that the woman should also have been abducted, and I fail to understand why the accused should not have been separately convicted and separately sentenced when they were found guilty of two distinct separate offences. In my opinion the accused have been rightly convicted and the contention raised by the Counsel for the appellants does not appear to have any force.

I uphold the convictions and the sentences awarded by the learned Magistrate and dismiss the appeal.

N. H. *Appeal dismissed.*

LAHORE HIGH COURT.

CRIMINAL REVISION No. 1140 OF 1921.

January 23, 1922.

Present:—Justice Sir William Chevis, Kt.

DHANNA SINGH AND OTHERS—ACCUSED—PETITIONERS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 199—Penal Code (Act XLV of 1860), ss. 494, 497, 498—"Husband of the woman," meaning of—Marriage dissolved before complaint, effect of.

The words "the husband of the woman" in section 199 of the Criminal Procedure Code are simply intended to point to the particular person who has the right to start proceedings in respect of the offences mentioned in the section, and a man does not cease to be "the husband of the woman" within the meaning of that section merely because the marriage tie has been dissolved subsequent to the commission of the offence complained of. In other words, the dissolution of the marriage tie does not take away from the complainant the right to lodge a complaint in respect of an offence committed before the marriage tie was dissolved [p. 736, col 2.]

Case reported by the Sessions Judge, Hoshiarpur, with his No. 856 of 9th August 1921.

FACTS.—Buta, a Muhammadan by religion, has brought this complaint under sections 498, 494 and 497 against four persons, Hindu *Jats*, for enticement of and adultery with his

wife *Musammat* Nathi whom, he says, the accused Dhanna Singh and Indar Singh have married by *chadarandasi* and converted into Hinduism.

The accused in this case plead that, as the conversion to Hinduism is admitted by the complainant himself, his admission puts an end to the marriage and to the status of the complainant as a husband. He, therefore, cannot come into Court. The lower Court has disallowed the objection on the ground that the woman was the complainant's wife at the time the offence was committed, and then Nawabzada Mirza Ibzaz ud-Din Ahmad Khan, exercising the powers of a Magistrate of the First Class in the Hoshiarpur District, by order dated 2nd July 1921, held that the complaint, under sections 498, 494 and 497 of the Indian Penal Code, can proceed against all the four accused.

GROUNDS.—The points for decision are two and I think they are very clear.

Whether the conversion of the woman puts an end to the marriage tie, and, secondly, whether, under these circumstances, the case can proceed.

On the first proposition the complainant has not got any thing to say. The Muhammadan Law is very clear on this point. Section 88 (A) of Muhammadan Law by Wilson lays down that the effect of either or both of the parties to a Muhammadan marriage renouncing the Muhammadan religion is to dissolve the marriage *ipso facto* so far as the British Courts are concerned. Similarly, according to *Abdul Gani* v. *Aziz-ul-Haq* (1) in Muhammadan Law the marriage of a man who subsequently embraces Christianity becomes *ipso facto* void notwithstanding the re conversion to Islam during the period of *Idat*, and the wife, in contracting a second marriage during such period, does not commit bigamy under section 494, Indian Penal Code. This proposition of law is not contested by the complainant's Counsel or the Public Prosecutor. They, however, take their stand on the point that the complainant was the husband at the time of the commission of the offence. Section 198 of the Criminal Procedure Code is clear. No Court shall take cognizance of an offence under section 497 or 498 of the Indian Penal Code except upon a complaint made by the husband of the woman or in his absence by any person who had care of such woman on his behalf at the time when such offence was committed. It is necessary, therefore, that the complainant should be the husband of the woman at the institution of the suit, otherwise he has no *locus standi* to sue. The complainant quotes *High Court Proceedings 26th July* 1869 (2) and *Imperator* v. *Nur Mahomed* (3) which are to the effect that the death of the husband does not necessarily put an end to a prosecution for adultery. This relates to the death during the pendency of the case and not before its institution. The effect of section 198, in my opinion, is that the marriage tie must be subsisting at the time when the suit is brought, otherwise if an abduction takes place and subsequently the husband divorces the woman he will still have a right to run in for 498 on the plea that the woman was his wife at the time of the commission of the offence. In my opinion, the accused's case is quite clear. I think he would not have taken this extreme step to move this Court on revision side but for some irregularities committed by the lower Court. The whole proceedings show that the Magistrate has not brought a proper judicial mind to the trial of this case. The woman is not one of the accused. A warrant of arrest was issued against her in the very beginning on a bail of Rs. 500. Subsequently, the security of the accused was allowed to remain the same but that of the woman, who was merely a witness, was enhanced to Rs. 1,000. The order against her is to remain on bail and attend the Court till the whole evidence is recorded. A woman is usually a witness and after her statement has been recorded she is not detained in Court but in this case the lower Court has given explicit orders that she should attend the Court till the whole evidence is recorded. She appeared on the 2nd April and was called upon to furnish bail of Rs. 1,000. Her statement was recorded in which she asserted herself to be a Sikh and the case was ordered to be taken up at Talwara. The instructions of the High Court are that in cases where women are concerned, *i. e.*, where their attendance is necessary, should be taken up at *sadr* so that they may not be put to unnecessary trouble, but the Magistrate fixed this

(1) 14 Ind. Cas 641; 39 C. 409; 15 C. L. J. 263; 16 C. W. N. 451 13 Cr. L. J. 257.

(2) 4 M H. C. R. App. (ix) 60.

(3) 8 Cr. L. J. 190; 1 S. L. R. 72 Cr.

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case at the other extremity of the District. The case was not taken up at Talwara on account of a Sessions case and it was adjourned to the 16th May. The case was not taken on that day for want of time and it was adjourned to 11th June. The first surety of the woman withdrew and she was called upon to furnish another on 11th June. It is not clear why such a drastic order was passed when she had already appeared two or three times and her statement was recorded. The case was postponed to the 13th of June. Only the complainant was examined and the case was put off for next day on account of heavy work and the order against the woman was that as the case was a serious one and parties were excited the woman should furnish heavy security of Rs. 1,000. On the 14th six witnesses were examined and the case was postponed to 1st July 1921. I think the procedure has been unnecessarily harrassing to the woman and as the accused have proved that the case cannot proceed I beg to submit the papers to High Court to proceed on its revision side for necessary action.

Lala *Fakir Chand*, for the Petitioners.

Sheikh *Niaz Muhammad*, for the Respondents.

ORDER.—In this case Buta has lodged a Criminal complaint under sections 494, 497 and 498 against four Hindu *Jats*. The case is pending before the Magistrate but has been reported to this Court by the learned Sessions Judge of Hoshiarpur who is of opinion that proceedings should be quashed because Buta's wife has embraced Sikhism, and thus the marriage has come to an end.

The view that the woman's embracing Sikhism has put an end to the marriage seems to me correct, and the accused persons could not be convicted under either of the above sections for anything done after the termination of the marriage. But here, according to the story of the complainant, the woman was abducted before she embraced the Sikh religion, and while she was still the wife of the complainant, so that I am unable to hold that no offence has been committed by the accused. It is, however, urged on behalf of the accused that, under section 199, Criminal Procedure Code, the Court cannot take cognizance of an offence under section 497 or 498 upon a complaint made by the complainant at a time when he had ceased to be the husband of the woman. Turning to section 198 of the Criminal Procedure Code, I find that it is laid down that a Court shall not take cognizance of certain offences, including an offence under section 494, Indian Penal Code, except upon the complaint made by some person aggrieved of such offence. Turning again to section 199 I find that a complaint made by the husband of the woman is necessary to start proceedings under section 497 or 498. Reading both the sections together it seems to me that the Legislature intended to leave it to the option of the person aggrieved to set the law in motion. Now, I cannot see that the husband's grievance against a person who has enticed away his wife or committed adultery with her ceases merely on the marriage coming to an end. I am of opinion that the words in section 199 "the husband of the woman" are simply intended to point to the particular person who has the right to start proceedings and that a man does not cease to be "the husband of the woman" within the meaning of section 199, Criminal Procedure Code, merely because the marriage tie has been dissolved. The right to start proceedings is given to him simply because he is the person aggrieved. To take an instance somewhat different from the one before me if *A* were to run away with *B's* wife, *B* would have a grievance and under section 199, Criminal Procedure Code, would be able to set the law in motion by lodging a complaint. If he lodged a complaint and it was then discovered that the woman had died the night before the complaint was lodged, it certainly could not be said that his grievance had ceased with the death of the woman.

As at present advised, I am, therefore, unable to find that the dissolution of the marriage takes away from the complainant the right to lodge a complaint, and I, therefore, decline to stay proceedings. I do not, however, record any definite finding, as I think that in case of a conviction the convicts may make it as one of their grounds of appeal that the provisions of section 199, Criminal Procedure Code, have not been complied with, and the matter will then be one for the decision of the Appellate Court. The case is returned and the proceedings in the Magistrate's Court will continue in due course.

Z. K. & N. K.

Case returned.

KABUL SINGH v. KALA SINGH.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1487 OF 1916.

March 23, 1920.

Present:—Mr. Justice Scott-Smith and Mr. Justice Abdul Raoof.

KABUL SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

KALA SINGH—PLAINTIFF—KEHAR SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Custom—Agriculturists—Alienation—Alienation to raise money for trade, validity of—Necessity—Borrower wanton and dissolute—Lender, whether justified to advance money for payment of land revenue—Mortgage—Redemption—Right of person interested in part of property to redeem whole.

An agriculturist governed by the Customary Law is not entitled to alienate his ancestral land in order to raise money for the purpose of trade. [p. 737, col. 2.]

Where a borrower is shown to be a man of bad character who has squandered his income in extravagance and wanton waste, the lender would not be justified in advancing him money for payment of Government revenue and other ordinary expenses of a Zemindar. [p. 738, col. 2.]

Ram Kishen v. *Musammat Hassi*, 39 Ind. Cas. 191; 76 P. R. 1917; 57 P. W. R. 1917, followed.

A person who has any right to redeem, has a right to redeem the whole of the mortgaged property, and, unless there is a special bargain, he cannot be compelled to redeem only the parts in which he may be interested. [p. 737, col. 2; p. 738, col. 1.]

Huthasanan v. *Parameswaran*, 22 M. 209; 8 Ind. Dec. N. S. 149, referred to.

Second appeal from a decree of the District Judge, Ferozepore, dated the 23rd March 1916, varying that of the Senior Subordinate Judge, Ferozepore, dated the 30th November 1914.

Mr. *G. C. Narang*, for the Appellants.

Lala *Amar Nath Bhatia*, for the Plaintiff-Respondent.

JUDGMENT.—In the suit out of which these two appeals arise, Kala Singh, one of the two sons of Jit Singh deceased, sued for possession of certain properties mortgaged by his father on the ground that the alienations were made without any valid necessity. The lower Appellate Court has found that some of the alienations were made without any necessity and that in respect of the other alienations necessity in part existed. In respect of the latter the District Judge has given a decree for redemption of the whole of the property concerned on payment of the sum found in each case to be for necessity. In regard to those alienations in which it was found that no part of the consideration was raised for necessity he has given plaintiff a decree for possession of a half share unconditionally, but not of the other half which is that of his brother Kehr Singh who has not joined in suing.

From this decree two appeals have been filed in this Court, one by Kabul Singh and others, alienees, under certain of the deeds, and the other by Daulat Ram in whose favour a house was mortgaged for Rs. 1,000 on the 7th March 1910. The appeal of Kabul Singh and others has been argued by Mr. Gokal Chand Narang and that of Daulat Ram by Mr. Balwant Rai.

The only mortgage deed about which Mr. Narang has addressed us is that for Rs. 500, dated 29th June 1909. This Rs. 500 is said to have been advanced for purchase of bullocks. Gurditta says that this was the object of the loan and that six bullocks were actually bought. It is argued that the purchase of bullocks amounted to necessity. The evidence, however, shows that the bullocks were purchased to sell again, *i. e.*, for the purpose of trade and not agriculture. In our opinion an agriculturist governed by the Customary Law is not entitled to alienate his ancestral land in order to raise money for the purpose of trade in cattle. The findings of the District Judge in respect of other alienations in which Mr. Gokal Chand's clients are interested are not contested before us. Counsel, however, urges that the plaintiff is not entitled to redeem more than his own share of the property mortgaged at the reduced rate. He refers to the Law of Mortgage by Ghosh, 4th Edition, Volume I, page 248, in which is discussed a case where a part owner was held not entitled to redeem the whole of the remainder of the property mortgaged although he was bound to offer to do so. In that case, however, the equity of redemption was sold to a number of persons, one of them being the mortgagee himself. This was a distinguishing feature of the case and on page 249 of the same volume it was remarked that the observations of their Lordships in the case in question leave untouched the general rule that a person, who has any right at all to redeem has a right to redeem the whole of the

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mortgaged property, and cannot be compelled to redeem only the parts in which he may be interested. A person who has any right to redeem, has a right to redeem the whole of the mortgaged property, and not a part of it, unless there is a special bargain. The case of *Huthasanan* v. *Parameswaran* (1) is a similar authority in support of this proposition. In the present case mortgages in favour of Kabul Singh and others have been held binding to a limited extent. But this fact does not, in our opinion, alter the general rule referred to above. In accordance with this principle the plaintiff, the owner of only half the property mortgaged, is entitled to redeem the whole on payment of the sum found to have been taken for necessity and binding on the reversioners.

We now come to Daulat Ram's appeal. The finding of the learned District Judge is that the whole of the evidence seems insufficient to prove any legal necessity for the sums borrowed by Jit Singh from Daulat Ram. *Prima facie* this appears to us to be a finding of fact and cannot be challenged in second appeal. Counsel, however, has urged that the District Judge has made several mistakes. Rs. 131 out of the consideration of Rs. 1,000 was paid in cash before the Sub-Registrar. The District Judge says there is no evidence as to the legal necessity for this sum. Mr. Balwant Rai refers to the evidence of Ghoka Singh who states that Jit Singh purchased a buffalo from him for this sum and that he was paid by Daulat Ram. This evidence appears to have been overlooked by the District Judge but we do not think it is sufficient to vitiate his finding. It is probably quite false; no necessity for this item was mentioned in the deed. There is a concurrent finding by both the Courts that Jit Singh was a man of bad character who squandered his money, who raised Rs. 5,500 in seven years and who had ample property for all his needs. We agree with the lower Courts that under such circumstances it was necessary for the alienee to prove strictly that the various sums advanced by him to Jit Singh were all advanced for valid necessity. The District Judge also says in his judgment that Jit Singh was not cultivating any land for himself. It is urged that there is no admission as to this on the record and Counsel points to a copy of an entry in *Khasra Girdawari* which shows that Jit Singh was cultivating some land in *Kharif* 1909 and *Rabi* 1910. This was subsequent to the mortgage in favour of Daulat Ram. There certainly does not appear to be any admission on the record that Jit Singh did not cultivate any land himself. There is, however, considerable evidence that he went in for trading in cattle, and the probability is that the admission in question was made orally in the Court of the District Judge. We do not think that he would have referred to such an admission had it not been made. In any case even if the District Judge did make a mistake in this respect, we do not think it is such as to vitiate his judgment. Jit Singh owned considerable property the income of which was ample for all his needs. In *Ram Kishen* v. *Musammat Hassi* (2) it was held that if a borrower has squandered his income in extravagance and wanton waste the lender would not be justified in advancing him money for payment of Government revenue and other ordinary expenses of a Zemindar. In the present case Jit Singh apparently spent his income in extravagance and then found it necessary to borrow money from Daulat Ram and others for payment of revenue, for purchase of cattle and for the ordinary needs of a Zemindar. Having regard to what is laid down in this ruling we consider that Daulat Ram is not protected under the circumstances of the present case. It is very easy for a money-lender to show in account books the items borrowed as apparently borrowed for a necessary purpose. Under all the circumstance of the case we do not think it can be said that the finding of the learned District Judge in regard to Daulat Ram's mortgage is in any way contrary to law.

Both appeals accordingly fail and are dismissed with costs.

W. C. A. & N. H.

Appeals dismissed.

(1) 22 M. 209; 8 Ind. Dec. (N. S.) 149.

(2) 39 Ind. Cas. 191; 76 P. R. 1917; 57 P. W. R. 1917.

FAZAL ILAHI v. PRAG NARAIN.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 180 OF 1921.

March 20, 1922.

Present:—Mr. Justice Walsh and Mr. Justice Ryves.

FAZAL ILAHI—PLAINTIFF—APPELLANT

versus

Munshi PRAG NARAIN—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), Sch. II, paras. 5, 17—Reference to arbitration without intervention of Court—Refusal of an arbitrator to act—Right to obtain order of reference from Court—Fresh arbitrator, appointment of.

Where a party goes to arbitration in a case in which if it had refused to do so, an order of reference would have been made under paragraph 17, Schedule II of the Civil Procedure Code, he cannot dispute the right of the other party to obtain from the Court an order of reference under that provision of the Code when a difficulty arises at a later stage of the proceedings which has not been provided for by the parties, as for instance, where one of the arbitrators refuses to act In such a case the Court is competent to appoint under paragraph 5 a fresh arbitrator in place of the one who has declined to act.

Bhagwan Dass v. *Gurdayal*, 64 Ind. Cas. 459; 19 A. L. J. 823, followed.

Bala Pattabhirama Chetti v. *Seetharama Chetti*, 17 M. 498; 6 Ind. Dec (N. S.) 345, referred to.

Ahmad Noor Khan v. *Abdur Rahman Khan*, 54 Ind. Cas. 366; 18 A. L. J. 76; 1 U. P. L. R. (A.) 67, distinguished.

Appeal from an order of the Officiating Subordinate Judge, Allahabad, dated the 19th August 1921.

Dr. *S. M. Sulaiman* and Mr. *Iqbal Ahmad*, for the Appellant.

The Hon'ble Mr. *N. P. Asthana*, for the Respondent.

JUDGMENT.—In this case an order of reference outside the Court was made to two arbitrators and an umpire. Both the arbitrators being Vakils of this Court and the umpire being a Barrister formerly of this Court. No order of reference was found necessary or was in fact obtained under paragraph 17 of the Second Schedule. We do not know why, but presumably because the parties were reasonable men of business and they did not consider it necessary to waste time and money in obtaining an order when they were entirely agreed about the procedure. The arbitration was begun but unfortunately it fell through owing to one of the arbitrators declining to act. Whereupon the present appellant applied to the Subordinate Judge of Allahabad for an order of reference under paragraph 17, and for an order under paragraph 5 appointing an arbitrator in the place of the Vakil who had retired. The learned Judge took a very narrow view of the matter. He held that he was unable to appoint a fresh arbitrator, because there was no provision to that effect in the deed of agreement, and that it was not proposed to appoint any body who was specifically named in that deed of agreement. If it were necessary we should be prepared to hold that the words in paragraph 17, sub-clause (4) (which enables a Court to make an order of reference to a particular arbitrator at the time of filing the reference) "if there is no such provision and the parties cannot agree," covers a case, where there has been a provision for a particular arbitrator who is either dead or retired. If he has died or refused to act, it is as though there were no provisions, but apart from that we think that the case is entirely covered by the decision in the rather curious case of *Bhagwan Dass* v. *Gurdayal* (1), and particularly by the principle laid down in that case which we entirely endorse: "where a party has gone to arbitration in a case in which if it had refused to go to arbitration an order of reference would have been made under paragraph 17, it is too late for him, when a difficulty arises at a later stage of the proceedings which has not been provided for unless an order of reference has been made, to dispute the right of his opponent to obtain an order of reference under paragraph 17." The decision in the case of *Bala Pattabhirama Chetti* v. *Seetharama Chetti* (2) really supports the appellant, although the learned Judge did not seem to think it applicable, and the decision which he followed, namely the case of *Ahmad Noor Khan* v. *Abdur Rahman Khan* (3) to which a member of this Bench was a party and which both of us endorse, has nothing whatever to do with the question raised in this case. The appeal must be allowed with costs and the matter sent back to the Subordinate Judge with directions to file the

(1) 64 Ind. Cas. 459; 19 A. L. J. 823.
(2) 17 M. 498; 6 Ind. Dec. (N. S.) 345.
(3) 54 Ind. Cas. 366; 18 A. L. J. 76; 1 U. P. L. R. (A.) 67.

agreement of reference and to proceed with the appointment of the arbitrator in accordance with the provisions of the Schedule.

N. H. *Appeal allowed.*

LAHORE HIGH COURT.

LETTERS PATENT APPEAL No. 130 OF 1920.
February 18, 1921.

Present:—Mr. Justice Leslie-Jones and Mr. Justice Broadway.

KAKA SINGH—JUDGMENT-DEBTOR—APPELLANT

versus

LACHHMAN DAS—DECREE-HOLDER—RESPONDENT.

Decree, construction of—Execution of decree—Court, duty of.

T. and *L* brought pre-emption suits. The Court passed decrees in favour of both. *T.* was held to have the prior right to pre-empt and was directed to pay the price of the property in suit within a specified time and get possession. If he failed his suit was to stand dismissed. The decree in favour of *L.* stated that on *T.*'s default, he should get possession on making the required payment, and the vendee should pay him the costs of the suit. *T.* paid the amount and obtained possession. *L.* sued out execution for costs :—

Held, that the terms of the decree were quite clear and that under it the payment of costs to *L.* was made conditional on his being able to act on the decree and obtain possession. [p. 741, col. 1.]

Obiter—It is the duty of a Court executing a decree to look, in the first instance, at the decree, and if the terms of the decree are clear and unambiguous, the Court is bound to give effect to it, even though it may regard its provisions as erroneous. [p. 740, col. 2.]

Letters Patent Appeal from the order passed by Mr. Justice Scott-Smith, on the 10th June 1920, in Civil Appeal No. 447 of 1920.

Messrs. *B. P. Khosla* and *Ghulam Rasul*, for the Appellant.

Lala *Amar Nath Chona*, for the Respondent.

JUDGMENT.—This is an appeal under clause 10 of the Letters Patent against a judgment of Scott-Smith, J.

The facts are briefly these. Kaka Singh purchased a half share in a house from Mangal Sain. On the 25th July 1918 Lachhman Das filed a suit for pre-emption and on the 31st July 1918 Tahl Das filed a similar suit. Kaka Singh did not enter an appearance and *ex parte* decrees were passed in favour of the pre-emptors. Tahl Das was held to have the prior right to pre-empt and was directed to pay the sum of Rs. 1,000 into Court within one month and a failure on his part to make this payment was to result in his suit being dismissed. In the event of Tahl Das not making the payment, it was ordered that Lachhman Das was to be entitled to get possession of the house on payment of the said sum of Rs. 1,000 within one month from the date of Tahl Das's default. The judgment of the Court passing these decrees concluded with a direction that the vendee was to pay the costs of the pre-emptors. Tahl Das paid up the Rs. 1,000 within the prescribed period and obtained possession of the property. The decree in favour of Lachhman Das, therefore, became ineffective. He, however, sued out execution for costs which he claimed had been decreed to him whether or not Tahl Das made a default in payment of the Rs. 1,000. The Courts below held that Lachhman Das was entitled to the costs, and in coming to this conclusion the judgment in the cases of pre emption has been relied on. It is, however, the duty of an Executing Court to look, in the first instance, at the decree and if the terms of the decree are clear and unambiguous, an Executing Court is bound to give effect to it, even, though it may regard it as erroneous. This principle has been correctly laid down by the learned Judge in Chambers and is not attacked in the appeal before us. Mr. Beni Parshad Khosla for the appellant, however, contends that the decree under consideration is perfectly clear and unambiguous. Mr. Amar Nath Chona for the respondent agrees that this is so. The decree is in the following terms :—

Bagair hazri mudda alaih mushtri pesh hua. Hukam hua ki yaktarfa hukam hasa ke zariye awwal wali Tahl Das muddai nisf hissa makan mutadawiya boshart adaigi ek hazar rupeya andar ek mah hasil kare. Warna uska dawa kharij tasuwwar hoga, kionke woh pahla digridar hai. Jab Tahl Das ki tarf se waada khilafi howe to Lachhman Das muddai muqadama hasa mustahiq hoga ki phir woh ek mah ke andar ek hazar rupeya dakhil karke digri dakhal nisf hissa makan mutadawiya hasil kare aur mablagh yak sad rupeya athh anna muddaialaih mudai ko ada kare.

MAFIZUDDIN v. MOHAMMAD ISLAM.

It seems to us that the terms of this decree are quite clear and that under it the payment of costs to Lachhman Das was made conditional on his being able to act on the decree and obtain possession of the house on payment of the Rs. 1,000, in other words, that just as Lachhman Das's right to get possession of the house was dependent on Tahl Das making a default so was his right to costs dependent on the same default.

We think that this is not only clear but equitable, for Lachhman Das's right to pre-empt was dependent on the failure of Tahl Das to exercise his superior right. We accordingly feel constrained to accept this appeal with costs throughout.

W. C. A. & N. H.

Appeal accepted.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 342 OF 1919.

March 15, 1922.

Present :—Mr. Justice Newbould.

MAFIZUDDIN HOWLADAR—PLAINTIFF—APPELLANT

versus

MOHAMMAD ISLAM CHAUDHURY AND OTHERS—DEFENDANT—RESPONDENTS.

Benamidar—*Suit for recovery of possession*

A *benamidar* can maintain a suit for recovery of possession.

Gur Narayan v. *Sheo Lal Singh*, 49 Ind. Cas. 1; 23 C. W. N. 521, 17 A. L. J. 66; 36 M. L. J. 63; 9 L. W. 335; 1 U. P. L. R. (P. C.) 1; 46 C. 566; 12 Bur. L. T. 122; 46 I. A. 1 (P. C.), followed.

Appeal against a decree of the Subordinate Judge, First Court, Backergunj, dated the 27th of November 1918, reversing that of the Munsif, Fourth Court at Barisal, dated the 31st of July 1917.

FACTS appear from the judgment.

Dr. *Sarat Chandra Basak* (with him Babu *Suresh Chandra Talukdar*), for the Appellant.—The lower Appellate Court dismissed my suit on having come to a decision on the question of *benami* to that of the first Court. In this the lower Appellate Court has clearly erred. It has been held that a *benamidar* can maintain a suit for recovery of possession and so my suit should not have been dismissed. Reference may be made to *Gur Narayan* v. *Sheo Lal Singh* (1).

Babus *Gunada Charan Sen* and *Biraj Mohan Mazumdar*, for the Respondent, did not oppose but submitted that the beneficial owner might be added as a party at the hearing of the case.

Dr. *Sarat Chandra Basak* not called upon to reply.

JUDGMENT.—The plaintiff brought this suit for establishment of his title to the disputed land and recovery of *khas* possession of it claiming as auction-purchaser at a revenue sale.

One of the pleas taken in defence was that the plaintiff was a *benamidar*. The first Court decided this issue and the other issues raised in the plaintiff's favour and granted him a decree. On appeal the lower Appellate Court came to a contrary decision on the issue of *benami* and on that ground alone dismissed the suit. It has been held, however, by the Judicial Committee of the Privy Council in the case of *Gur Narayan* v. *Sheo Lal Singh* (1) that a *benamidar* can maintain a suit for recovery of possession. The lower Appellate Court having dismissed the suit solely on the finding that the plaintiff as a mere *benamidar* cannot maintain the suit, his judgment must be reversed and the case remanded to him for the decision of the other issues that arise in the case.

The learned Vakil for the respondent does not dispute the contention now raised on behalf of the plaintiff-appellant but asks that at the re-hearing of the appeal the beneficial owner may also be made a party. I can make no order in this matter when the beneficial owner is not before me. It will be open to him to make such an application in the lower Appellate Court.

The appeal is accordingly decreed and the judgment and decree of the lower Appellate Court are set aside and the case remanded to that Court for re-hearing and decision according to law.

The appellant is entitled to a refund of the Court fee paid on the memorandum of appeal under section 13 of the Court Fees Act.

The parties will bear their own costs of this appeal.

B. N.

Appeal decreed.

(1) 49 Ind. Cas. 1; 23 C. W. N. 521; 17 A. L. J. 66; 36 M. L. J. 63; 9 L. W. 335; 1 U. P. L. R. (P. C.) 1; 46 C. 566; 12 Bur. L. T. 122; 46 I. A. 1 (P. C.).

LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 780 OF 1921.
November 30, 1921.
Present:—Mr. Justice Harrison.

THE LAHORE ELECTRIC SUPPLY Co., LTD.—DEFENDANT—PETITIONER

versus

THE BOMBAY MOTOR AND CYCLE Co. LAHORE—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 115, O. XXXIX, r. 2—Temporary injunction, nature of—Interlocutory injunction—Revision.

An injunction under r. 2 of O. XXXIX of the Civil Procedure Code whether it is one restraining a party from altering the position of affairs or directing it to restore the conditions which prevailed at the time the cause of action arose, must not go further and must not create totally new state of things. [p. 743, col 2.]

Rasul Karim v. *Pirbhai Amirbhai*, 24 Ind. Cas. 625; 38 B. 381: 16 Bom. L. R. 288, referred to.

Whether or no an injunction in mandatory form or a "true" injunction in mandatory form is within the scope of O. XXXIX, it never is if it creates a totally new set of conditions. [p. 744, col. 1.]

In revisions the question of substantial justice arises more truly when a case has been decided and where the High Court is of opinion that any technical error, which might have been urged in an ordinary appeal, is not a sufficient reason for interference in revision unless injustice has been caused thereby or the petitioners have been prejudiced. [p. 742, col. 2.]

Petition, under section 44 of Act VI of 1918, for revision of an order of the District Judge, Lahore, dated the 2nd November 1921, reversing that of the Subordinate Judge, First Class, Lahore, dated the 1st July 1921.

Lala *Durga Das*, for the Petitioner.
Mr. *Jai Gopal Sethi*, for the Respondent.

JUDGMENT.—The Bombay Motor and Cycle Company instituted a suit against the Lahore Electric Supply Company for specific performance of a contract, which they allege to have been made for the supply of electric power to their new premises in Lahore. While the suit was proceeding the plaintiffs applied to the Subordinate Judge for a mandatory injunction under O. XXXIX, r. 2 directing the defendants to make the necessary connection and to supply the power at once. This the Sub-Judge refused to do and on appeal the District Judge passed an interlocutory temporary mandatory injunction directing the connection to be made. From that order the Lahore Electric Supply Company has presented this application for revision, which has been very ably argued by Counsel on both sides.

The main contention of the petitioners is that this is not an injunction of the type contemplated in O. XXXIX, r. 2; that not only is it mandatory in form but it does not maintain or restore the *status quo* at the time the cause of action arose. It is urged in addition that the suit does not lie at all and this on the strength of two English rulings. It is contended that where a Statute provides a special penalty for the infringement of the conditions on which a license is given to a public Company, a private individual cannot obtain redress for breach of those conditions by means of an ordinary suit, and Counsel points to section 42 of the Electricity Act and explains that criminal proceedings are at the present moment pending against his client. It appears to me that this second point hardly arises at this stage though it can doubtless be urged in the main case, and what has to be seen is whether the injunction issued does or does not comply with the conditions laid down in O. XXXIX. Counsel for the respondents urges that all that has been done is to restore the *status quo*, that anyhow if the appeal lay to the District Judge there could be no ground for revision, however illegal the order he passed might be, that the misuse of discretion is no ground for interference, and, finally, that substantial justice has been done and that the rulings of this Court lay down that where this is the case the order should be allowed to stand. The question of substantial justice arises more truly when a case has been decided and where the High Court is of opinion that any technical error, which might have been urged in an ordinary appeal, is not a sufficient reason for interference on revision unless injustice has been caused thereby or the petitioners have been prejudiced. Counsel, however, contends that the true test of whether or no an application for revision lies is not the substance of the order but the capacity of the Judge to entertain the appeal in which he has passed such order, or, in other words, that if an original Court refuses to pass an order which it believes to be illegal, on an appeal from such refusal being presented to the District Judge, provided the District Judge be capable of hearing that appeal, the High Court has no power to interfere even if a

wholly illegal order be passed. This goes very much further than any of the rulings which have been quoted, and if it be established that the District Judge has exercised a jurisdiction not vested in him and has acted illegally or with material irregularity, his order must be set aside as laid down in section 115, Civil Procedure Code. The real question is whether this mandatory injunction can be fairly said to maintain or restore the *status quo* at the time the cause of action arose. The position between the parties is that the plaintiff firm addressed the defendants and asked them whether they would be in a position to supply power in the premises to which they contemplated going. The manager replied that subject to certain limitations he would supply the power. Subsequently, the defendant firm alleged that they were unable to comply for various reasons. They stated that the manager had exceeded his authority in giving the assurance and, therefore, declined to carry out the undertaking given by him. The plaintiffs contend that as they had been supplied with power for many years in their old premises, the continuance of that supply in the new premises is tantamount to maintaining the *status quo* existing at the time the alleged default or breach was committed, that they are asking for nothing new and, therefore, the injunction passed complies with the provisions of O. XXXIX. Counsel for the defendants has argued that under no circumstances can a mandatory injunction issue and he relies on the very instructive judgment of Beaman, J., in *Rasul Karim* v. *Pirbhai Amirbhai* (1). As against this there are two Division Bench rulings of Madras and Calcutta to the effect that a mandatory injunction may certainly issue. It is not necessary for me to follow or dissent from any of these rulings and in truth the divergence of opinion is more apparent than real, for Beaman, J. was careful to explain that what he disapproved of and considered illegal was a 'true' mandatory injunction in the sense of a final injunction in mandatory form and not every and any interlocutory order, which it may be more convenient to express in mandatory rather than prohibitory language and which can be worded either way. For instance, in a suit concerning an easement a party asks to have a certain window kept open until the decision of the suit. It is optional to the Court to order the other side to keep the window open or forbid it to close it and the former is not a true mandatory injunction in the sense in which the words are used by Beaman, J., for it is not final. It is also pointed out in that judgment that a great objection to all mandatory injunctions is that it is almost impossible to avoid prejudging thereby the final decision and this more especially in suits for specific performance where it is optional to the Court to order such specific performance or to award damages. If the specific performance has been ordered by an interlocutory injunction it follows almost necessarily that if the plaintiff does succeed, the possibility of awarding damages in the alternative will not even be considered. To this, however, the answer appears to me to be that O. XXXIX does not lay down that a Court must pass an injunction, for full discretion is allowed and I presume that no Court would ever pass an injunction giving the specific relief prayed for in the plaint or any part of it, unless it were satisfied that if the plaintiff were eventually to prove successful, it would decree such specific performance and not pecuniary damages. However, all the authorities are agreed that whether the injunction be one restraining a party from altering the position of affairs or directing it to restore the conditions which prevailed at the time the cause of action arose, that order must not go further and must not create a totally new state of things. Now, this is exactly what the order of the District Judge appears to me to have effected. The premises in which the plaintiffs now carry on business, have never had the connection or the power to which the plaintiffs claim they are entitled. It cannot, therefore, be truly said that an order which compels the defendant firm to connect these premises with the source of supply for the first time restores the pre-existing any more than it maintains the present condition of affairs. The supply of electricity is not like an over-coat which a man can take with him from one house to another and the connection of premises is a definite act, which totally and radically alters the character of those premises in a most im-

(1) 24 Ind. Cas. 625; 38 B. 381; 16 Bom. L. R. 288.

portant particular. It appears to me, therefore, that whether or no an injunction in mandatory form or a "true" injunction in mandatory form is within the scope of O. XXXIX, it certainly never is if it creates a totally new set of conditions.

The learned District Judge appears to have been influenced more especially by the equitable nature of the plaintiffs' claim and the grave difficulty the firm must experience in carrying on business without the necessary supply. Even if it be granted for the sake of argument that the contentions of the plaintiffs are true and that they would not have moved to the new premises had they not believed that they would be given the connection which they required, and that that connection was promised by the manager, and even if it be admitted that it is practically impossible for them to carry on business under the present conditions, no sufficient reason has been made out for the granting of this injunction until the case is concluded and it is proved that the manager had authority to give that promise and to bind the defendant Company. The facts are very nearly as if a plaintiff were to come into Court and say: "I am suing for Rs. 1,000; my claim is good and true and just, I am threatened with bankruptcy for want of this sum of money, and, therefore, I ask for an injunction directing the defendant to pay over this sum until the decision of the suit and I will return it if I lose." In such a case the plaintiff does not pretend that he had the Rs. 1,000 before he instituted the suit but he contends that he is entitled to receive it. So here the plaintiff does not say that the connection which he enjoyed has been taken from him and that it should be restored until the suit be decided, but that an entirely new connection to entirely new premises should be given to him because he is suffering a grievous injury. Under these circumstances, however grievous the injury may be, and however true and just the plaintiffs' claim may finally be shown to be, he cannot be given the relief he seeks until he has proved his case. I find, therefore, that the District Judge has acted without jurisdiction in passing an order which is not covered by O. XXXIX, r. 2, that he has gone beyond the scope of that rule and has acted with material irregularity in doing so and in directing the defendants to establish a totally new set of conditions by what purports to be an interlocutory temporary injunction restoring the state of things which never existed.

I, therefore, accept the revision and set aside the order of the District Judge. The costs of the petitioners-defendants will be paid by the respondents throughout.

Z. K. & S. D. *Revision accepted.*

PATNA HIGH COURT.

LETTERS PATENT APPEAL No. 75 OF 1921.
May 17, 1922.

Present:—Sir Dawson Miller, Kt., Chief Justice, and Justice Sir B. K. Mullick, Kt.

SIR L. E. RALLI AND OTHERS—DEFENDANTS—APPELLANTS

versus

A. H. FORBES—PLAINTIFF—RESPONDENT.

Estoppel, principles of—Lease for building purposes—Presumption of permanency.

Where the owner of a plot of land by his own act or representation creates or induces in the mind of his tenant a mistaken belief that he has a permanent interest in the land and may safely build thereon and the tenant, relying upon the act or representation so made, treats his interest as permanent and incurs expense in building which he would not otherwise have done, the owner cannot afterwards be heard to deny the truth of that which he represented. [p. 749, col. 2]

Estoppel may arise by reason of either a declaration, an act or an omission, but in either case there must be an intention on the part of the person, against whom the estoppel operates, to cause or permit a belief in the mind of another. In the case of a mere omission no such intention can well be imputed unless the true facts are known to the person whose omission is in question, but where there is a deliberate declaration or act

causing or permitting such belief and inducing another to act upon it, it must be presumed that such declaration or act was intended to have its ordinary and natural effect upon the mind and actions of the other party. [p. 750, col. 2.]

Sarat Chunder Dey v. *Gopal Chunder Laha*, 19 I. A. 203; 20 C. 296; 6 Sar P. C. J. 224; 10 Ind. Dec. (N. S.) 201, P. C.) referred to.

Obiter.—Where a lease has been granted for building purposes and no term is specified in the instrument, if the buildings contemplated or in fact erected are of a permanent nature, the presumption is that the interest granted was a permanent one. But no such presumption can outweigh the actual terms of the lease itself. [p. 748, col. 1.]

Letters Patent Appeal against the judgment of Mr. Justice Ross, dated the 19th July 1921, reversing that of the Officiating District Judge, Purneah.

Messrs. *Manuk*, *S. P. Sen*, and *B. N. Mitter*, for the Appellants.

Messrs. *P. K. Sen*, and *L. M. Ganguli*, for the Respondent.

JUDGMENT.

MILLER, C. J.—This is an appeal by the defendants under the Letters Patent from a decision of Mr. Justice Ross, dated the 19th July 1921 setting aside a decree of the lower Appellate Court.

The appellants, Messrs. Ralli Brothers, are merchants carrying on business in Calcutta and other places. The respondent, Mr. A. H. Forbes, is the proprietor of a large estate in the Purnea District of this Province. The appellants are the lessees under the respondent of 4 *bighas* of land on the latter's estate under an instrument dated the 22nd January 1894.

On the 17th September 1917 the respondent instituted this suit as plaintiff claiming to eject the appellants and recover possession of the land. His case is that the lease was a yearly lease and could be terminated by him on giving six months' notice, which was duly given, but the appellants refused to give up possession. It is the appellants' case, first, that the lease was a permanent lease, or, secondly, if the instrument does not bear this interpretation, that they had been induced by the acts and representations of Mr. Forbes to believe that they had a permanent interest in the land and that acting thereon, and in good faith, they had erected permanent buildings on the land and established a business connection at that place at considerable expense and that Mr. Forbes was estopped from denying the truth of the representation. They rely upon the provisions of section 115 of the Evidence Act and the equitable doctrine of estoppel.

The Munsif, before whom the case came for trial, was of opinion that the lease was a permanent one and not a lease from year to year and, further, that Mr. Forbes had induced the appellants to build upon the land at considerable expense by representing that Messrs. Ralli Brothers had a permanent interest and was estopped from denying the truth of the representation.

On appeal the Officiating District Judge affirmed the decree of the Munsif and dismissed the appeal.

A second appeal to this Court was argued before Mr. Justice Ross who was of opinion that the lease created a yearly tenancy only and not a permanent interest in the land. On the question of estoppel the learned Judge held that, as the written lease was plain and unambiguous in its terms, there was no room for mistake and, as the lease was not a permanent one, no statement about it by Mr. Forbes could make it so. He further considered that there was in fact no representation that the lease was a permanent lease and that no opinion expressed by Mr. Forbes could alter the nature of the estate taken under the deed and that there was no estoppel.

From this decision Messrs. Ralli Brothers have appealed under the Letters Patent to this Bench. It is contended on their behalf, first, that the lease in fact grants a permanent interest and, secondly, that upon the facts found by the lower Appellate Court, which cannot be questioned in second appeal, the respondent is estopped from denying the truth of the representation made by him as found by the lower Appellate Court, and that it was not competent for the learned Judge of this Court by his decision to arrive at a different

conclusion of fact and base his decision thereon.

It is necessary, therefore, to consider in some detail the facts alleged by the parties and the conclusions arrived at by the Officiating District Judge in first appeal. The lease in question is dated the 22nd June 1894 and was registered three days later. The lease itself has been put in evidence and the *kabuliyat* executed by Mr. Acatos, the Agent of Messrs. Ralli Brothers, has also been proved and admittedly contains the terms of the lease. It provides as follows :—"That whereas land is required by me Mr. Acatos, Agent of Messrs. Ralli Brothers, Sahebgunge Agency, for the purpose of erecting buildings, putting up press, etc. for trading, I, the aforesaid Agent agree to lease from Mr. A. H. Forbes, executor to the estate of the late A. J. Forbes, 4 *bighas* of land for the above purpose measured with the local rod of 4½ cubits of 18 inches situate in Mauza Pokhar, Pargana Sultanpur, Thana Matiari in the District of Purnea and adjacent to the Forbesgunj Railway Station on the following terms, *viz*, from year to year at an annual rental of Rs. 45 per *bigha* or total rental of Rs. 180 and to pay Zamindari Dak cess as well as all legal cesses payable at present and which may hereafter be enforced by Government beginning from the agricultural year 1302 M. S." The second clause provides for payment of the rental by quarterly instalments. The third clause restricts the tenant from cutting down or selling any trees on the land without the sanction of the lessor under penalty of paying Rs. 10 per tree or more according to the value thereof. The fourth clause provides that if at any future date the area of the land under the lease should be found by measurement to be in excess of the area leased the tenant should pay rent for the excess according to the highest rate then prevailing. The fifth clause provides that the nominal lessee, Mr. Acatos, shall have no right to transfer except to the name of Messrs. Ralli Brothers or to sell any portion of the land without the written authority of the lessor. The sixth and last clause contains the boundaries and dimensions of the land settled.

By section 106 of the Transfer of Property Act, in the absence of a contract or local law or usage to the contrary, the lease of immovable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year terminable by six months' notice by either party. But where a lease has been granted for building purposes, and no term is specified in the instrument, if the buildings contemplated or in fact erected are of a permanent nature, the Courts in this country have generally presumed that the interest granted was intended to be a permanent one. The present lease purports to be a building lease and buildings have in fact been erected of a permanent nature but the terms are stated to be from year to year at an annual rental of Rs. 45 per *bigha*, and some years later, towards the end of 1903, Messrs. Ralli Brothers, although they considered, as was found by the learned District Judge, that they had a permanent interest in the land and might safely erect permanent buildings thereon, nevertheless, owing to a certain vagueness in the terms of the lease, approached the lessor before doing so. Accordingly on the 31st December 1903 an interview took place between Mr. Forbes and his agent, Mr. Duff, on the one hand and Mr. Carras representing Messrs. Ralli Brothers on the other. The purport of what took place at that interview was given in evidence by Mr. Carras and was accepted by the learned Judge. At the request of Mr. Carras the result of what took place at that interview was reduced to writing and is contained in a letter written to Mr. Carras by Mr. Duff the same day. The letter is in these terms :—

Sultanpur,
31 12-1903.

Dear, Mr. Carras,

Referring to your conversation of this morning with Mr. Forbes and myself I write at your request to say that the lease executed by Mr. C. Acatos dated the 22nd June 1894 is a permanent lease and gives you the right to erect buildings but it does not entitle you to hold at a fixed rate and the rent is liable to enhancement after proper legal notice. If your firm desires to have a permanent lease at a fixed rate of rent I will be glad to see the proposed draft of lease and to show it to Mr. Forbes. In the meantime you can commence the house if you like to do so.

Yours sincerely,
(Sd.) PATRIK DUFF,
Manager, Sultanpur Estate.

The evidence of Mr. Carras, which was accepted by the learned District Judge, was to the effect that he wanted to construct a permanent building for his residence on a portion of the leasehold land and, on referring the matter to his principals at Calcutta, was instructed that the point should be made quite clear as to whether the lease was a permanent one or not. He accordingly interviewed Mr. Forbes and his manager Mr. Duff, when a conversation took place between them the substance of which was embodied in the letter of the 31st December. Mr. Duff was not called as a witness. Mr. Forbes, however, was called and apparently denied all recollection of the matter. It was found as a fact that the letter accurately represented the substance of the conversation between Mr. Forbes and his agent and Mr. Carras and that the letter was written under the directions of Mr. Forbes. It appears that at this time Messrs. Ralli Brothers wished to have a permanent lease at a fixed rent and it is clear from the letter that the question whether the rent was fixed or liable to enhancement was discussed at the interview, and the agreement come to was that the lease was permanent but did not entitle the tenant to hold at a fixed rate of rent. It appears further from the Munsif's judgment that a *nazarana* was paid by the lessees in respect of the building which was commenced sometime in January 1904 and completed in May and, from a letter written by Mr. Duff to Messrs. Ralli Brothers' Solicitors on the 23rd January, it appears that before building the lessees had called for the lessor's title-deeds. This latter refuses to produce the title deeds stating that matters of greater importance than the lease of a few *bighas* of land were constantly transacted in the lessor's estate without the production of such papers and that there were no special title-deeds for the plot of land which Messrs. Ralli Brothers had held for the last nine years. It then says: "Mr. Forbes, therefore, declines to produce such valuable papers as he holds and considers that the existing lease with the addition of the sanction recently given to erect the building is sufficient for all requirements." It is found as a fact that the defendants would never have undertaken the construction of a masonry building at such a heavy cost if they had not been led to do so by the representation of the plaintiff and his manager referred to above. It is also found in terms that Mr. Forbes gave Messrs. Ralli Brothers fully to understand that the lease of 1894 was a permanent lease and that they could construct buildings without any fear but had no right to hold the land at a fixed rate. From 1904 till 1916 the appellants remained in occupation paying the rent reserved under the lease. In that year the lessor's Kacheri or estate-house was unfortunately destroyed by fire. He thereupon attempted to levy a toll upon each of his tenants at the rate of 0-1-6 per rupee of their rental for the purpose of re-building the Kacheri. Whether the other tenants of Mr. Forbes submitted without protest to this procedure does not appear, but Messrs. Ralli Brothers definitely refused to contribute their proportion and were undoubtedly within their rights in so doing. This appears to have given offence to Mr. Forbes who in August 1916 served the lessees with notice to quit and subsequently instituted the present suit.

I have referred in some detail to the findings of the Additional District Judge as it is upon these findings that the determination of the question of estoppel must depend. With regard to the appellant's first contention *viz*, that the lease is in fact a permanent one, in my opinion, the decision of Ross, J, now under appeal was right and that of the Additional District Judge cannot be supported. Admitting that a lease granted for the purpose of building permanent structures may be presumed to pass a permanent interest. I do not think that such a presumption can outweigh the actual terms of the lease itself. The lease purports to be from year to year at an annual rental of Rs. 45 per *bigha* and this, in my opinion, can only be construed as granting a lease from year to year even if the lessees have power to build. Certain cases were referred to by the appellants in support of their contention on the first point. The first is that of *Juhooree Lall Sahoo* v. *Mr. H. Dear* (1) but that decision goes no further than this, that where the

(1) 23 W. R. 399.

land is given to a lessee for the purpose of building a house to live in, without any term being fixed for the tenancy, the tenure of the house and land cannot be taken away from the lessee's heir or his vendee as long as he continues to pay the rent. The decision goes no further than to raise a presumption of permanency in the case of building leases where no term is fixed which does not appear to me to be the present case where the term is said to be from year to year. It was contended, however, that the words "year to year at an annual rental of Rs. 45 per *bigha*" meant no more than an undertaking to pay the rent year after year and the case of *Raja Promoda Nath Roy* v. *Sri Govindo Chowdhury* (2) was cited, where it was held that where a lease was given for building purposes the Court may well presume that it was intended to be a perpetual lease. The words used in that instance were: "You will pay the rent, etc. at the above rate *kist* by *kist* year after year" and the following passage in the judgment of Ghose and Bodilly, JJ., was relied upon that even a lease stated to be from year to year might be of a permanent nature: "As already noticed the lease in this case does not specify any period during which it is to subsist. The land was to be held by the lessee from year to year at a certain yearly rent and in the event of a masonry building being erected on it the lessee would be liable to pay the prevailing rate of rent. And it seems to us, looking at the document as a whole, that the absence of the words, *mouruzi mukarrari* and so forth which are usually found in grants in perpetuity does not indicate that it was not the intention of the lessor to grant a permanent lease." If by this the learned Judges meant that the lease was in fact one from year to year the decision eventually arrived at seems hardly consistent with that finding nor were the words from year to year in that part of the judgment a correct reproduction of the words actually used in the lease. I do not think that a chance expression such as that relied upon and which may well have been made *per incuriam* can have any binding force as an authority upon the construction of such leases.

In *Saradu Kripal lla* v. *Akhil Chandra Biswas* (3) the lease which was called a *taluka patta* recited that the tenant had executed a *kabuliyat* in favour of the grantor and that the *taluka patta* was granted on rent of Re. 1 from year to year. Then followed a covenant in these terms:—"You shall erect houses upon the land and live there. If I have a personal necessity you shall relinquish the land and you will not be entitled to make any objection." It was held that if there be nothing either in the surrounding circumstances or in the instrument which creates the interest to show that it was intended to be otherwise, the inference is that a lease described as a *taluka patta* was intended to be permanent. The words in that case "on rent of Rs. 1 from year to year" were clearly taken as indicating merely a yearly rent of one rupee and having no reference to the term demised, and no point appears to have been taken that they could bear any other interpretation. In the present case, however, the words are different and appear to me to indicate both a lease from year to year and an annual rental of Rs. 45. I hold, therefore, that the lease must be construed as a yearly lease. At the same time the cases to which reference has been made may well have raised a doubt in the minds of the parties in this case as to what their exact rights were under the instrument in question and this is not without importance in considering the question of estoppel.

In support of their plea of estoppel the appellants rely upon the case of *Ramsden* v. *Dyson* (4) and contend that on the facts found by the Officiating District Judge the respondent is estopped from denying the permanent nature of their interest. The doctrine is thus expressed by Lord Cranworth, L. C., in that case:—

"If a stranger begins to build on my land supposing it to be his own, and I, perceiving his mistake, abstain from setting him right, and leave him to persevere in his error, a Court of Equity will not allow me afterwards to assert my title to the land on which he had expended money on the supposition that the land was his own. It considers that, when I saw the mistake into which he had fallen, it was my duty

(2) 9 C. W. N. 463; 32 C. 648.

(3) 41 Ind. Cas. 530; 28 C. L. J. 18; 21 C. W. N. 903.

(4) (1866) 1 H. L. 129; 12 Jur. (N. S.) 506; 14 W. R. 926; 149 R. R. 543.

to be active and to state my adverse title; and that it would be dishonest in me to remain wilfully passive on such an occasion, in order afterwards to profit by the mistake which I might have prevented.

But it will be observed that to raise such an equity two things are required, first, that the person expending the money supposes himself to be building on his own land; and, secondly, that the real owner at the time of the expenditure knows that the land belongs to him and not to the person expending the money in the belief that he is the owner. For if a stranger builds on my land knowing it to be mine, there is no principle of equity which would prevent my claiming the land with the benefit of all the expenditure made on it. There would be nothing in my conduct, active or passive, making it inequitable in me to assert my legal rights."

The respondent, on the other hand, contends that on the facts found the case is not governed by the principle there enunciated. The Lord Chancellor in thus stating the principle deals only with the case where the owner of the land takes no active part in inducing the tenant to build or encouraging him in the mistaken idea that he has a right to do so, but merely remains passive whilst he perceives the mistake. The reason why Courts of Equity refuse to allow the owner of land to profit by such a mistake rests upon the ground that it would be conniving at dishonesty to permit him to do so. But in the case supposed where the owner merely stands by and does nothing, and afterwards seeks to eject the tenant there can be no question of fraud or dishonesty unless the owner was aware when the building was erected that he had power to prevent it. In such a case there could be no obligation or duty upon him to disclose that of which he was not himself aware, and it is the attempt to take advantage of this breach of duty or obligation which constitutes the dishonesty. Similarly, if the tenant is aware that he has no right to build, there is no obligation upon the owner to inform him of that which he already knows, nor would it make any difference in such a case that the owner was well aware of his own rights. The knowledge of the owner as to his power to interfere is, therefore, essential where his conduct is merely passive and he takes no active steps to create or induce a mistaken belief in the mind of the tenant as to the latter's rights, or as to his own acquiescence in or consent to the trespass. Lord Cranworth, L. C., did not in terms formulate any principle indicating the factors which would be necessary for the application of the doctrine where the owner by his own words or acts intentionally caused the tenant to believe that he was entitled to build or induced him to do so. But I apprehend that where the owner, being either ignorant of his rights or uncertain of their extent, by his own act or representation creates or induces in the mind of his tenant a mistaken belief that he has a permanent interest in the land and may safely build thereon, and the tenant, relying upon the act or representation so made, treats his interest as permanent and incurs expense in building, which he would not otherwise have done, the owner cannot afterwards be heard to deny the truth of that which he represented. To allow him to do so would, in my opinion, be opposed to the fundamental principles of the doctrine of estoppel. For just as in the former case the rightful owner must be deemed guilty of a dishonest act if knowing an innocent mistake has been committed he omits to correct it and afterwards seeks to take advantage of it, so, in the latter case if he actively assists in creating the mistaken belief in the mind of his tenant which the tenant acts upon in good faith, it would be contrary to honest dealing if the landlord were afterwards to go back upon his word, however, innocent his conduct may have been in the first instance.

The facts found by the majority of their Lordships in *Ramsden* v. *Dyson* (4) did not bring the case within the doctrine, but Lord Kingsdown who took a different view of the facts enunciated the rule thus:—

"The rule of law applicable to the case appears to me to be this: If a man, under a verbal agreement with a landlord for a certain interest in land, or, what amounts to the same thing, under an expectation, created or encouraged by the landlord, that he shall have a certain interest, takes possession of such land, with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord and without objection

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by him, lays out money upon the land, a Court of Equity will compel the landlord to give effect to such promise or expectation. This was the principle of the decision in *Gregory* v. *Mighell* (5) and, as I conceive, is open to no doubt."

Although Lord Kingsdown differed from the majority of their Lordships in his appreciation of the evidence, his decision as to the principle to be applied has not, so far as I am aware, ever been questioned. It was referred to by Sir Lawrence Jenkins, C. J., in the *Municipal Corporation of Bombay* v. *Secretary of State for India* (6) as a correct exposition of the doctrine and was applied in that case. Moreover, the application of the doctrine of estoppel in this country, in so far as it creates a rule of evidence, is governed by Statute and finds expression in section 115 of the Evidence Act. Whether there be, as stated by Sir Lawrence Jenkins, C. J., in that case, essential differences between the law embodied in the section and the equitable doctrine referred to, I do not propose to discuss, for full effect must be given in this country to the rule enacted by the section, which appears to me to do no more than embody in a compendious form the result of the principles laid down in the decided cases. It is unnecessary, therefore, to refer in detail to all the English authorities which were referred to in argument. Section 115 of the Evidence Act provides as follows :—

"When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing."

It will be observed from the wording of this section that it combines the principles underlying the doctrine of estoppel as enunciated both by Lord Cranworth, L. C., and Lord Kingsdown in *Ramsden* v. *Dyson* (4). The estoppel may arise by reason of either a declaration, an act or an omission, but in either case there must be an intention on the part of the person against whom the estoppel operates to cause or permit a belief in the mind of another. In the case of a mere omission no such intention can well be imputed unless the true facts are known to the person whose omission is in question, but where there is a deliberate declaration or act causing or permitting such belief and inducing another to act upon it, it must be presumed that such declaration or act was intended to have its ordinary and natural effect upon the mind and actions of the other party. In considering the effect of this section I cannot do better than refer to the case of *Sarat Chunder Dey* v. *Gopal Chunder Laha* (7) where Lord Shand in delivering the judgment of their Lordships of the Judicial Committee dealing with the case of a declaration or act observed :—

"In regard to the first of these points, the section of the Evidence Act by which the question must be determined does not make it a condition of estoppel resulting that the person who by his declaration or act has induced the belief on which another has acted was either committing or seeking to commit a fraud, or that he was acting with a full knowledge of the circumstances, and under no mistake or misapprehension. The Court is not warranted or entitled to add any such qualifying conditions to the language of the Act; but even if they had the power of thus virtually interpolating words in the Statute which are not to be found there, their Lordships are clearly of opinion that there is neither principle nor authority for any such legal doctrine as would warrant this. The learned Counsel who argued the present case on either side were agreed that the terms of the Indian Evidence Act did not enact as law in India anything different from the law of England on the subject of estoppel, and their Lordships entirely adopt that view. The law of this country gives no countenance to the doctrine that in order to create estoppel the person whose acts or declarations induced another to act in a particular way must have been under no mistake himself, or must have acted with an intention to mislead or deceive. What the law and the Indian Statute mainly regard is the

(5) (1811) 18 Ves. 328; 11 R. R. 207; 34 E. R. 341.
(6) 29 B. 580; 7 Bom. L. R. 27.

(7) 19 I. A. 203; 20 C. 296; 6 Sar. P. C. J. 224; 10 Ind. Dec. (N. S.) 201 (P. C.)

position of the person who was induced to act; and the principle on which the law and the Statute rest is, that it would be most inequitable and unjust to him that if another by a representation made, or by conduct amounting to a represention, has induced him to act as he would not otherwise have done, the person who made the representation should be allowed to deny or repudiate the effect of his former statement, to the loss and injury of the person who acted on it. If the person who made the statement did so without full knowledge, or under error, *sibi imputet*, it may in the result be unfortunate for him, but it would be unjust, even though he acted under error, to throw the consequences on the person who believed his statement and acted on it as it was intended he should do."

The judgment from which I have just quoted contains a forcible and lucid exposition of the law of estoppel as administered in India and based upon the Statute. Upon the facts found by the lower Appellate Court the present case appears to me to come directly within the four corners of the principle as enunciated by Lord Shaw.

It is contended on behalf of the respondent, however, that the terms of the lease are so clear that there can be no room for mistake, and that Messrs. Ralli Brothers could never have been deceived as to their actual rights by any representation made by Mr. Forbes. It is further argued that the representation was at most a mere expression of opinion upon which Messrs. Ralli Brothers might act or not at their own risk. This appears to have been the view taken by Ross, J., in the decision now under appeal. The learned Judge also appears to have considered that there was no representation at all of any existing fact, and, as I read his judgment, he arrived at this conclusion by finding that the representation such as it was was a mere expression of opinion, or, at most of the landlord's present intention. In face of the express findings I must respectfully decline to speculate as to whether a person of reasonable intelligence could honestly believe the instrument created more than a yearly interest. It is found as a fact that Messrs. Ralli Brothers thought that they had a permanent interest but that the terms of the lease were vague and indefinite, and they, therefore, had a doubt, and wanted it cleared up before committing themselves to building. I think that is a fair inference to be drawn from the findings as a whole. In these circumstances they approached the lessor who definitely declared that the lease was a permanent one and gave the lessees the right to erect buildings. By so acting the lessor dissipated any doubt that remained in the mind of his lessees and induced them to spend money in building which, it is found, they never would have done but for the representation made. The suggestion that the representation was a mere expression of opinion was argued before the Officiating District Judge but was rejected by him and, in my opinion, rightly. The finding of the Officiating District Judge who had the evidence before him is conclusive on this question of fact and it could not be re-opened in second appeal.

The case of *Jorden* v. *Money* (8) was also referred to in argument and relied on by the respondent. From the facts found in that case it would appear that the representations relied upon were taken to amount merely to an expression of present intention by Mrs. Jordon which created no estoppel fettering her future conduct or preventing that lady from changing her mind. It was found that she never agreed to give up her legal rights but merely intimated that she had no present intention of enforcing them, and any one who speculated upon the slender chances of a lady remaining of the same mind could not afterwards complain if his venture turned out unprofitable. The representation may well have been true as to the state of affairs existing at the time it was made, and it was nonetheless true because subsequently Mrs. Jordon's intention altered. The representation in the present case cannot be regarded as the mere expression of an intention. It is in the nature of a declaration of the tenant's rights and a direct invitation to them to act upon it which in consequence they did.

It was further contended by the learned Counsel for the respondent that the proper course, if our judgment should be against him on the point of estoppel, was to grant him a decree of ejectment giving the appellants compensation for the sums expended by them on the buildings. In my opinion no reason

(8) (1854) 5 H. L. C. 185; 23 L. J. Ch. 865; 101 R. R. 116; 10 E. R. 865.

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has been shown why this course should be adopted and it is manifest that the mere cost of building would not adequately compensate the appellants for the loss of the land in connection with which after erecting permanent structures at considerable expense they have established a large business connection. In my opinion the proper course to follow is to dismiss the plaintiff's claim. I would allow this appeal and dismiss the suit with costs here and in the Courts below.

MULLICK, J.—I agree.

Appeal allowed.

N. K.

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No. 1088 OF 1921.

November 12, 1921.

Present:—Mr. Justice Broadway.

NAND LAL—JUDGMENT-DEBTOR—APPELLANT

versus

TOLA RAM—DECREE-HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 90—Execution of decree—Sale not proclaimed by beat of drum—Paucity of bidders—Irregularity.

Where owing to the failure of the decree-holder to deposit the necessary charges, an execution sale is not properly announced and the omission results in a paucity of bidders, the irregularity must be taken to have caused substantial injury to the judgment-debtor and the sale will be set aside on that ground.

Surno Moyee Debi v. *Dakhina Ranjan*, 24 C. 291; 12 Ind. Dec. (N. S.) 861, relied upon.

Ramaswamy Chetty v. *Ma U. Tha*, 38 Ind. Cas. 98; 11 Bur. L. T. 40, referred to.

Miscellaneous first appeal from an order of the District Judge, Dera Ghazi Khan, dated the 21st January 1921.

Lala *Jagan Nath*, for the Appellant.

Mr. *Kanwar Narain*, for the Respondent.

JUDGMENT.—For details of the facts leading to this appeal my judgment in Miscellaneous Civil Appeal No. 1436 of 1921, dated 12th November 1921, may be consulted. This appeal relates to an objection by Nand Lal that the sale attacked should be set aside on the ground of irregularities. Mr. Kanwar Narain has admitted that the following irregularities took place:—

(*i*) omission to announce sale by beat of drum;

(*ii*) all the judgment debtors were not personally served.

He, however, contended that under the proviso to r. 90 of O. XXI, Civil Procedure Code, such irregularities must be regarded as immaterial unless the objector can show that he has sustained substantial injury by reason of them.

Mr. Jagan Nath referred to the report of the Civil Nazir (Khuda Bakhsh) who conducted the sale and urged that this report showed beyond doubt that substantial injury had been caused by these irregularities. This report is dated 17th November 1920 and shows that the bidders were less than they might have been owing to the failure to announce the sale by beat of drum—an omission due to the refusal on the part of the decree-holder to pay the requisite fees.

In *Ramaswamy Chetty* v. *Ma U Tha* (1) it was held that omission to give notice to the judgment-debtors of an execution sale of their property is fatal.

In *Surno Moyee Debi* v. *Dakhina Ranjan* (2) it was held that the sale of property for an inadequate price due to the paucity of bidders by reason of an irregularity in the proceedings showed that the injury was a necessary result of the irregularity.

In the present case the paucity of bidders was due (according to Khuda Bakhsh whom I see no reason to disbelieve) to the irregularity in not announcing the sale by beat of drum, and the failure to do this was due to the omission on the part of the decree-holder to pay the necessary charges.

Though the omission to serve the other judgment debtors may be disregarded, (for Nand Lal, the objector, was served). I do not think I can overlook the other irregularity which is material and which I consider resulted in an injury to appellant.

I accordingly accept this appeal with costs and setting aside the sale direct that the property be re-sold in accordance with law.

Z. K. *Appeal accepted.*

(1) 38 Ind. Cas. 98; 11 Bur. L. T. 40.

(2) 24 C. 291; 12 Ind. Dec. (N. S.) 861.

RAM DAS v. NETTO.

LAHORE HIGH COURT.

MISCELLANEOUS SECOND CIVIL APPEAL No. 1451 OF 1921.

February 20, 1922.

Present:—Mr. Justice Broadway.

RAM DAS—PLAINTIFF—APPELLANT,

versus

S. P. NETTO—DEFENDANT—RESPONDENT.

Execution of decree—Executing Court, duty of—Court cannot go behind decree—Civil Procedure Code (Act V of 1908), s. 47—Questions under s. 47 must have reference to matters subsequent to decree.

A Court executing a decree must take the decree as it stands. It has no power to go behind the decree, in other words, it cannot entertain any objection as to the legality or correctness of the decree, the reason being that a decree though it may not be according to law, is binding and conclusive between the parties, if it is not appealed from. [p. 753, col. 2; p. 754, col. 1.]

Questions under section 47, Civil Procedure Code, relating to the execution of a decree and arising between the parties to a suit in which the decree was passed or their representatives, must be such as have reference to matters arising subsequent to the passing of the decree and not antecedent to it. [p. 754, col. 1.]

Chhoti Narain Singh v. *Rameshwar Koer*, 6 C. W. N. 796, referred to.

Lakhmiram Kevalram Bhatt v. *Punamchand Pitamber*, 59 Ind. Cas. 444; 45 B. 550; 22 Bom. L. R. 1178, distinguished.

Plaintiff obtained an *ex parte* decree against defendant. In execution the defendant objected that the decree could not be executed inasmuch as the claim upon which the decree was based had been satisfied by an order of discharge passed in certain insolvency proceedings:

Held, that this objection should have been taken as a defence to the suit and could not be entertained in execution, inasmuch as the executing Court had no power to go behind or question the legality of the decree. [p. 754, cols. 1 & 2.]

Appeal against a decree of the District Judge, Lahore, dated the 26th April 1921, confirming that of the Senior Sub Judge, Lahore, dated the 3rd July 1920.

Mr. *Carden Noad* and Lala *Harbhajan Das*, for the Appellant.

Mr. *M. Obedullah*, for the Respondent.

JUDGMENT.—This is a miscellaneous second appeal from the appellate decision of the District Judge, Lahore, passed in certain execution proceedings. On the 8th of April 1911 the respondent, S. P. Netto, and two others executed a pro-note in favour of the appellant Ram Das. It appears that on the 18th July 1911 S. P. Netto filed a petition in insolvency in the High Court of Bombay and obtained his discharge from that Court on the 1st of November 1911. In the schedule of creditors S. P. Netto showed Ram Das as being entitled to a sum of Rs. 500 and another sum of Rs. 50. On the 24th of September 1912 Netto filed a second petition in insolvency also in the Bombay High Court and obtained his discharge on the 16th of June 1915. Ram Das's name was not entered as one of the creditors in the second insolvency proceedings.

On the 16th of January 1917 Ram Das instituted a suit against S. P. Netto and two others on the pro note dated 8th April 1911 and obtained an *ex parte* decree against S. P. Netto alone on the 2nd of May 1917. On the 14th of January 1920 Ram Das applied for execution of the decree by attachment of S.P. Netto's pay. S.P. Netto then pleaded that his pay could not be attached in execution of this decree inasmuch as the claim on which the decree was based had been satisfied by the orders of discharge made by the Bombay High Court on the 1st of November 1911 and again on the 16th of June 1915. Ram Das pleaded that he knew nothing of the insolvency proceedings which took place in Bombay and that the debt due under the pro-note sued upon had not been included in the schedule. The Courts below have held that inasmuch as the order discharging S. P. Netto amounted to satisfaction of all the debts entered in the schedule the decree in question could not be executed. Ram Das has now come up to this Court in second appeal and on his behalf I have heard Mr. Carden Noad while Mr. Obedullah has addressed me on behalf of the respondent, S. P. Netto.

It has been contended that the Courts below have erred in going behind the decree and that the objection now taken by S. P. Netto could not be given effect to in execution proceedings. Mr. Carden Noad admitted, for the purposes of argument, that had S. P. Netto raised this plea in the suit itself it would have concluded the matter but he contended that as S. P. Netto allowed the suit to be decreed, all that the Courts had to do was to execute the decree and that they were not concerned with the question whether the decree was a good or a bad one. As pointed out by Mulla in his Commentary on the Civil Procedure Code, 7th Edition, page 114, the Court executing a decree must take the decree

as it stands. It has no power to go behind the decree, in other words, it cannot entertain any objections to the legality or correctness of the decree, the reason being that a decree, though it may not be according to law, is binding and conclusive between the parties, if it is not appealed from. In *Chhoti Narain Singh* v. *Rameshwar Kosr* (1) it was held that questions under section 47, relating to the execution of a decree and arising between the parties to a suit in which the decree was passed or their respresentatives, must be such as have reference to matters arising subsequent to the passing of the decree and not antecedent to it. In the present case the plea raised appears to me to amount to a plea that the decree had been satisfied. Indeed if I understood Mr. Obedullah aright, what he contended was that the satisfaction alleged was based on the orders of discharge by the Bombay High Court. Whichever order be relied on neither of them can be held to have discharged the *debt due under the decree*, and it was the execution of the decree that the Courts below were concerned with. I do not think that they had any power to go into the question whether the decree had been rightly and legally passed. Mr. Obedullah referred to *Lakhmiram Kevalram Bhatt* v. *Punamchand Pitamber* (2) but that case is distinguishable from the present one in that there the question before the Court was whether an injunction should issue staying proceedings in a foreign Court. At page 155* the learned Judges say that no doubt the point for argument before the learned Judge was whether the order of discharge is a complete release or not from the debts mentioned in the schedule. Such an order no doubt would be recognised by all Courts in the British Empire. It seems to me, however, that those remarks must be confined to a plea raised in defence of a suit based on a claim to which an order of discharge related. Had S. P. Netto defended the suit on the pro note and advanced this plea in all probability the plea would have been given effect to and the suit dismissed. He, however, allowed the case to go *ex parte* with the result that the claim was decreed and the mere fact that the claim itself ought not to have been decreed inasmuch as it had been discharged by Statute, would not, I think, be sufficient to empower a Court to refuse execution of the decree when passed. Take the case of a suit based on a claim which owing to the efflux of time had become barred. Suppose the defendant failed to appear and thus did not raise the plea of limitation with the result that the claim was decreed. Could the jungment-debtor when the decree-holders ought to execute that decree ask the executing Court to refuse execution on the ground that, as a matter of fact, the claim was barred and the decree should not have been passed. The answer must, I think, be in the negative. The present situation is very similar and, in my opinion, the Courts below were not empowered to go into the question whether the decree ought or ought not to have been passed. The decree-holder went into Court seeking to get his decree executed and I am of opinion that he was entitled to the assistance of the Court.

In these circumstances I accept this appeal with costs and direct the execution to proceed.

Z. K. & S. D. *Appeal accepted.*

(1) 6 C. W. N. 756.
(2) 59 Ind. Cas. 444; 45 B. 550; 22 Bom. L. R. 1173.

*Page of 45 B.—[*Ed.*]

BOMBAY HIGH COURT.
SECOND CIVIL APPEAL No. 600 OF 1921.
March 23, 1922.
Present :—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Kanga.

PURSHOTTAM VITHALDAS SHET—PLAINTIFF—APPELLANT
versus
RAVJI HARI ATHAVLE—DEFENDANT RESPONDENT.

Malicious prosecution—Suit for damages by discharged person—Limitation Act (IX of 1908), Sch I, Art. 23—Discharge, whether "termination" of prosecution—Cause of action—Revision application, effect of.

The discharge of an accused person is the termination of the prosecution, within the meaning of Art. 23 of Schedule I to the Limitation Act, because if no further proceedings are taken, the accused person is free of the charge made against him

The cause of action for a suit for damages for malicious prosecution instituted by a person discharged of an offence would arise immediately on

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his being discharged, and would not be suspended because further proceedings might be taken either by Government or by the complainant in order to get the order of discharge set aside; if a revisional application is successful and the criminal proceedings are directed to be continued, then there is no longer any cause of action, because the plaintiff is no longer a discharged person, and he has to wait until the prosecution terminates in his favour before his cause of action arises again.

Venu v. *Coorya Narayan*, 6 B. 376; 6 Ind. Jur. 535; Chitty's S. C. C. R. 106; 3 Ind. Dec. (N. S.) 706, followed.

Narayya v. *Seshayya*, 23 M. 24; 8 Ind. Dec. (N. S.) 411, referred to.

Second appeal from the decision of the District Judge Thana, in Appeal No. 46 of 1921, confirming the decree passed by the Subordinate Judge at Alibag, in Civil Suit No. 105 of 19 0.

Mr. *P. B. Shingne*, for the Appellant.

Mr. *G. N. Thakor*, for *Solomon Moses*, for the Respondent.

JUDGMENT.—The only question in this appeal is when did time begin to run against the plaintiff who had filed this suit for damages for malicious prosecution. The period of limitation is one year from the time when the plaintiff is acquitted, or the prosecution is otherwise terminated. In this case the plaintiff was discharged more than a year prior to the suit, and clearly his cause of action would arise immediately on his being discharged, and would not be suspended because further proceedings might be taken either by Government or by the complainant in order to get the order of discharge set aside. No doubt if a revisional application is successful and the criminal proceedings are directed to be continued, then there is no longer any cause of action, because the plaintiff is no longer a discharged person and he has to wait until the prosecution terminates in his favour before his cause of action arises again. It was held in *Venu* v. *Coorya Narayan* (1) that the discharge of an accused person is the termination of the prosecution. That seems obvious, because if no further proceedings are taken, the accused person is free of the charge made against him, and if the charge was maliciously made he would have a right of bringing an action against the person who instituted it. Then in *Narayya* v. *Seshayya* (2) it was held that a suit for damages for malicious prosecution brought more than one year from the date of the plaintiff's acquittal, but within a year from the dismissal of a revision petition which had been filed against the acquittal, was barred under Article 23. The only difference between that case and this is that the plaintiff in that case was acquitted instead of being discharged. The result must be that the lower Courts were right in holding that the plaintiff's suit was barred. The appeal will be dismissed with costs.

S. D.

Appeal dismissed.

(1) 6 B. 376; 6 Ind. Jur. 535; Chitty's S. C. C. R. 106; 3 Ind. Dec. (N. S.) 706.

(2) 23 M. 24; 8 Ind. Dec. (N. S.) 411.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1499 OF 1921.

December 12, 1921.

Present:—Mr. Justice Abdul Raoof.

KALU—DEFENDANT—APPELLANT

versus

NUPU AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11—Res judicata—Doctrine not to be unduly conditioned.

The doctrine of *res judicata* should not be unduly conditioned and qualified by all sorts of ingenious attempts at evasion, where there has been in fact a fair contest on a question in dispute between the parties and the Court intended to give and has given a final decision on that question [p 757, col 2]

Rama Krishna Naidu v. *Krishnasami Naidu*, 52 Ind. Cas. 34; (1919) M. W N. 7; 25 M. L. T. 88; 9 L. W. 180; 36 M. L. J. 641, followed

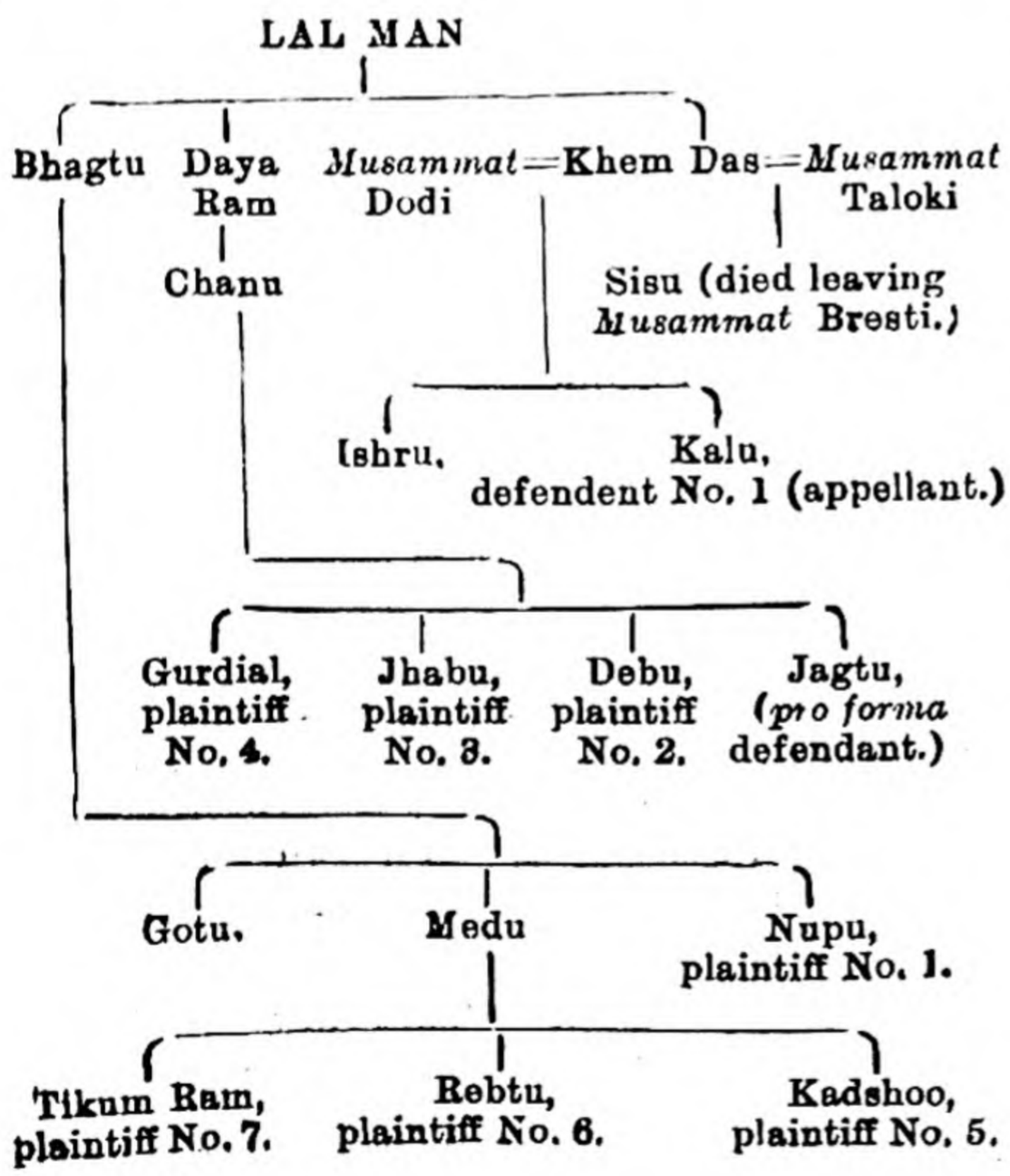
KALU v. NUPU.

Second appeal from a decree of the District Judge, Kulu at Dharmsala, dated the 9th March 1921, affirming that of the Subordinate Judge, Kulu at Naggar, dated the 17th November 1920.

Lala *Mehr Chand Mahajan*, for the Appellant.

Kanwar *Dalip Singh*, for the Respondents.

JUDGMENT.—This was a suit for possession of land brought by the reversioners of Khem Das on the basis of a decree of the Chief Court in Civil Appeal No. 1447 of 1916. It has been decreed by the Courts below and the defendant Kalu has come up in second appeal to this Court. The following pedigree table will be helpful in explaining the facts of the case:—



Khem Das died on the 19th March 1894. Mutation was effected in the name of *Musammat* Bresti on the 10th February 1895, as Sisu, the son, had pre-deceased Khem Das. On the 27th August 1907 *Musammat* Bresti gifted the land to Kalu. On the 9th January 1915 she, however, surrendered the estate to the plaintiffs in this case. On the 25th March 1915 mutation was effected in favour of the present plaintiffs. On the 23rd August 1915 Kalu sued *Musammat* Bresti, Chanu, Kadshu, Rebtu, Tikum Ram and Nupu for a declaration that he was the owner of Khem Das's land, firstly, as the son of Khem Das, secondly, as a donee from *Musammat* Bresti and, thirdly, by adverse possession. On the 17th November 1915 the suit was decreed by Mr. Tyson, who held that adverse possession was proved and that Kalu was the heir of Khem Das. He did not decide the question of gift. On appeal by the present plaintiffs the Appellate Court upheld the first Court's decree on a different ground, namely, that the land being the self-acquired property of Khem Das the widow had full power of alienation and that the gift made by her in favour of Kalu was good and unimpeachable. On the question of heirship of the plaintiff to Khem Das the Court distinctly held that he was not the son of Khem Das being the son of one Man Chand. As, however, the decree of the First Court was upheld the present plaintiffs appealed to the Chief Court. The judgment of the Chief Court shows that only the question of the gift of *Musammat* Bresti was raised and considered. The Chief Court, however, held that *Musammat* Bresti had only a life-interest and could not confer an absolute right on Kalu. The following order was passed by the learned Judge, who decided the case:—

"The result is that I grant the plaintiff a declaratory decree to the effect that he shall be entitled to keep the land during the lifetime of *Musammat* Bresti, but that the gift in his favour shall not affect the reversionary rights of defendants Nos. 2 to 5, the collaterals of the deceased Khem Das." The widow *Musammat* Bresti having died the present suit is now brought by the plaintiffs for possession of the land in question on the basis of this decree. The main defence put forward by Kalu was that he was the son of Khem Das and as such was entitled to remain in possession of the property in spite of the decree of the Chief Court. Both the Courts below have held that the question raised in defence had been decided by the District Judge in the previous suit against the appellant and that his decision operated as *res judicata*. The plaintiffs' suit has been decreed

and the defendant has come up in second appeal to this Court.

It is contended on his behalf that the decision of the District Judge in the previous suit cannot operate as *res judicata* for the following reasons, namely, (1) that as the suit of the plaintiff in that case was decreed on the basis of the gift made by *Musammat* Bresti it was not necessary to decide the question whether he was the son of Khem Das or not, and (2) that as the entire decree was in favour of the plaintiffs he could not have appealed against the adverse decision of the District Judge on the question whether the plaintiff was the son of Khem Das or not. In my opinion there is no force in this contention. Kalu in the previous suit based his title to the property on two grounds, firstly, as the son of Khem Das and, secondly, as the donee from *Musammat* Bresti. His title as the son of Khem Das would have given a higher right. As a donee his right to the property would be of a lesser kind; for as held it would inure only during the lifetime of *Musammat* Bresti. Besides this, on the extinction of the donee's family the property would revert to the family of the donor. The decision as to the higher right claimed being against Kalu, appellant, he had every right to appeal. Moreover, he could have questioned the correctness of the decision of the District Judge under O. XLI, r. 22, Civil Procedure Code. The following cases are relied upon by the learned Counsel in support of his contention, but they have no bearing on the facts of the present case:—

(i) *Bai Nathi* v. *Narshi Dullabh* (1),
(ii) *Kelu Nambiar* v. *Chathu Nambiar* (2),
(iii) *Buta Singh* v. *Lal Singh* (3),
(iv) *Basanta* v. *Indar* (4),
(v) *Allah Dia* v. *Sandha* (5),

In the case of *Rama Krishna Naidu* v. *Krishnasami Naidu* (6) it was laid down that the doctrine of *res judicata* should not be unduly conditioned and qualified by all sorts of ingenious attempts at evasion, where there has been in fact a fair contest on a question in dispute between the parties and the Court intended to give and has given a final decision on that question. In my opinion this is a correct ruling and is fully applicable to the present case. I hold, therefore, that the question now raised is clearly barred by the rule of *res judicata*. I accordingly uphold the decree of the Courts below and dismiss the appeal with costs.

There is a slight discrepancy between the final order of the learned Subordinate Judge contained in his judgment and the decree prepared in the case. The plea No. 6 taken in the memorandum of appeal filed in this Court relates to that discrepancy. The decree in this Court will be prepared in the terms of the decretal order made by the learned Subordinate Judge in his judgment dated the 17th November 1920, which runs thus:—

"I, therefore, at once grant plaintiffs and defendant No. 2 a decree for possession of the land with costs against defendant No. 1."

In other respects the decree of the First Court will stand.

Z. K. *Appeal dismissed.*

(1) 55 Ind. Cas. 32?; 22 Bom. L. R. 64; 44 B. 321.
(2) 52 Ind. Cas. 258; 25 M. L. T. 63; (1919) M. W. N. 34; 9 L. W. 84.
(3) 27 Ind. Cas. 535; 5 P. W. R. 1915; 37 P. L. R. 1915.
(4) 51 P. L. R. 1908.
(5) 8 Ind. Cas. 242; 78 P. L. R 1910; 203 P. W. R. 1910.
(6) 52 Ind. Cas 34; (1919); M. W. N. 7, 25 M. L. T. 88; 9 L. W. 18?; 36 M. L. J. 611.

BOMBAY HIGH COURT.

SMALL CAUSE COURT REFERENCE IN SUIT No. 1289-1380 OF 1921.

April 10, 1922.

Present:—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

SIDHRAJ BHOJRAJ—

versus

ALLI HAJI.—

Limitation Act (IX of 1908), ss. 14, 15—Exclusion of time—Debtor adjudged insolvent but adjudication subsequently cancelled—Suit by creditor—Presidency Towns Insolvency Act (III of 1909), s. 17 no bar to creditor's right to institute suit.

When once time has begun to run against a plaintiff for the institution of a suit which he is competent to file, it will continue to run unless stopped by some provision of the Limitation Act, [p. 758, col. 2.]

SIDHRAJ BHOJRAJ v. ALLI HAJI.

Where after a debt has become due and payable and time has begun to run against the creditor, the debtor is adjudicated insolvent but his petition is subsequently dismissed and the adjudication order cancelled, the time during which the insolvency proceedings were pending is not to be deducted in computing the period of limitation for a suit brought by the creditor [p 758, col 2]

Section 17 of the Presidency Towns Insolvency Act is not a bar absolute to the creditor's right to institute a suit unless the institution of a suit has been stayed by an injunction or order The creditor, therefore, cannot claim a deduction of time, during which the insolvency was pending, in computing the period of limitation in any suit brought by him after the insolvency proceedings are quashed. [p. 758, col]

Ramaswami Pillai v. *Govindaswami Naicker*, 49 Ind. Cas 625; 42 M. 319; 38 M. L J 104; 25 M. L. T. 247; (1919) M. W. N. 698, referred to.

Small Cause Court Reference made by the Third Judge of the Presidency Court of Small Causes at Bombay.

JUDGMENT.

MACLEOD, C. J.—This is a reference by the Third Judge of the Court of Small Causes.

The following questions have been referred:—

(1) Where after a debt has become due and payable and time has begun to run against the creditor, the debtor is adjudicated insolvent and his petition is subsequently dismissed and the adjudication order cancelled if the creditor institutes a suit thereafter against the debtor to recover the debt, is the time during which insolvency proceedings were pending to be deducted in computing the period of limitation?

(2) Is section 17 of the Presidency Towns Insolvency Act a bar absolute to the creditor's right to institute a suit so as to enable creditor to claim a deduction of the time during which the insolvency was pending, in computing the period of limitation in any suit brought by the creditor after the insolvency proceedings are quashed?

Judgment in the case was delivered by the Third Judge contingent on the opinion of the High Court under section 69 (2) of the Presidency Small Cause Courts Act. But in spite of that the defendant applied to the Full Court. This would seem to be irregular as there was no decree or order against which an appeal would lie. Though the appeal was heard by the Full Court and both Judges were of opinion that a case should be stated, still the reference comes before us as on a case stated by the Third Judge alone.

We have not had the advantage of hearing the parties or their advocates.

We think both the questions should be answered in the negative.

When once time has begun to run against a plaintiff for the institution of a suit which he is competent to file, it will continue to run unless stopped by some provision of the Limitation Act. In this case the plaint was presented on the 11th July 1921. The suit was to recover the balance due on account of sugar sold and delivered to the defendant from the 16th March 1916 to the 31st October 1917 To save the bar of limitation the plaintiff relied upon the fact that the defendant was adjudicated insolvent on the 7th January 1919 by an order of the High Court which was annulled on the 5th October 1920.

The plaintiff contends that the period during which the adjudication order was in force should be excluded under section 15 of the Indian Limitation Act. That section says that where the institution of a suit has been stayed by an injunction or order, the time of continuance of the injunction or order, the day on which it was issued or made and the day on which it was withdrawn shall be excluded in computing the period of limitation prescribed for the suit. The plaintiff would then have to show that the institution of his suit was stayed by an injunction or order, or that it could be said that the institution of his suit was stayed by virtue of the provisions of section 17 of the Presidency Towns Insolvency Act. That section says that on the making of an order of adjudication no creditor to whom the insolvent is indebted in respect of any debt provable in insolvency shall during the pendency of the insolvency proceedings have any remedy against the property of the insolvent in respect of the debt or shall commence any suit or other legal proceeding except with the leave of the Court or on such terms as the Court may impose. It cannot, therefore, be said that when an adjudication order is made there is any injunction or order against the institution

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of a suit by a creditor. Before a creditor can institute a suit he must comply with the formality prescribed by the section, and it is only when leave is refused that it can be said that there is an injunction or order staying the institution of the suit. In *Ramaswami Pillai* v. *Govindaswami Naicker* (1) the same question arose and it was decided that the period during which insolvency proceedings were pending could not be excluded. I think a certain amount of confusion of thought is due to the fact that with regard to the proof of debts in insolvency the date of the adjudication order determines a creditor's right to prove (section 6 of the Presidency Towns Insolvency Act), but a creditor has always to face the risk that the order may be annulled when made on a creditor's petition on the ground that no act of insolvency has been committed and for want of prosecution when made on the debtor's petition. The creditor, therefore, should see that his debt is acknowledged in the schedule, for even if his proof is admitted by the Official Assignee his claim may be barred if the adjudication order is annulled. Cases of real hardship must be very rare, for if a creditor allows the greater part of the time prescribed for instituting his suit to pass by, he has only himself to thank if the time expires pending insolvency proceedings. In this case it would appear that from the 7th January 1919 until the 5th October 1920 the plaintiff did nothing to protect himself either by getting an acknowledgment of his claim from the debtor or by asking for leave to put a suit on the file. The only excuse he may have had was that there had been previous decisions of the Small Cause Court to the effect that the period during which insolvency proceedings were pending could be excluded from the period of limitation.

SHAH, J.—We have not been assisted with any argument in this case: and the questions referred to us are not altogether free from difficulty.

On the whole I do not think that there is sufficient ground for not accepting the view taken by the Madras High Court in *Ramaswami Pillai* v. *Govindasami Naicker* (1). It may work hardship in some cases. But in the absence of any order of the Insolvency Court refusing leave to commence the suit, it is difficult to hold that the provisions of section 15 of the Indian Limitation Act can apply. The mere fact of an adjudication order having been made does not necessarily mean that there is an injunction or order staying the institution of a suit within the meaning of section 15 of the Indian Limitation Act, though the effect of the order of adjudication read with section 17 of the Presidency Towns Insolvency Act is to prevent a creditor from commencing any suit against his debtor without the leave of the Court.

I do not consider it necessary to refer to the English decisions bearing on this point, as I do not think that the difficulty of interpreting the provisions in the Indian Acts on the point is removed thereby. In spite of the possible hardship in some cases, I think that, on the whole, the view of the Madras High Court is right.

I, therefore, agree that the questions should be answered as proposed by my Lord the Chief Justice.

N. K.

Answers accordingly.

(1) 49 Ind. Cas. 625; 42 M. 319; 36 M. L. J. 104; 25 M. L. T. 247; (1919) M. W. N. 698.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 697 OF 1919.

December 20, 1921.

Present:—Mr. Justice Scott Smith and Mr. Justice Harrison.

NATHU AND OTHERS—PLAINTIFFS—APPELLANTS

versus

BATAN SINGH, MINOR, THROUGH BABU, HIS COUSIN AND ANOTHER—DEFENDANTS—RESPONDENTS.

Punjab Courts Act (VI of 1918), ss. 41 (3), 44—Appeal, second—Custom—Burden of proof—Certificate, whether necessary—Refusal, erroneous, to grant certificate—Revision, if competent.

The question of *onus probandi* in custom cases cannot be raised in second appeal without a certificate under section 41 (3) of the Punjab Courts Act.

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Allah Din v. *Salam Din*, 31 Ind. Cas. 497; 96 P. R. 1915; 169 P. W. R. 1915; *Bhari* v. *Khannu*, 44 Ind. Cas. 162; 7 P. R. 1918; *Ram Rakhi* v. *Mela Ram*, 63 Ind. Cas. 657; 2 L. 167, followed.

When an application for a certificate under section 41 (3) of the Punjab Courts Act for filing a second appeal on the question of *onus probandi* in a custom case is refused by a District Judge on the erroneous ground that no certificate is required, a revision to the High Court from the order of refusal is competent on the ground that the District Judge has failed to exercise the jurisdiction vested in him.

Sarup Singh v. *Jawahri*, 44 Ind. Cas. 732; 18 P. R. 1918, followed.

Second appeal from a decree of the District Judge, Hoshiarpur, dated the 13th December 1918, reversing that of the Munsif, First Class, Hoshiarpur, dated the 7th December 1917.

Bakhshi *Tek Chand*, for the Appellants.

Mr. *Nanak Chand*, for the Respondents.

ORDER.—The plaintiffs-appellants sued for a declaration that the adoption of defendant No. 2 by defendant No. 1 would not affect their reversionary rights. Defendant No. 2 is the sister's son of defendant No. 1 who is a sonless male proprietor, and the First Court laid the burden of proving the validity of adoption on the defendants and finding that they had not discharged it decreed the plaintiffs' claim. The lower Appellate Court was of opinion that the onus should have been upon the plaintiffs to prove that the adoption was invalid and holding after a further enquiry that they had not discharged it dismissed their suit. The plaintiffs then applied for a certificate to enable them to file a second appeal under section 41 (3) of the Punjab Courts Act. Upon this application the District Judge recorded the following order.—

"The real question in this case is as to the burden of proof and for an appeal on that no certificate is required. If the burden has been rightly assigned by me, then I cannot grant the certificate in the terms required by the section. If wrongly, then no certificate is, as said, needed. Refused."

The plaintiffs have accordingly filed a second appeal to this Court without a certificate and in the note to the memoradum of appeal they pray that if the District Judge is wrong in his view that no certificate is required, he should be directed to pass formal orders on the application for the grant of a certificate. In *Allah Din* v. *Salam Din* (1) it was held that the question of *onus probandi* in a custom case cannot be raised in second appeal without a certificate under section 41 (3) of the Punjab Courts Act. The same view was taken in *Bhari* v. *Khannu* (2) and in *Ram Rakhi* v. *Mela Ram* (3). We, therefore, have no hesitation in holding that the learned District Judge is wrong in his view that no certificate is necessary to enable the plaintiffs to file a second appeal in this Court.

Mr. Nanak Chand, on behalf of the plaintiffs, contends that this Court has no power to interfere on revision with the order of the lower Appellate Court refusing to grant a a certificate. It was, however, held in *Sarup Singh* v. *Jawahri* (4) that when an application for a certificate under section 41 (3) of the Punjab Courts Act is refused by the District Judge on the erroneous ground that no question of custom arose, a revision to the Chief Court from the order of refusal is competent on the ground that the District Judge has failed to exercise the jurisdiction vested in him. Following this decision we hold that this Court certainly has power to interfere on revision with the order of the District Judge refusing a certificate on the erroneous ground that none was required for filing a second appeal. We, therefore, set aside the order of the District Judge refusing a certificate and remand the case to him in order that he may consider whether this is a fit case in which a certificate should be granted or not and may pass orders upon the application in accordance with law. The record will be returned to him and should come back to this Court within three months. If a certificate is granted by him a fresh date will be fixed for hearing the appeal.

Z. K.

Record returned.

(1) 31 Ind. Cas. 497; 96 P. R. 1915; 169 P. W. R. 1915.

(2) 44 Ind. Cas. 162; 7 P. R. 1918.

(3) 63 Ind. Cas. 657; 2 L. 167.

(4) 44 Ind. Cas. 732; 18 P. R. 1918.

BANK OF BOMBAY v. FAZULBHOY EBRAHIM.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL No. 127 OF 1921.

April 10, 1922.

Present:—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

THE BANK OF BOMBAY—DEFENDANT—APPELLANT

versus

FAZULBHOY EBRAHIM—PLAINTIFF—RESPONDENT.

Trust, breach of—Executor depositing legacy money with Bank—Subsequent withdrawal and misappropriation—Liability of Bank—Notice—Actual and constructive—Limitation Act (IX of 1908), Sch. I, Arts. 48, 62, application of.

K. died in the year 1900 leaving a Will whereby one *J.* was appointed executor and trustee and among other legacies, Rs. 50,000 were to be invested in the name of one *F.* The income was to be accumulated for *F.'s* benefit and the principal and the income were to be made over to him on his attaining 21 years. *J.* who took out the Probate deposited with the Bank of Bombay G. P. Notes of the value of Rs. 52,000 which were credited to account No. 1. A corresponding current account was opened to which the interest was to be credited. A power-of-attorney was executed by J. in favour of the Bank and the Probate of the Will was duly registered with the Bank. In May 1911 *J.* asked for a loan of Rs. 45,000 on the security of Notes for Rs. 52,000. Accordingly a loan account to *J.* was opened while notes for Rs. 52,000 were debited to account No. 1 and credited to advance account to *J.* In August *J.* wrote to the Bank to sell the Notes for Rs. 52,000. The Notes were sold accordingly, the loan account was closed and the balance was transferred to No. 1 current account. *F* attained majority on 25th October 1913, and filed this suit against the Bank on 18th October 1918, praying that the Bank might be ordered to make good to him the sale-proceeds of Government paper standing to the credit of account No. 1 together with interest. He submitted that the Bank had notice, actual or constructive, of the trust, that the loan account was commenced 9 years from the date of deposit, that the Bank must have known that the loan was required by *J.* for his own purposes, that from the lapse of time and other circumstances the Bank was put on enquiry which would have disclosed to them the fact that *J.* drew the money out of the trust fund for himself, that the Rank had either knowledge or reasonable suspicion that the said G. P. Notes were applied by *J.* in breach of trust and that Bank derived benefit from the breach:

Held, (1) that on the face of it the Bank was entitled to advance money to *J.* as executor on securities deposited by him as executor and there would be nothing wrong in their acting on his instructions as executor to sell the securities and credit the loan account with a sum sufficient to square it; [p. 767, col. 1.]

(2) that if it were assumed that *J.* deposited the Rs. 52,000 to meet the plaintiff's legacy and thereby became a trustee of it and pledged it to secure an advance to himself personally or as executor and the Bank sold the paper to re-pay the advance, only then the question would arise whether the Bank had notice of the trust. But there was nothing to support this view of the case; [p. 765, col. 1.]

(3) that even assuming this view of the case to be right the Bank had no actual notice of the trust; [p. 767, col. 2.]

(4) that the Bank had no constructive notice of the trust, for the mere fact of an account being continued and the investment account having a corresponding current account and this being continued for 9 years would not necessarily put the Bank on enquiry; [p. 767, col. 2.]

(5) that if there was merely a pledge of the securities, then if *J.* had no title to them as executor and the Bank in good faith delivered them back to him, or according to his instructions, under s. 66 of the Contract Act the Bank would not be responsible to the owners in respect of such delivery; [p. 765, col. 2.]

(6) that assuming everything against the Bank the suit was either one for conversion, or for money had and received to the plaintiff's use, to which Arts. 48 and 62 of the Limitation Act would apply. Consequently it was barred by three years' rule of limitation. [p. 766, col. 1.]

Attenborough v. *Solomon*, (1913) A. C. 76; 82 L. J. Ch 178; 107 L. T. 833; 57 S. J. 76; 29 T. L. R. 79, distinguished.

Gray v. *Johnstone*, (1868) 3 H. L. 1 at p. 11; 16 W. R. 842, *Abhiram Goswami* v. *Shyama Charan Nandi*, 4 Ind Cas 449; 36 I. A. 148; 11 Bom. L. R. 1234; 10 C. L. J. 284; 6 A. L. J. 857; 19 M. L. J. 530; 14 C. W. N. 1; 36 C. 1003 (P. C.) and *Keane* v. *Robarts*, (1819) 4 Madd. 332 at p. 357; 20 R. R 306; 56 E. R. 728, referred to.

Appeal from the judgment of Mr. Justice Kajiji.

Sir *Thomas Strangman*, Advocate-General Messrs. *Inverarity*, *Coltman* and *Campbell*, for the Appellant.

Messrs. *Desai* and *Taraporevalla*, for the Respondent.

JUDGMENT.

MACLEOD, C. J.—One Khakibhai Hemani, a Khoja Muhammadan of Bombay, died on or about the 4th October 1900 leaving a Will dated the 26th September 1900.

BANK OF BOMBAY v. FAZULBHOY EBRAHIM.

He appointed as executors and trustees thereof Currimbhoy Ebrahim, Labai his wife, and Joosab Peerbhoy his son-in law. Probate was granted to Labai and Joosab on the 4th December 1901. By clause 4 the testator directed that Rs. 50,000 should be expended in such manner as his trustees might consider proper for such purposes as might perpetuate his name.

By clause 5 he bequeathed various legacies

To Fazulbhai, the son of his daughter Fatmabai, he bequeathed Rs. 50,000 to be invested in Government Promissory Notes, Port Trust Bonds or other Government Security Debentures. The income was to be accumulated for Fazulbhai's benefit, the principal and income to be made over to him on his attaining the age of twenty-one. If Fazulbhai died before attaining the age of twenty-one, the moneys were to be handed over to his issue, but if there was no issue then over.

There were five other legacies of Rs. 30,000 each, Rs. 50,000 were to be set apart for the expenses of a Dharamsala, two houses were given to Labai on certain conditions, and the residue of the estate was also left to her.

On the 30th January 1902, the executor and executrix deposited with the Bank of Bombay Government Promissory Notes of the face value of Rs. 52,000, which were credited to their account No. 1 as executor and executrix of Khakibhai Hemani. On the same day account No. 2 was opened with a deposit of Government Promissory Notes of the face value of Rs. 3 ,000. and thereafter seven other accounts were opened with deposits of Government Promissory Notes of the face value of Rs. 31,000, 3 ,200, 31,200, 31,200 31,200, 15,000 and 4,000 respectively. With each deposit account there was a corresponding current account to which the interest was credited. We are only concerned with the deposit account No. 1 and the current account No. 1, but the other accounts have been exhibited so that the Court might be asked to draw the inference that Labai and Joosab opened all these accounts in order to carry out the wishes of the testator with regards to the payment of the legacies.

On the 1st of February 1902, Labai and Joosab executed a general power of-attorney in favour of the Bank.

On the 24th July 1902, Probate of the Will was registered with the Bank. In the register under the heading "Executors and Administrators" there is the following entry, "Labai the widow and Joosab Peerbhoy the son in law of the deceased two of the executors named in the Will reserving the right of Currimbhoy Ebrahim the other executor named in the said Will to come in and apply for Probate."

In 1905 Labai died and all the various accounts were transferred to the name of Joosab as surviving executor, while he executed a power-of attorney in favour of the Bank in the same capacity. Until May 1911, the interest on the Notes for Rs. 52,000 was re-invested so that the total of the Notes to credit of account No. 1 was Rs. 67,000.

On 17th May, Joosab appears to have asked for a loan of Rs. 45,000 on the security of Notes for Rs. 52,000 out of the account No. 1. Accordingly a loan account to Joosab as surviving executor was opened while Notes for Rs. 52,000 were debited to account No. 1 and credited to "advances account to Joosab Peerbhoy as surviving executor."

On the 16th August 1912, Joosab wrote to the Bank a letter (Exhibit Q) which has been put in in a mutilated condition, but it is a request to sell the Notes for Rs. 52,000 against which Rs. 45,000 had been advanced at the bazar rate.

Accordingly, on the 17th August 1912, the Bank sold the Notes, closed the loan account and transferred the balance of Rs. 4,518-10-7 to No. 1 current account. By the 30th January 1913 the remaining Notes for Rs. 15,000 in account No. 1 had been sold and the proceeds credited to the current account. That account was drawn upon by Joosab until on the 3rd November 1913 it was exhausted.

Fazulbhai attained majority (eighteen years) on the 25th October 1913. He filed this suit on 18th October 1919 against the Bank praying that the Bank might be ordered to make good to him the sale proceeds of the Government paper standing to the credit of the said account No. 1 together with interest. He submitted that the

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Bank had notice, actual or constructive, of the trust on which the Government Promissory Notes and moneys which stood from time to time to the credit of the account No. 1 were held by Joosab. As the loan account was commenced in 1911 after a lapse of nine years from the date of the deposit, the Bank must have known that the loan was required by Joosab for his own purposes. That from the lapse of time and other circumstances the Bank was put on inquiry which would have disclosed to them the fact that Joosab was re paying to the Bank moneys which he drew for himself out of the trust fund, and that the Bank had either knowledge or reasonable suspicion that the said Promissory Notes were being applied by Joosab in breach of trust and that the Bank derived benefit from the breach of trosh.

The defendant Bank in its written statement denied that the securities for Rs. 52,0 0 were deposited in trust for the plaintiff or that they represented the investment of his legacy. The current account was opened on the depositor's agreeing to comply with the Bank rules and by r. 14 of which they had notice the Bank did not recognise trusts. If the Bank had had notice that the securities were held in trust the Bank would not have received the same. The Bank denied that it had notice of the actual trust and submitted that in law it had no constructive notice. It denied that it must have been put on inquiry for the reasons alleged by the plaintiff and it was under no obligation to inquire and see to the application of the said moneys by Joosab. It had no knowledge or reasonable suspicion that the Promissory Notes were being applied as alleged, and it derived no benefit from the alleged breach of trust. Lastly, it was submitted that the claim was barred by limitation.

On these pleadings the parties went to trial. Out of the many issues raised the most important were :—

(1) Whether the Government Promissory Notes of Rs. 50,000 (*sic*) represented the investment of the plaintiff's legacy and were deposited in trust for the plaintiff ?

(2) Whether the Bank had actual or constructive notice of the alleged trust ?

(5) Whether the loan for Rs. 45,000 was required and taken by Joosab for his own purposes and not for the purposes of the legacy or the estate ?

(8) Whether there were sufficient circumstances to put the Bank on inquiry ?

(9) If so, whether such inquiry would have disclosed that Joosab was, as alleged, re paying to the Bank money which he drew for himself out of the trust funds and in breach of trust ?

(10) Whether the Bank were guilty of such negligence as to impute to them constructive notice of the alleged breach of trust and misapplication ?

(13) Whether any personal benefit to the defendant Bank was designed or stipulated for when such moneys were taken by Joosab ?

(14) Whether the claim was barred by limitation ?

The evidence called by the plaintiff to prove his claim was extremely meagre.

His father proved his age.

The plaintiff himself said :—

"I am now aware that my grandfather left a legacy. I know Joosab Peerbhoy. He was my mother's sister's husband. I demanded my legacy from Joosab. He has not given it to me. He led me to understand that he was not in a position to pay. He is more or less an insolvent."

In cross examination he said :

"I demanded the legacy in 1917 or 1918, probably at the end of 1917 or in the beginning of 1918. I had no suspicion then that he was not in a position to pay. About the end of 1918 or beginning of 1919 I came to know he was not in a position to pay".

The rest of the plaintiff's evidence consisted of the various accounts opened with the Bank, certain correspondence, the petition for Probate, the Probate itself, powers of attorney given to the Bank by Labai and Joosab, and by Joosab, and the Register of Probate in the Bank's books.

The Bank called an Accountant to prove the rules of the Bank for current accounts. The most important witness in the case would have been Joosab but he was not called. There was no evidence that he was not in a position to pay the legacy except the plaintiff's statement that he had been given to understand by Joosab that it could not be paid. There was no evidence to explain the opening of the various accounts in the Bank, or to

show what became of the moneys which were withdrawn, although it may be presumed that Joosab kept accounts as executor. The members of the family must have been perfectly well aware of the contents of Khakibhai's Will. The plaintiff took a vested interest in the legacy, and though under the Will it was not payable until he became twenty-one he was entitled in law to demand it when he attained the age of majority. If Joosab has misappropriated the legacy it is not unfair to assume that the family knew what he was doing. But without putting the necessary facts before the Court, the plaintiff asked the Court to draw every inference against the Bank from the accounts opened by Joosab with the Bank, and so make the Bank liable for the defalcations of his uncle. The learned Trial Judge came to the conclusion that Labai and Joosab had divested themselves of their office as executor and executrix and continued to be trustees from 1902. Then no notice was required to be given to the Bank that they had deposited those moneys as trustees. The Bank dealt with Joosab and in dealing with him the Bank took those moneys subject to all the infirmities Joosab had in them. When the Bank made the loan of Rs. 45,000 and took as security the pledge of Government paper for Rs. 52,000 the Bank was taking such ownership as Joosab could give. As he had no power to deal with the Government paper, the plaintiff was entitled to recover it. But with regard to the Government Paper for Rs. 15,000 the learned Judge thought that as it was not pledged, the Bank was not aware that Joosab was committing a breach of trust and so was not responsible for it. The inconsistency in the argument is obvious, for if the Bank had notice that the Rs. 52,000 Government paper was held in trust, they also had notice that the accretions thereto were held in trust, but the whole basis of the judgment rests on the loan of Rs. 45,000 to Joosab. If he had asked the Bank to sell the Government paper and pay in the proceeds into current account No. 1 and even if he had then withdrawn the proceeds it would appear that the Bank would not have been held liable.

The very important question of limitation has hardly been considered. No doubt if Art. 120 of the Second Schedule of the Indian Limitation Act was applicable the suit was filed in time but no reason is given for the decision that Art. 120 was applicable.

Without any finding on the issues a decree was passed for the plaintiff for $3\frac{1}{2}$ per cent. Government paper for Rs. 52,000 face value with interest at $3\frac{1}{2}$ per cent. from the date of deposit with six monthly rests. The learned Judge evidently thought that the case of *Attenborough* v. *Solomon* (1) was absolutely on all fours with the present case and failed to realise that the two cases were entirely different. The result is that we have no findings on some of the most important issues.

In *Attenborough* v. *Solomon* (1) a testator by his Will after appointing two persons executors and trustees and giving pecuniary legacies gave his residuary estate to his trustees upon trust for sale and distribution as therein mentioned. Fourteen years after the testator's death one of the executors without the knowledge of his co-executor pledged certain plate forming part of the residuary estate with a firm of pawn brokers who had no notice that he was not the absolute owner thereof, and misapplied the money so raised. All the debts and legacies had been paid and the residuary account had been passed within one year of the testator's death, but the residuary estate had not been completely distributed. On the death of the pledgor the transaction was discovered and an action was brought by the co-executor and a new trustee against the pawn-broker to recover the pledge. It was held that from the residuary account, Mr. J. B. Solomon, the surviving executor, regarded the debts as having been all paid and the estate as ready to be held upon the trusts of the Will which affected it in the hands of the trustees. The true inference from the facts was that the executors considered that they had done all that was due from them as executors and were content when the residuary account was passed that the dispositions of the Will should take effect. The residuary estate including the chattels in question thus became vested in them as trustees.

(1) (1918) A. C. 76; 82 L. J. Ch. 178; 107 L. T. 833; 57 S. J. 76; 29 T. L. R. 79.

Their title to the chattels pledged as executors had ceased to exist. By the contract of pawn the property remained in the bailor, and the bailee simply took at the outside a right to the possession dependent on the validity of title of the bailor. Then the pawn-brokers got no title to the plate, since the executor when he bailed it over had no property to pass as executor, and they got no contractual rights which could prevail over the trustees who were the true owners and in a position to maintain the action, which under the old form would have been an action of trover or detinue to recover possession of the chattel free from the restrictions on the right to re-claim possession which were sought to be imposed by the contract between the pledging executor and the pawn-brokers.

If Joosab holding Government paper as one of several trustees had pledged it with the Bank in his own name to secure an advance to him personally and the Bank still retained the paper, then the property in the paper remaining with the trustees they might be able to recover it from the Bank free of the advance, but if the Bank had sold the paper to re-pay the advance then the question of notice of the trust would become of the utmost importance.

By section 63 of the Indian Trusts Act "where trust property comes into the hands of a third person inconsistently with the trust, the beneficiary may require him to admit formally, or may institute a suit for a declaration, that the property is comprised in the trust. Where the trustee has disposed of trust-property and the money or other property which he has received therefor can be traced in his hands, or the hands of his legal representative or legatee, the beneficiary has, in respect thereof, rights as nearly as may be the same as his rights in respect of the original trust property."

By section 64 "nothing in section 63 entitles the beneficiary to any right in respect of property in the hands of (*a*) a transferee in good faith for consideration without having notice of the trust, either when the purchase-money was paid, or when the conveyance was executed, or (*b*) a transferee for consideration from such a transferee." These sections would only apply if the Government paper was transferred to the Bank, but there is no evidence with regard to this, and from the fact that Joosab asked the Bank to sell, it may be inferred that the paper remained in his name. If there was merely a pledge of the Government paper then if Joosab had no title to it as executor, and the Bank in good faith delivered it back to him, or according to his directions, under section 166 of the Indian Contract Act the Bank would not be responsible to the owners in respect of such delivery.

The case of *Attenborough* v. *Solomon* (1) is only an authority for this proposition, that if a pawn-broker takes in pledge from A an article which belongs in fact to *B*, he must return it on demand to B free of the amount advanced. What is his liability if he has already sold the article at the request of *A* and re-paid himself his advance is an entirely different question. This brings me to the question what is the plaintiff's cause of action and on the answer depends the period of limitation for the plaintiff's suit Assuming everything against the Bank, it would appear that the suit is either one for conversion (Art. 48), or for money had and received to the plaintiff's use (Art. 62).

The complaint is that the Bank, holding Government paper for Rs. 52,000 held in trust for the plaintiff of which trust it had constructive notice, sold it, and parted with the sale-proceeds. In either case the period of limitation would be three years, and the plaintiff's suit is barred, for he made no attempt to prove that time did not begin to run against him until within three years of the suit. But apart from the question of limitation there are many other difficulties in the way of the plaintiff.

The Court was asked to infer that Labai and Joosab had assented to all the legacies mentioned in the Will when they opened the various accounts with deposits of Government paper approximating to the amounts of the legacies. Against this the Advocate General argued that under clause 4 of the Will the executors were to spend Rs. 50,000 in such manner as they might think in perpetuating the name of the testator, and there was nothing to show that the Rs. 52,000 Government paper deposited in account No. 1 was not intended to meet that request of the testator. It may be very fairly argued on the other side that the probabil-

ities are vastly in favour of their contention that account No. 1 was opened for the appropriation of the plaintiff's legacy, but the person who could have set all doubts at rest was Joosab, and when a fact can be proved by a witness who can be called and is not called, is the plaintiff entitled to rely on an inference which, however plausible and probable, is not the only possible inference? If Joosab were dead it would be a different matter, and it came as a surprise to me when I ascertained towards the end of the argument that he was still alive, as it never occurred to me if he was alive, that his evidence would not be on the record. Strictly speaking if the Government paper was held in trust, the trustee or trustees would still be the true owners and the proper persons to sue for its recovery.

However that may be, it is necessary to deal with the case on the footing that Labai and Joosab deposited the Rs. 52,000 Government paper to meet the plaintiff's legacy and so became trustees thereof. The learned Judge seemed to think that if they were trustees the question of notice to the Bank became irrelevant. But it is certainly of the very greatest importance in a suit, not to recover the trust property, but for damages for conversion or for money had and received to the plaintiff's use. For the trustees would not be bound to keep the trust property with the Bank and even if the Bank had notice of the trust, it would not be liable if the trust property were afterwards misappropriated unless it could be proved that the Bank was privy to the breach of trust.

Now, it cannot be said that assuming there was a trust the Bank had actual notice of it. It accepted the various accounts in the names of Labai and Joosab as executor and executrix, and as such Labai and Joosab had absolute power to deal with the accounts and the Bank would not be liable if they dealt with them against their duties as executor and executrix. But it is said the Bank was put on inquiry. The opening of nine accounts by the executor and executrix was most unusual, the Bank should have called for a copy of the Will, and then it would have ascertained that various legacies had been bequeathed therein, that these various accounts must have been opened in respect of those legacies, and consequently Labai and Joosab were no longer executor and executrix and had become trustees, so that the Bank would become liable for any wrong dealing by them with those accounts. That even if the Bank was not put on inquiry at once, the fact that the accounts were continued, that each deposit investment account had a corresponding current account to which the interest was credited, and that this continued for nine years in any event put the Bank on inquiry to ascertain the reason for their client's conduct. No authority for such an extension of the doctrine of constructive notice has been cited, and it seems to me that if a Bank was bound to take notice of the number of accounts an executor opened and the length of time such account was continued, so that in self-protection it would be necessary to send for him and ask him to explain his dealings with the estate in his charge as executor, it would result in Bank's refusing to have any dealings with constituents as executors. But with regard to the advance of Rs. 45,000 it has been argued that, at any rate, considering the Rs. 52,000 Government paper had been in deposit with it for nine years with the interest being accumulated and re-invested, the Bank should have asked Joosab why he wanted the advance, he would then have said the account was in his name as executor and he was entitled to deal with it as he pleased. Even if the Bank had not been satisfied and had called for a copy of the Will, it could not have forced Joosab to say that account No. 1 was appropriated to the plaintiff's legacy. At the same time I know of no authority which would justify such inquisitorial proceedings by a Bank.

The liability of a Bank to honour a customer's cheque appears to be absolute unless it can be shown that the Bank is privy to an intent to misapply trust funds.

In *Gray* v. *Johnstone* (2) a banker had acted as such to T. J. who carried on business with his son-in-law under the style of J and M, but his accounts with them were kept in the name of T. J. T. J. died leaving a Will by which he bequeathed all his property to the use of his wife for life and after her death to be divided amongst their children as she might think fit. Part of this property consisted of Life Policies which were

(2) (1868) 3 H. L. 1 at p. 11; 16 W. R. 842.

put in the hands of the bankers together with Probate of the Will. They recovered the amount of the Policies, made up their accounts and after deducting their unsettled claim declared a certain sum to remain due from themselves to the executrix. She continued her husband's business with his late partner and a new account was opened with the bankers in the name of the new firm and she as executrix drew a cheque for the amount stated to be due to her and paid it in to her banker to be credited to the firm, and it was so credited and paid out by means of cheques drawn by the new firm. It was held that these circumstances were not in themselves sufficient to show that a breach of trust had been committed and that the banker knew of the intention to commit the breach so as to render them liable on a suit by the children of the testator to replace the money. Lord Cairns said at page 11.

"I say that the result of those authorities is clearly this: in order to hold a banker justified in refusing to pay a demand of his customer, the customer being an executor and drawing a cheque as an executor, there must, in the first place, be some misapplication, some breach of trust, intended by the executor, and there must, in the second place, as was said by Sir John Leach in the well-known case of *Keane* v. *Robarts* (3), be proof that the bankers are privy to the intent to make this misapplication of the trust funds. And to that I think I may safely add, that if it be shown that any personal benefit to the bankers themselves is designed or stipulated for, that circumstance, above all others, will most readily establish the fact that the bankers are in privity with the breach of trust which is about to be committed."

The learned Judge seems to have thought the Bank derived personal benefit by re-paying the loan account out of the sale-proceeds of the Government paper. On the face of it the Bank was entitled to advance money to Joosab as executor on securities deposited with them by him as executor, and there would be nothing wrong in their acting on his instructions as executor to sell the securities and credit the loan account with a sum sufficient to square it. If the Bank had advanced money personally to Joosab and re paid themselves by the sale-proceeds of Government paper lodged with it by Joosab as executor, or if the advance had been made to Joosab as executor and was re paid by the sale of Government paper which the Bank knew was held by him in trust, then it might be said that the Bank derived personal benefit from the same, and that would certainly go a considerable way to establish the fact that the Bank was privy with the breach which was intended to be committed. But, in my opinion, the plaintiff has not proved any of the facts which he was bound to prove before he could succeed against the Bank. Joosab, the person alleged to be guilty of the actual breach of trust, ought to have been a defendant in the suit, or at least, if he was not made a party, he should have been called as a witness. We are asked to infer, though we do not know for certain, that the Bank held the plaintiff's legacy. No attempt has been made to prove that Joosab held as trustee the plaintiff's legacy or that if so the trust property could not be followed. It has not even been proved that Joosab cannot pay the legacy, or that even if he cannot pay now he could not have paid it in 1913. It is not sufficient for the plaintiff to say "Joosab led me to understand that he could not pay. He is more or less insolvent," in order to found a claim against the Bank six years after the legacy was payable.

On the issues I have set out above I would hold as follows:—

1. There are facts from which the Court might infer that the Notes for Rs. 52,000 represented the investment of the plaintiff's legacy, but the witness who could have proved this positively has not been called, and such being the case the Court is not bound to draw the inference suggested by the plaintiff.

2. The Bank has neither actual nor constructive notice of any trust, if there was a trust.

5. No answer in the absence of Joosab's evidence.

8. In the negative.

9. Unnecessary.

10. In the negative.

13. In the negative.

14. In the affirmative.

(3) (1819) 4 Madd. 332 at p. 357; 20 R. R. 303; 56 E. R. 728.

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I think the appeal should be allowed and the plaintiff's suit dismissed with costs throughout.

SHAH, J.—I entirely agree. I desire to add a few words with reference to two points.

First, as regards limitation, it is clear that the point was not properly argued by the parties before the Trial Court. Before us the appellants have relied upon Arts. 48 and 62 and the plaintiff has relied upon Art. 133 as being applicable to the facts of the case. Art. 120, which has been held by the Trial Court to apply, has not been seriously relied upon by the plaintiff's Counsel. Art. 133 clearly has no application, as the suit is against the Bank holding the Government paper as security for the loan to Joosab as the surviving executor. It is not suggested that the Bank bought the Government paper and in the course of the argument it was admitted that the Bank did not buy the Government paper in question. On the strength of certain decisions bearing on Art. 134 it has been argued by Mr. Desai that a purchase would include a mortgage and that the Article would apply to the Bank as pledgees from a trustee. This contention is opposed to the decision in *Abhiram Goswami* v. *Shyama Charan Nandi* (4) and there was no change in the wording of Art. 133 as there was in Art. 134 when the Indian Limitation Act of 1908 was passed, to indicate any change in the scope of Art. 133. It seems to me that in view of the relief claimed by the plaintiff Art. 48 would apply. But if it is to be treated as a suit for money received by the defendants as sale-proceeds and properly payable to the plaintiff Art. 62 would apply. In either case the claim is clearly time-barred. It was argued with reference to Art. 48 that there was nothing to show that plaintiff had the necessary knowledge more than three years prior to the date of the suit. The defendants pleaded limitation and it was for the plaintiff to prove the facts which would bring the claim within time. The plaintiff has not stated anywhere that he had not the necessary knowledge as to the possession of the property. Having regard to the circumstances of the case it is quite a fair inference, in the absence of any statement to the contrary, that the plaintiff knew on his attaining majority that the Government paper had been with the Bank and had been sold by the Bank at the instance of Joosab. It is significant that the learned Counsel for the plaintiff has not asked for any opportunity now to show that on the footing of Art. 48 being applicable the plaintiff acquired the necessary knowledge within three years of the suit, on the ground that for want of a specific plea as to Art. 48 he omitted to adduce necessary evidence on that point.

The second point relates to the merits of the case. Mr. Desai relied upon the following observaions of Lord Westbury in *Gray* v. *Johnstone* (2):

"But then it has been very well settled that if an executor or a trustee who is indebted to a banker, or to another person, having the legal custody of the assets of a trust estate, applies a portion of them in the payment of his own debt to the individual having that custody, the individual receiving the debt has at once not only abundant proof of the breach of trust, but participates in it for his own personal benefit".

It has been urged that these observations apply to the facts of this case. In the first place there is nothing on the record of this case to show that Joosab applied the assets of the trust estate in the payment of his own debt at the time. The loan account of Joosab was in his capacity as an executor: and the account No. 1, from which the security was taken, was also in his name in that capacity. In the absence of the accounts of the estate of the deceased Khakibhai kept or rather presumed to have been kept by the executors and in the absence of any evidence of the surviving executor, it could not be assumed that he applied a part of the trust estate in the payment of his own debt. Secondly, there is nothing to show that the Bank had actual notice of the trust or of misapplication of the funds. Even assuming in favour of the plaintiff that the Bank knew or ought to have known that the surviving executor was a trustee and that account No. 1 related to a trust estate there

(4) 4 Ind. Cas. 449; 36 I. A. 148; 11 Bom. L. R. 1234; 10 C. L. J. 284; 6 A. L. J. 857; 19 M. L. J. 530; 14 C. W. N. 1; 36 C. 1003 (P. C.).

is nothing in the nature of his dealings with the Bank to show that he was using the trust assets for any improper purpose at the time. It is difficult to understand on what principle the Bank could be expected to know the dealings of Joosab with the estate of the deceased and to realise that the loan account in his name as an executor was his own personal debt. Even now we have no means of ascertaining it: and it is hardly possible to accept the contention that the Bank must be deemed to have constructive notice of what is not clear even on the present record. I do not think that the observations in *Gray* v. *Johnstone* (2) can help the plaintiff in this case. The plain position, so far as the Bank is concerned, seems to be that Joosab dealt with them as an executor throughout and that they had no means of knowing, and, in view of the nature of the dealings with them, were under no obligation to inquire, as to whether Joosab was acting properly as an executor or a trustee at the time he withdrew the trust funds from the Bank in his capacity as an executor. The subsequent dealings by Joosab with the trust fund after he withdrew it from the Bank, however improper, cannot affect the Bank in any way.

N. K. & N. H.

Appeal allowed.

LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL No. 185 OF 1919.

March 10, 1921.

Present:—Mr. Robinson, Chief Judge, and Mr. Justice Heald.

MAUNG PAN ON —APPELLANT

versus

MAUNG TUN THA AND OTHERS —RESPONDENTS.

Burmese Buddhist Law—Inheritance—Orasa *son's ¼th share—Estate, when comes into existence—Mesne profits.*

On the death of his father an *orasa* son becomes entitled to a definite one-fourth part of the estate. The estate comes into existence at his father's death and he is entitled to recover it with mesne profits. [p. 770, col. 1.]

First appeal against the judgment passed by the District Judge, Thaton.

Mr. *May Oung*, for the Appellant.

Mr. *Keith*, for the Respondents.

JUDGMENT.—U Tu died in December 1906. Six and a half years later, plaintiff sued as his *orasa* son for his one-fourth share in the estate. On appeal this Court held that the question for decision was, whether an *orasa* son must act with reasonable promptitude in exercising his option of taking one fourth of his parents' joint property on the death of his father or whether he has twelve years within which he can exercise that option under Article 123 of the Limitation Act. It was held that, in the interests of the family and because the mode of management of the property must vary and the prospects of the other heirs would also vary according as the option was exercised or not, he should do so without delay. It was, therefore, held that plaintiff's right to a one-fourth share had lapsed altogether. This decision was reversed on appeal by their Lordships of the Privy Council,* who said that defendant's contention was that plaintiff had not in fact any share in the estate but that on the death of his father he had obtained a right to elect whether he would have that share or no, and that, in the absence of an election within reasonable time, the claim could not be brought forward. Their Lordships held that the whole contention depended upon the consideration of two different rules, namely, rule 5, and rule 14 of Chapter X of the *Manukye*. They did not consider it desirable to express an opinion upon the true construction of rule 14 which relates to the division of the estate on the death of the mother. They held that its determination was not relevant to the question before them and that, "even assuming in favour of the respondents, that the rights of the eldest son would change in the event of his not having segregated his one-fourth share before his mother's death, it by no means follows that the right which he got under rule 5 was merely the right to elect within a certain limited period of time whether he would take the property or no. Their Lordships can find no ground whatever for the suggestion that he got anything under rule 5 excepting a definite one-fourth share in the property of the estate, a right which he was at liberty to assert within any

*See *Maung Tun Tha* v. *Ma Thit*, 38 Ind. Cas. 809—[*Ed.*]

period that was not outside the period fixed by Article 123 of the Indian Limitation Act as the period within which a claim must be made for a share of property on the death of an intestate."

The case then returned to the original Court for a final determination of the rights of the plaintiff, and from that decision the present appeal has been filed on two points only.

[After stating the points and discussing the evidence their Lordships proceeded to observe as follows :—]

It has been, for a long time, the commonly accepted view of the *orasa* son's right that it consists of an option in respect of a definite share which may or may not be exercised by him as he chooses, and where the family consists of only three children or less it may be to the advantage of the *orasa* son not to exercise that option but to wait until the mother's death and then divide the estate equally with the other children whereby he would get a larger share than a fourth. This view, as it appears to us, is clearly shown to be wrong by the decision of their Lordships of the Privy Council to which we have referred above. The *orasa* son becomes entitled on the death of his father to a definite one-fourth part of the estate, and in the present case the position is that he has asserted that claim prior to his mother's death and within time. It has been suggested that the estate to which he succeeded does not vest in him until he makes his claim to reduce it into possession, but that view is, in our opinion, put out of Court by their Lordships' decision. On the death of his father he became entitled to a definite one-fourth part of the estate and he is, therefore, entitled to recover that estate in the present suit. This being so, the estate came into existence at his father's death and he is entitled to mesne profits on it.

[NOTE.—The rest of the judgment is not material for the purposes of this report.—*Ed.*]

S. D.

Order accordingly.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1534 OF 1920.

February 1, 1922.

Present :—Mr. Justice Greaves.

Syed NAYAJAN ALI AND OTHERS—DEFENDANTS—APPELLANTS

versus

MIDNAPORE ZAMINDARY COMPANY, LIMITED—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XLI, r. 27—Additional evidence at the appellate stage—Discretion of Court—Appeal, second—New point.

The admission of evidence in appeal is largely a matter of the discretion of the Court, and not is entirely a matter of right. [p. 772, col. 2.]

A point in respect of which no issue was framed in the Trial Court, and which was not argued in the first Appellate Court, cannot be raised in second appeal. [p. 771, col. 2.]

Appeal against a decree of the Officiating Subordinate Judge, First Court, Midnapore, dated the 10th of March 1920, affirming that of the Officiating Munsif, Second Court at that place, dated the 13th of August 1918.

FACTS appear from the judgment.

Moulvi *Nuruddin Ahmed* (with him Moulvi *Syed Soadullah*), for the Appellants.—The learned Judge was wrong in not admitting the finally published records the entries wherein were in my client's favour. The learned Judge does not assign any reason for rejecting this piece of evidence. I submit the entries ought to have been admitted in evidence. These entries raise a rebuttable presumption in my favour.

The copy was a certified copy of the petition. We could not call the Pleader as he was dead. Jagadis too was dead.

The Judge has not given due weight to former decisions.

Mr. *U. N. Sen Gupta* (with him Babu *Probodh Kumar Das*), for the Respondent.—This was a title suit. The whole point was a question of title. Records are only presumptive evidence of possession. Even if filed they could not be evidence of title. We claim *khas* possession after declaration of our title.

[GREAVES, J.—The entries might show something more. We do not know].

We claim title. Section 102, Bengal Tenancy Act, lays down the points which a Settlement Officer is to lay down in the Record

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of Rights. Parties can make objections under section 103. The Revenue Officer has no right to go into the question of title. The power of Appellate Courts to admit evidence is also very limited. The Judge was right in discarding Settlement Records. The Record of Rights was published after the institution of the suit. Mere exercise of possession as a trespasser would not give him any title unless mine is barred. I am admittedly the possessor.

Moulvi *Nurudlin Ahmed*, in reply.—They are suing to get *khas* possession by ejecting me. This document raises a presumption in my favour, which, if unrebutted, would have benefited me. I can show that I am not a trespasser. They do not admit me to be a tenant.

Refers to *Venkatachela Pillai* v. *Ranga Pillai* (1). There should be a remand.

JUDGMENT.—This is an appeal by the defendants. The suit by the plaintiffs was for *khas* possession of certain land and for damages and for an injunction. The plaintiffs were Zamindars of a certain Pergannah which included the village in which, I understand, the defendants held some land and the dispute was with regard to certain land which the plaintiffs claimed as their *khas* land. Whereas the defendants alleged that this land had been let out to them and that the plaintiffs had no right to eject them. Both the lower Courts have decreed the suit in the plaintiffs' favour.

Four points are urged before me. First, it is said that the lower Appellate Court wrongly excluded certain evidence that was tendered on behalf of the defendants, namely, the Settlement map and *khatain* forming part of the Record of Rights. It is said that this evidence could not be adduced in the First Court as the Record of Rights had not been finally published but that between the hearing before the Munsif and the hearing in the Appellate Court the Record of Rights had been published and that, accordingly, as the entries in the Record of Rights were alleged to be in the defendants' favour, the lower Appellate Court should have admitted this in evidence to be given in favour of the defendants' contention; secondly, it is said that the lower Appellate Court has not given effect to the statement contained in Exhibit D, a petition which is referred to in the judgment; thirdly, it is said that the lower Appellate Court has not properly considered the effect of certain judgments, Exhibits K and L; and lastly, it is urged that the heirs of one *Musammat* Amina Khatun, defendant No. 5, who died after the institution of the suit, should have been brought on the record.

So far as the last point is concerned, no issue was raised with regard to this before the Munsif. Nor was the point argued in the lower Appellate Court. Under the circumstances, it is not open to the defendants to raise it in appeal to this Court.

So far as Exhibits K and L are concerned, what the learned Judge says is this, that these documents do not show what was the area let out in Mandali to Golam Aliha. Now, this being so. I do not see how they could really have any bearing upon the question in dispute. Admittedly, the defendants held certain land in the village and the only dispute was whether certain *khas* lands were included in the area of their demise. If these judgments, as already stated, did not show what was the area demised, it seems to me that they could have very little bearing on the question that the learned Subordinate Judge had to decide.

So far as Exhibit D is concerned, the learned Subordinate Judge says that there is no evidence that the petitioner had any knowledge of the contents. Now, the original petition which had been filed in another suit had been destroyed along with the record of the suit which was a suit of 1893. A certified copy was produced. But, as the learned Subordinate Judge points out, the original was not signed by Jogeswar Naran and no proof was given of the truth of the statements contained in the certified copy of the petition. Under the circumstances, it seems to me that the learned Subordinate Judge is right in saying that this document had no evidentiary value.

The first point only remains now. Under the provisions of O. XLI, r. 27, the Appellate Court is empowered to allow, in the circumstances stated in the Order, evidence to

(1) 28 Ind. Cas. 694; 17 M. L. T. 220; 28 M. L. J. 284.

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be produced which was not given in the First Court. No doubt the evidence could not have been given in the First Court for the reasons already stated. After all, it was for the Court to see whether the evidence would really have some value with regard to the question propounded for decision. Now, the entry was no doubt before the Subordinate Judge: it was, as I understand, to this effect that the defendants were entered as persons entitled to and in possession of certain lands which were described as *patit* land and the right is said to have been intermediate Mandali permanent right but not Mukarrari. Now, the question really that the Court had to decide was whether the plaintiffs had established their title to the land or whether the defendants by virtue of their holding had right to this *khas* land, and I think it may well be that the learned Subordinate Judge in his discretion thought that this entry to which I have referred would not assist him in arriving at his decision with regard to the questions that were at issue before him. After all, the entries were only presumptive evidence and capable of being rebutted by evidence given on behalf of the plaintiffs. Under the circumstances, I am not prepared to say that the learned Subordinate Judge was not justified in not allowing this evidence to be given. After all, it is largely a question of discretion and not entirely a matter of right. I do not think that in second appeal under the circumstances I should interfere with or send the matter back for a consideration by the lower Appellate Court of this evidence.

In the result, the appeal fails and must be dismissed with costs.

W. C. A.

Appeal dismissed.

LAHORE HIGH COURT.
FULL BENCH.

MISCELLANEOUS SECOND CIVIL APPEAL No. 1174 OF 1920.

February 22, 1921.

Present :—Mr. Justice Chevis, Mr. Justice Broadway and Mr. Justice Wilberforce.

HIMMUN—JUDGMENT-DEBTOR—APPELLANT

versus

FAUJA—DECREE-HOLDER—RESPONDENT.

Pre-emption suit—Decree directing payment within certain period—Period, expiry of, while Court closed—Payment on re-opening of Court, effect of—Civil Procedure Code (Act V of 1908), O. XX, r. 14—Intention of Legislature.

Where a pre-emptor is given a decree on condition of paying in Court the purchase-money within a certain period and the Court closes the very next day and remains closed till after the expiry of the period allowed, payment on the day the Court re-opens is a sufficient compliance with the decree. [p. 775, col. 1.]

O. XX, r. 14 of the Civil Procedure Code implies that, in a suit for pre-emption, a future date should be fixed for the payment of the purchase-money, and indicates that the intention of the Legislature was not that payment should be made on the day on which judgment is announced. [p. 775, cols. 1 & 2.]

Obiter.—When a pre-emptor is given a decree on condition of paying the purchase-money within a certain period, and the Court is open during the earlier part of that period but closed during the latter part, payment on the day the Court re-opens is not a sufficient compliance with the decree. [p. 775, col. 1.]

Miscellaneous second appeal from the order of the District Judge, Ludhiana, dated the 29th March 1920, reversing that of the Munsif, First Class, Jagraon, District Ludhiana, dated the 18th November 1919.

ORDER OF REFERENCE TO A FULL BENCH.

CHEVIS, J.—(*November* 12, 1920).—On the 29th August 1919 the plaintiff obtained a decree for pre-emption on condition of payment of Rs. 500 within a month. The Court was closed during September and the early part of October, and opened on the 7th October. On that day plaintiff appeared in Court and tendered Rs. 400, the balance of the Rs. 500, Rs. 100 having already been paid in on 5th July 1919. The Court called for a report, and the next day the money was actually paid in. The vendee-defendant then objected that, as the pre-emption money had not been paid in within the period fixed by the decree, the decree had lapsed. The First Court accepted this as the correct view. The learned District Judge on appeal held that the decree had not lapsed. He referred to *Naba* v. *Pathana* (1) as authority for holding that time could be extended by reason of section 148, Civil Procedure Code, and held that time should be extended up to the re-opening of the Court, and that tender of the money on the 7th October was sufficient. The vendee-defendant appeals to this Court

(1) 18 Ind. Cas. 86; 60 P. R. 1913; 53 P. L. R. 1913; 72 P. W. R. 1913.

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His Counsel's main contention is that the fact of the Court being closed on the 29th September does not prevent the lapsing of the decree when the money was not paid in on that date. This contention we will deal with later on.

In the first place, we note that we find ourselves quite unable to accept the view put forth in *Naba* v. *Pathana* (1) that section 148 applies to such cases. We are of opinion that this section was never intended to allow a Court to alter a decree. A decree can be altered by review, on appeal or on revision, but we do not think that either section 148 or 151 can be utilized for the purpose of altering a decree. And in support of this we cite *Suranjan Singh* v. *Rambahal Lal* (2).

Supposing for the moment that payment of the money on the day the Court re-opened was sufficient compliance with the decree, there is the fact that the money was not actually paid till the following day. But this was not the plaintiff's fault, and in several cases tender has been held to be sufficient, see *Nathu* v. *Imam Din* (3), *Ahmad Din* v. *Rihan* (4), *Mir Zaman* v. *Fyao* (5), *Prabhu* v. *Nihala* (6) and *Gaya Bakhsh Singh* v. *Tilak Singh* (7). And Mr. Jai Gopal admits that the money was tendered on the 7th October, and does not press the contention that tender was not equivalent to payment.

The main question in the case is, whether the principle laid down in section 4 of the Limitation Act, and in section 10 of General Clauses Act (X of 1897) and in section 8 of the Punjab General Clauses Act (I of 1898) is applicable to such cases. Section 4 of the Limitation Act is not applicable as that relates only to the period of limitation prescribed by the Act for suits, appeals and applications and cannot be applied to the period of limitation prescribed by a decree for the payment of money. Similarly, the sections in the General Clauses Acts cannot be applied, as the limitation there spoken of is the limitation prescribed by an Act and not by a decree. Mr. Jai Gopal relies on *Hirdey Narain* v. *Alam Singh* (8). In that case the six months allowed to the plaintiff for depositing the pre-emption money expired on a holiday, and the money was tendered on the following day. It was held that the decree had lapsed. There are two rulings of this Court on the point. In *Shams-ud-din* v. *Fir Baksh* (9) it was held by a majority, Boulnois, J., dissenting, that payment on the re-opening of the Court was sufficient. In *Baghela* v. *Musammat Sallo* (10) a similar view is held. So, too, in *Dabi Din Rai* v. *Muhammad Ali* (11).

It is urged by Mr. Jai Gopal Sethi that these judgments give no clear reasons for their decision that in cases where the period fixed by the decree for payment expires on a day on which the Court is closed payment may be made on the day on which the Court re-opens. The decision presumably rests on what has been stated to be a general principle of law, *viz.*, that though a party cannot himself extend the time allowed for doing an act in Court, yet if delay in the performance of the act is caused, not by any act of the party, but some act of the Court itself, such as the fact of the Court being closed, he is entitled to do the act on the following day. This has been followed as a principle in certain cases, see *Sambasiva Chari* v. *Ramasami Reddi* (12), *Shooshee Bhusan* v. *Gobind Chunder Roy* (13) and other cases cited on page 27 of Starling's Limitation Act, fifth Edition. In these cases certain English cases are cited which we will now notice.

In *Mayer* v. *Harding* (14) the appellant, having applied to the Justices to state a case and having received it on Good Friday had to transmit it to the proper Court within three days. The offices of the Court were closed

(2) 21 Ind. Cas. 585; 35 A. 582; 11 A. L. J. 950.
(3) 31 P. R. 1880.
(4) 69 P. R. 1881.
(5) 79 P. R. 1881.
(6) 36 Ind. Cas. 183; 123 P. W. R. 1916; 72 P. L. R. 1917.
(7) 28 Ind. Cas. 879; 2 O. L. J. 151.
(8) 48 Ind. Cas. 353; 41 A. 47; 16 A. L. J. 892.
(9) 31 P. R. 1877.
(10) 18 Ind. Cas. 994; 3 P. R. 1913; 226 P. L. R. 1913; 303 P. W. R. 1912.
(11) 3 A. 850; A. W. N. (1881) 100; 2 Ind. Dec. (N. S.) 573.
(12) 22 M. 179; 8 M. L. J. 265; 8 Ind. Dec. (N. S.) 127.
(13) 18 C. 231; 9 Ind. Dec. (N. S.) 154.
(14) (1867) 2 Q. B. 410; 9 B. & S. 27*n.*; 16 L. T. 429; 15 W. R. 816.

from Friday till Wednesday. The case was transmitted on the Wednesday, and this was held to be sufficient, as it was a case in which it was impossible for the appellant to transmit it earlier.

In *Waterton* v. *Baker* (15) appellant had to give notice of appeal and to give security to be approved by the Registrar for costs of appeal within 10 days. He gave notice and tendered good security within the ten days but the security was not approved till after the ten days had expired. It was held that he had done all that it was possible for him to do, and that the requirements of law had been complied with.

But there are two earlier cases which require to be noticed, as they are more applicable to the case before us.

In *Peacock* v. *Reg.* (16) it was held that where the three days allowed for an application to Justices to state a case expired on a Sunday an application presented on the Monday was not in time. This ruling was followed in *Pennell* v. *Churchwardens of Uxbridge* (17). These two rulings are in no way dissented from in the later English rulings. On the contrary, in *Mayer* v. *Harding* (14) we find Mellor, J., saying, "where a Statute requires a thing to be done within three days, or six months, or within any perscribed period, the time may no doubt be circumscribed by the fact of its being impossible to comply with the Statute *on the last day of the period so fixed.*"

So all that the English rulings amount to is this, that where it is impossible to do the required act at any time during the prescribed period it may be done on the next possible occasion. They do not lay down that where the doing of the act is left till the latter part of the period and it is then found impossible to do the act during that latter part it may be done after the period has expired ; quite the reverse.

In the particular case before us the pre-emption money might have been paid into Court on the 30th August 1919 (not on 31st for that was a Sunday). No doubt one day is a very short time to allow for payment of pre-emption money ; but the pre-emptor might have asked for review, or might have appealed on the ground that he could not possibly go home and get the money and return in one day. It is certainly a hard case, and we note that such hard cases would be avoided if the Courts would take the trouble to comply with the provisions of O. XX, r. 14, of the Civil Procedure Code, and fix, not a period, but a date by which the money should be paid, taking care also to see that the date fixed is one on which, so far as can be foreseen, the Court will not be closed.

But we must decide the case in accordance with law. In our opinion there is neither any particular law nor any general principle which enables a person who is directed to do an act within a certain period and who is able to do it within the earlier part of that period to do it after the completion of the period, merely because the Court was closed during the latter part of that period.

As at present advised, we are, therefore, of opinion that the Allahabad ruling *Hirdey Narain* v. *Alam Singh* (8) lays down the correct law, and that this appeal should be accepted. But as the former rulings of this Court are to the contrary the case must be referred to a Full Bench.

We refer to a Full Bench the following question. When a pre-emptor is given a decree on condition of paymant within a certain period, and the Court is open during the earlier part of that period but closed during the latter part, is payment on the day on which the Court re-opens a sufficient compliance with the decree?

Mr. *Jai Gopal Sethi*, for the Appellant.

Mr. *Kanwar Narain*, for Diwan *Narinjan Parshad*, for the Respondent.

JUDGMENT OF THE FULL BENCH.

The facts are fully stated in the order of the Division Bench, dated the 12th November 1920 referring this case to a Full Bench. When the case was referred the Division Bench apprehended that the Court was open on the 30th August 1919. This, however, was a mistake, for the 30th August was a last Saturday in the month, on which day the Court is always closed. So the case now stands as follows :—

On the 29th August 1919 the plaintiff was given a decree for possession by pre-

(15) (1868) 3 Q.B. 173; 9 B. & S. 23; 37 L. J. Q. B. 65; 17 L. T. 468; 16 W. R. 358.

(16) (1858) 114 R. R. 707; 4 C. B. (N. S.) 364; 27 L. J. C. P. 224; 6 W. R. 517; 140 E. R. 1085; 31 L. T. (O. S.) 101.

(17) (1862) 149 R. R. 785; 31 L. J. M. C. 92; 8 Jur. (N. S.) 99; 5 L. T. 685; 10 W. R. 319.

emption, on condition of payment of Rs. 500 within one month from the date of judgment. From that day onwards the Court remained closed until the 7th of October on which day the plaintiff appeared in Court and tendered the balance of the pre-emption money. The question, therefore, which was referred to the Full Bench, *viz.*, whether when a pre emptor is given a decree on condition of payment within a certain period and the Court is open during the earlier part of that period but closed during the latter part, payment on the day on which the Court re-opens is a sufficient compliance with the decree, does not really arise in the present case, since it is now found that the Court was closed during the whole of the period. Had the question really arisen we are of opinion that we should have followed that interpretation of the law which is laid down in *Hirdey Narain* v. *Alam Singh* (8). We need not give our full reasons for saying this, as anything we might say would be *obiter dictum*; it is sufficient simply to say that we agree with what has been said in the Order of Reference.

On behalf of the appellant it is urged that payment might have been made on the 29th of August 1919, *i. e.*, the very day on which the judgment was pronounced. We note that the last hearing of the case was on the 20th August 1919, when arguments were heard and the 29th August 1919 was fixed for pronouncing judgment. It seems to us, therefore, very likely that judgment was written at home and was delivered early on the 29th of August. But this does not necessarily follow, and it is by no means impossible, that judgment was delivered at the close of the day on the 29th August, and in that case it might, perhaps, be absolutely impossible for the plaintiff to have paid or tendered the money into Court on that day. It is, of course, extremely improbable that the plaintiff had the money with him that day, as pre-emptors do not bring with them to Court the pre-emption money on the day on which judgment is to be pronounced, and until judgment is pronounced they do not know what sum they will be required to pay. Further, O. XX, r. 14, lays down that the decree shall specify the day on or before which the purchase-money shall be paid into Court. This clearly implies that a future date shall be fixed for payment and seems to us an indication that the Legislature regards it as impossible for a person to come to Court on the day on which judgment is to be pronounced bringing with him for payment into Court on that day a sum which has yet not been fixed by the Court. We consider, therefore, that it was quite impracticable for the plaintiff to pay the purchase-money into Court on the 29th August. The plaintiff tendered the money into Court on the next day on which the Court was open. He might possibly, had he attempted to do so, have found the Nazir on the Court premises on one of the days during which the Court was closed, but he could not anticipate that he would do so, and we think that in such a case it should be held that payment on the day on which the Court re-opened was all that could possibly be expected of the plaintiff.

We, therefore, uphold the order of the District Judge and dismiss the appeal with costs.

W. C. A. & N. H.

Appeal dismissed.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 76 OF 1920.

February 9, 1922.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Cuming.

MIDNAPORE ZAMINDARY COMPANY, LIMITED—PLAINTIFF—APPELLANT

versus

SRIDHAR MAHATA—DEFENDANT—RESPONDENT.

Landlord and tenant—Bengal Tenancy Act (VIII of 1885), ss. 7, 105, 105A, 106, 109A—Fair and equitable rent, proceedings for settlement of—Questions as to extent of area and liability to enhancement of rent also decided—Appeal, second, to High Court, competency of.

If in any proceeding under section 105 of the Bengal Tenancy Act questions as to the extent of area and liability to enhancement of rent have been investigated and determined, the order of the Settlement Officer, though in form an order which settles a fair and equitable rent, does in substance embody a decision of a question within the

scope of section 105A and, consequently, of section 106. Such a decision is not one merely settling a rent within the meaning of section 109A and is consequently liable to be challenged by way of second appeal to the High Court. [p. 776, col. 2; p. 777, col. 1.]

Jnanada Sundari Chowdhurani v. *Abdur Rahman* [*Amudi Sarkar*], 33 Ind. Cas. 148; 43 C. 602; 20 C. W. N. 428; 23 C. L. J. 281, followed.

Where the landlord seeks to have the rent of a tenure-holder enhanced under section 7 of the Bengal Tenancy Act, the first point for investigation is whether the rent is liable to enhancement. When this has been made out, the next point for determination is, whether there is a customary rate payable by persons holding similar tenures in the vicinity. It is only when this has been answered in the negative that the rent can be enhanced up to such limit as the Court thinks fair and equitable. [p. 777, col. 1.]

Letters Patent Appeal against the judgment of Mr. Justice Walmsley, dated the 18th of August 1920, in Appeal from Appellate Decree No. 1585 of 1919.

FACTS appear from the judgment.

Babu *Probodh Kumar Das*, for the Appellant.—The decision of the Special Judge was a decision settling a rent. Hence having regard to the provisions contained in section 109A, sub-section (3), of the Bengal Tenancy Act, no second appeal lay to the High Court. The decision of Mr. Justice Walmsley was consequently without jurisdiction. As regards the merits, the question whether the landlords were entitled to have the rent enhanced under section 7 of the Bengal Tenancy Act, is a question of fact the finding whereon of the Special Judge could not be attacked in second appeal.

Babu *Mahes Chandra Banerjee* for Babu *Pramatha Nath Bandopadhyayya*, was not called upon to reply.

JUDGMENT.—This is an appeal under clause 15 of the Letters Patent from the judgment of Mr. Justice Walmsley in a proceeding under section 105 of the Bengal Tenancy Act.

The appellants who were the landlords instituted these proceedings against the respondent, their tenant, with a view to have fair and equitable rent settled in respect of the tenure held by him. The case as presented to the Settlement Officer was that the defendant was in occupation of an area in excess of what he paid rent for and was consequently liable to have his rent increased. Two issues were raised to cover this point; namely, first does the defendant hold any area in excess of what he is paying rent for? and secondly, 'what should be the fair rate of rent for assessment of the excess area, if any?' The Settlement Officer came to the conclusion that the defendant held an excess area of 5·95 acres, and that the rate of rent, should be fixed at 2 annas 6 pies per *bigha* which was the average rate fixed upon the original area. The consequence was that the rent was increased by Rs. 5-10-6. The landlords appealed against this decision and argued before the Special Judge that they were entitled to have the rent enhanced under section 7. The Special Judge acceded to this contention and held that the rent payable by the defendant should be fixed at Rs. 139. The tenant thereupon preferred a second appeal to this Court. A preliminary objection was taken to the competence of the appeal on the ground that the decision of the Special Judge was a decision settling a rent within the meaning of sub-section (2) of section 109A and was consequently not liable to be challenged by way of an appeal to this Court. Mr. Justice Walmsley overruled this contention, and held that the decision of the Special Judge had been founded on a basis never put forward before the Settlement Officer. He accordingly allowed the appeal, set aside the decision of the Special Judge and restored the decree of the Settlement Officer.

On the present appeal it has been contended that the appeal heard by Mr. Justice Walmsley was incompetent. We are of opinion that there is no foundation for this contention and that it is opposed to the decision of the Full Bench in the case of *Jnanada Sundari Chowdhurani* v. *Abdur Rahman* [*Amudi Sarkar*] (1). The principle applicable to cases of this character was explained in that decision: "If in any proceeding under section 105 questions under section 105A have been investigated and determined, the order of the Settlement

(1) 33 Ind. Cas. 148, 43 C. 603; 20 C. W. N. 428; 23 C. L. J. 281.

Officer, though in form an order which settles a fair and equitable rent, does in substance embody a decision of question within the scope of section 105A and consequently of section 106. Such a decision is not one merely settling a rent within the meaning of section 109A and is consequently liable to be challenged by way of second appeal to the High Court." In the case before us, the decision of the Special Judge is founded on two essential facts, namely, first, that the defendant held an area in excess of the original area of the tenancy and was consequently liable to have the rent assessed on such excess area; and secondly, that the tenure held by the defendant was of such a description that its rent was liable to be enhanced. Consequently, the decision of the Special Judge involves a determination of two fundamental questions in connection with the tenancy held by the defendant, namely, the extent of area and the liability to enhancement. There can be no room for argument that a decision of this character was not a decision merely settling rent within the meaning of section 109A and the appeal was consequently competent.

As regards the merits, we entirely agree with the view taken by Mr. Justice Walmsley. The record does not disclose the faintest trace of a contention in the Court of first instance that the defendant was liable to have his rent enhanced under section 7. The argument which was advanced for the first time before the Special Judge, should not have been entertained by him for decision on the materials available on the record. Section 7 provides that the rent of a tenure-holder, when it is liable to enhancement, may, subject to any contract between the parties, be enhanced up to the limit of the customary rate payable by persons holding similar tenures in the vicinity. It is only where no such customary rate exists, that it may, subject as aforesaid, be enhanced up to such limit as the Court thinks fair and equitable. The section then proceeds to lay down a rule for the ascertainment of the fair and equitable rent. Consequently, where the landlord seeks to have the rent of a tenure-holder enhanced, the first point for investigation is whether the rent is liable to enhancement. When this has been made out, the next point for determination is, whether there is a customary rate payable by persons holding similar tenures in the vicinity. It is only when this has been answered in the negative that the rent can be enhanced up to such limit as the Court thinks fair and equitable. None of these matters had been investigated in the Court of first instance for the reason that the question was not raised in that Court. In these circumstances, Mr. Justice Walmsley properly allowed the appeal and restored the decree of the primary Court.

The result is that the judgment of Mr. Justice Walmsley is affirmed and this appeal is dismissed with costs.

B. N.

Appeal dismissed.

LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL No. 148 OF 1920.

January 11, 1922.

Present :—Sir Sydney Robinson, KT., Chief Justice, and Mr. Justice Maung Kin.

P. V. CHETTY FIRM—PLAINTIFFS—APPELLANTS

versus

MOTOR UNION INSURANCE COMPANY—DEFENDANTS—RESPONDENTS.

Fire Insurance—Contract of insurance—Contract of indemnity—Contract between insurer and insured—Third party even if mortgagee cannot sue on insurance policy—"Total loss," meaning of—Salvage—Mortgagee, when entitled to benefit of insurance—Prohibitory order, issue of, by telegram.

A contract of insurance is a contract of indemnity. It is a contract by the insurer to indemnify the insured against the loss that he may suffer in certain conditions. It is not a contract to indemnify any other persons, and there is no privity of contract between the insurer and any third party. Therefore, a third party, even if he is a mortgagee of the insured property, cannot sue on the policy

unless the right of the insured to sue has been assigned to him by a proper and legal assignment. [p. 779, col. 1.]

Castellain v. *Preston*, (1883) 11 Q. B. D. 380 at p. 386: 52 L. J. Q. B. 366; 49 L. T. 29; 31 W. R. 559, referred to.

A 'total loss' means the destruction of the property or injury to it to such an extent as to render the insurer liable to pay the total sum insured. [p. 779, col. 1.]

When the insured has been indemnified to the full extent for a total loss, any salvage belonging to the insured is presumed, under such circumstances, to have been abandoned, and anything that may remain of the property belongs to the insurers to reimburse themselves so far as they can by selling the salvage for what it will fetch. That is an essential element in a contract of insurance. [p 780, col 1.]

Apart from Statute, the mortgagee is not *prima facie* entitled to the benefit of an insurance effected on the property by the mortgagor. In order to entitle the mortgagee to any claim on the policy there must be a covenant not only to insure but to insure for the benefit of the mortgagee or to apply the policy moneys in reinstatement or otherwise for the benefit of the mortgagee. [p. 779, col. 1.]

Rayner v. *Preston*, (1881) 18 Ch. D. 1; 50 L. J. Ch. 472; 44 L. T. 787; 29 W. R. 546; 45 J. P. 829, referred to.

Obiter.—Courts are forbidden to issue prohibitory orders by telegram. [p. 778, col. 2.]

First appeal against the judgment passed by Rigg, J., on the Original Side.

Mr. *N. M. Cowasji*, for the Appellants.

Mr. *Davies*, for the Respondents.

JUDGMENT.

ROBINSON, C. J.—One Maung Po Sin owed the plaintiff-appellant firm Rs. 6,000 and as security for the re-payment of that sum with interest he executed in their favour a deed of mortgage on certain paddy land together with a mill and the machinery contents standing on the land. The mortgage was executed on the 7th November 1917. Subsequent to that, Maung Po Sin insured the premises mortgaged for their full value with the respondent Company. In June 1918 the mill was completely destroyed by fire. All that remained was certain items of the machinery consisting of a damaged boiler, a steam-engine, an iron chimney, a large number of sheets of corrugated iron, more or less damaged, and certain other machinery—huller, pulleys, shafting, etc., which were badly damaged.

Maung Po Sin claimed from the Insurance Company payment of the insurance money. On the 29th June 1918 Counsel for appellants wrote to the Insurance Company informing them of the debt due by Maung Po Sin and claiming that their clients were entitled to receive the insurance money. They requested them to withhold payment and to make no payment to Maung Po Sin without reference to their clients who, they said, were about to file a suit on their mortgage. The defendant Company took no notice of that letter, and on the 3rd and 8th of July they duly made payment in full of the whole amount due under the insurance policy.

On filing the suit on the mortgage plaintiffs-appellants obtained an order from the District Court restraining the Insurance Company from paying Rs. 7,500 out of the insurance money to Maung Po Sin. This order was conveyed by telegram, but it is admitted that full payment had been made by the Insurance Company before they received that telegram.

Courts are forbidden to issue prohibitory orders by telegram, but the money having been already paid, the order was of no effect.

Plaintiffs appellants obtained a decree against Maung Po Sin on the 29th of July 1918. By that decree it was ordered that, if Maung Po Sin did not pay the sum decreed for principal, interest and costs within the time allowed, the mortgaged property or a sufficient part thereof shall be sold and the proceeds paid into Court and applied in payment of what was due to the plaintiffs with subsequent interest, and the balance, if any, to be paid to the defendant.

There was no reservation of rights to obtain a personal decree. On the 3rd July 1918, the salvage was sold, and the Insurance Company received Rs. 7,900 for it. The plaintiffs-appellants now bring this suit claiming to be entitled to recover the amount due on his mortgage from the Insurance Company and from the alleged purchasers of the salvage.

As regards the latter, apparently a mistake was made, and the 2nd defendant is not the purchaser and it is admitted that as against him there is no claim.

Against the Insurance Company the claim is based on two grounds: First, it is based on the policy of insurance issued to Maung Po Sin, and secondly, on the deed

of mortgage which, it is claimed, subsists as against the salvage property.

As regards the claim based on the policy, I am of opinion that the appellants are entitled to no relief. A contract of insurance is a contract of indemnity. It is a contract by the insurer to indemnify the insured against the loss that he may suffer in certain conditions. It is not a contract to indemnify any other persons, and there is no privity of contract between the insurer and any third party.

As regards the contract being one of indemnity, this is well recognised, and it is not necessary to do more than to quote one passage from the judgment of Brett, L. J., in the case of *Castellain* v. *Preston* (1):—"The very foundation, in my opinion, of every rule which has been applied to insurance law is this, namely, that the contract of insurance contained in a marine or fire policy is a contract of indemnity; and of indemnity only, and that this contract means that the assured, in case of a loss against which the policy has been made, shall be fully indemnified, but shall never be more than fully indemnified. That is the fundamental principle of insurance, and if ever a proposition is brought forward which is at variance with it, that is to say, which either will prevent the assured from obtaining a full indemnity, or which will give to the assured more than a full indemnity, that proposition must certainly be wrong." And it is pointed out in Macgillivray's Insurance Law, at page 773, that, "apart from Statute, the mortgagee is not *primâ facie* entitled to the benefit of an insurance effected on the property by the mortgagor..... In order to entitle the mortgagee to any claim on the policy there must be a covenant not only to insure but to insure for the benefit of the mortgagee or to apply the policy moneys in reinstatement or otherwise for the benefit of the mortgagee."

The deed of mortgage is silent as to insurance. There was no covenant by the mortgagor to insure for the benefit of the mortgagee, or at all. The mortgagee could not sue on the policy unless the mortgagor's right to sue had been assigned to him by a proper and legal assignment. There has been no such assignment, and the mortgagor has been paid in full for the loss that he suffered.

The loss was a "total loss," and a total loss means the destruction of the property or injury to it to such an extent as to render the insurer liable to pay the total sum insured. (Bunyon, on Fire Insurance, at page 267).

It was suggested that by the theory of subrogation the mortgagee would be entitled to the mortgagor's rights on this policy. The mortgagor has no rights left on the policy such as are now claimed by the mortgagee.

As to any right conferred by Statute, we have been referred to sections 49, 72 and 76 of the Transfer of Property Act.

Section 49 embodies a principle of law which was subsequently the view taken by James, L. J., in the case of *Rayner* v. *Preston* (2), in which he dissented from the opinion of the other two learned Lords Justices. It deals with the case of the transfer of immoveable property which was then insured against loss by fire, and in terms it only gives the right to the transferee, in the absence of a contract to the contrary, to require any money which the transferor actually receives under the policy or so much thereof as may be necessary to be applied in reinstating the property. It deals with an entirely different subject and has no application to the present case.

Section 72 deals with the case when, during the continuance of a mortgage, the mortgagee takes possession of the mortgaged property and it allows him to insure the property subject to certain limitations. Further, it lays down that nothing in the section shall be deemed to authorise the mortgagee to insure when an insurance of the property is kept up by or on behalf of the mortgagor to the amount in which the mortgagee is authorised to insure.

Section 76 lays down the liabilities of a mortgagee who, during the continuance of the mortgage, takes possession of the mortgaged property. There is no Statute provision by which the mortgagee is entitled to the benefit of the insurance effected by the mortgagor.

For these reasons, the first part of the claim fails, and the decree of the Court below must be confirmed.

(1) (1883) 11 Q. B. D. 380 at p. 386; 52 L. J. Q. B. 366; 49 L. T. 29; 31 W. R. 559.

(2) (1881) 18 Ch. D. 1; 50 L. J. Ch. 472; 44 L. T. 787; 29 W. R. 546; 45 J. P. 829.

BIDHURANJAN MOZUMDAR v. MANGAN SARKAR.

So far as the alternative claim which is based on the mortgagee's own mortgage rights is concerned, it is to be noted that in this case immoveable property was mortgaged, but owing to its destruction by fire all that remained was certain moveable property, and it is the moveable property that has been brought to sale by the insurer. What the effect of this may be it is not, I think, necessary to decide. The right that the mortgagee possesses under his mortgage and under the decree that has been granted him is to bring the mortgaged property to sale. If the property had been alienated by the mortgagor, any person purchasing the property would purchase it subject to the rights of the mortgagee and to the charge on the property, and it would be open to the mortgagee to follow the property in his hands. The purchaser would be liable to have the property sold and the mortgage-debt paid out of the proceeds of sale so far as they would go. Those rights the mortgagee does not attempt to enforce.

A contract of insurance, as has been pointed out above, is one of indemnity, and, when the insured has been indemnified to the full extent for a total loss, any salvage belonging to the insurers (insured ?) is presumed under such circumstances to have been abandoned, and anything that may remain of the property belongs to the insurers to reimburse themselves so far as they can by selling the salvage for what it will fetch. That is an essential element in a contract of insurance. The mortgagor having been paid in full could not recover anything that the insurers may have realised by the sale of the salvage from them.

In this case the mortgagor has no rights left as regards the property which could pass to the mortgagee. In the passage that I have already quoted in *Castellain* v. *Preston* (1) it is pointed out that the contract between the insurer and the insured does not permit of the insured obtaining more than full indemnity. If in addition to obtaining full indemnity, as he has done, his debts were also to be paid, that would be in contravention of the first principle of the contract into which he entered, and, as Brett, L. J., pointed out, any proposition which would have this effect must certainly be wrong. The rights that the mortgagee possessed under his mortgage have been embodied in a decree of the Court, and that right is to bring the mortgaged property to sale.

In my opinion, therefore, the plaintiffs-appellants have no rights against the Insurance Company before us on their mortgage, and I would confirm the decree of the Court below in its entirety and dismiss this appeal with costs throughout.

MAUNG KIN, J.—I concur.

S. D.

Appeal dismissed.

CALCUTTA HIGH COURT.

CIVIL REFERENCE No. 13 OF 1921.

January 17, 1922.

Present:—Justice Sir John Woodroffe, Kt., Mr. Justice Greaves and Mr. Justice Ghose.

BIDHURANJAN MOZUMDAR

versus

MANGAN SARKAR.

Stamp Act (II of 1899), s. 2, sub-sec. (5), cl. (b) —Attestation, meaning of.

The attestation referred to in section 2, sub-section (5) clause (*b*) of the Indian Stamp Act means attestation on the face of the instrument. [p. 781, col. 2.]

Reference under Stamp Act I of 1879, *s.* 49, 17 A. 211; A. W. N. (1895) 61; 8 Ind. Dec. (N. S.) 460 (F. B.), referred to.

Jagannath Khan v. *Bajrang Das Agarwala*, 62 Ind Cas. 97; 48 C. 61, distinguished.

Reference made by the Officiating Sub-Judge, First Court, Pabna, through the District Judge, Pabna under section 60 of the Stamp Act.

FACTS appear from the judgment.

Babu *Dwarka Nath Chakraverty*, Senior Government Pleader (with him Babu *Surendra Nath Guha*, Junior Government Pleader), for the Government.—The facts leading to this reference are briefly these:—The instrument in question purports to be a promissory-note for a loan of Rs. 71 re-payable on demand to the creditor, without the words "or order" or "bearer" and is attested by the writer who is

a third person, but it has been stamped with an adhesive stamp of one anna. It was proved that the writer was actually present at the time of the execution of the document and saw the execution. The learned Officiating Subordinate Judge of Pabna who is trying the case has made this reference on the following points:—(1) Whether an instrument attested by a witness containing an unconditional undertaking signed by the maker to pay a certain sum of money to a person without the addition of the words, 'or order' or 'bearer' and without any words prohibiting its transfer, comes within the definition of a bond as given in the Indian Stamp Act, after the amendment of section 13 of the Negotiable Instruments Act (XXVI of 1881) and addition of the Explanation (i) by section 3 of Act VIII of 1919? (2) If the above question be answered in the negative, whether the answer will be applicable to an instrument executed before Act VIII of 1919 came into operation?

I submit the learned Judge ought not to have made this reference in view of the fact, as appears from his letter, that the plaintiff has preferred to pay the stamp duty and penalty as on a bond. Attestation under section 2 (5), clause (*b*) of the Stamp Act means attestation on the face of the instrument. Refers to *Reference under Stamp Act I of* 1879, *s.* 49 (1). I submit the stamp payable was one anna only.

No one appeared to oppose.

JUDGMENT.

WOODROFFE, J.—This is a Reference under section 60 of the Indian Stamp Act. No appearance has been made by the person liable to pay the stamp. The learned Government Pleader has rightly pointed out to us that as the penalty has already been levied, it may be a question whether the learned Judge was right in making this Reference; but seeing that the learned Judge states in his Reference that "pending the decision on this Reference the plaintiff in this suit has preferred to pay the stamp duty and penalty," I think that the inference is that before the penalty was levied, the learned Judge had determined to make this Reference; and all that happened was that the Reference was actually framed later on. Upon the facts submitted to us, I think that the attestation referred to in section 2 sub-section (5) clause (*b*) of the Indian Stamp Act means attestation on the face of the instrument. In this connection I may refer to *Reference under Stamp Act I of* 1879, *s.* 49 (1). The decision in the case of *Jagannath Khan* v. *Bajrang Das Agarwala* (2), to which the learned Judge has referred, is not, I think, in point. It does not hold that the person who signs as writer of an instrument must be regarded as an attesting witness, but that a person who is present and witnesses execution of a mortgage-bond and whose name appears in the document though he is therein described merely as a writer of the deed is a competent witness to prove the execution of the mortgage-bond. Inasmuch as the words "attested by the witness" refer to attestation on the face of the instrument the findings on the evidence are, in my opinion, irrelevant for the purpose of determining the stamp payable. On this view of the case it is unnecessary to decide any other question to which the learned Judge has referred and I would answer the Reference by saying that the stamp payable on the document in question was one anna and, therefore, the document was properly stamped.

GREAVES, J.—I agree.

GHOSE, J.—I agree.

B. N. *Reference answered.*

(1) 17 A. 211; A. W. N. (1895) 61; 8 Ind. Dec. (N. S.) 460 (F. B.).

(2) 62 Ind. Cas. 97; 48 C. 61.

LOWER BURMA CHIEF COURT.

CIVIL REFERENCE No. 6 OF 1921.

November 12, 1921.

Present:—Mr. Justice Robinson, Chief Judge, and Mr. Justice Maung Kin.

MESSRS. ROWE & CO.—APPELLANT

versus

THE SECRETARY OF STATE FOR INDIA—RESPONDENT.

Income Tax Act (VII of 1918), *s.* 8—"*House property,*" *meaning of—Interpretation of fiscal and taxing Statutes—Occupation of house rent-free, whether "income."*

MESSRS. ROWE & CO. v. SECRETARY OF STATE FOR INDIA.

The business premises, built by a Company for their own use as a shop, godown and office and occupied by themselves for carrying on their business there, are not assessable as "house property" under section 8 of the Income Tax Act (VII of 1918). [p. 785, col. 2.]

Per *Robinson, C. J.*—The expression "house property" conveys the idea of buildings used for residential purposes. The word "house" does not mean any building erected for the use of man and, therefore, does not include all buildings of any description. [p. 784, col. 2.]

It is for the Crown to show that business premises fall within the expression "house property." The Crown seeking to recover the tax, must bring the subject within the letter of the law, otherwise the subject is free, however much within the spirit of the law the case might appear to be There can be no equitable construction admissible in a fiscal Statute the benefit of the doubt is the right of the subject. [p. 784, col. 1.]

Tennant v *Smith*, (1892) A. C. 150 at p. 154; 61 L. J. P. C. 11; 66 L. T. 327; 56 J. P. 596, *Attorney-General* v. *Milne*, (1914) A. C. 765 at p. 771; 83 L. J. K. B. 1083; 111 L. T. 343; 58 S. J. 577; 30 T L. R. 476, *Lumsden* v. *Inland Revenue Commissioners*, (1914) A. C. 877 at p. 887; 84 L. J. K. B. 45; 58 S. J. 738; 30 T. L. R. 678, *Killing Valley Tea Company Limited* v. *Secretary of State for India*, 61 Ind Cas 107; 48 C. 161 at p. 175; 32 C. L. J. 421, relied upon.

Obiter.—The occupation of a house rent-free is not income. [p. 785, col 1.]

Tennant v. *Smith*, (1892) A. C. 150 at p. 154; 61 L. J. P. C. 11; 66 L. T. 327; 56 J. P. 596, relied upon.

Per *Maung Kin, J.*—The ordinary meaning of the word "house" is a building used for human habitation or as the dwelling place of human beings and when it is used with other words, as in "coffee-house," "play-house," "ware-house," the previous word is regarded as the defining prefix indicating a meaning different to the ordinary meaning of the general word "house". The word must, therefore, be construed as a dwelling house unless, reading the Statute as a whole, the context directs a departure from that meaning. [p. 786, col. 2.]

John & Co. In the matter of, 58 Ind. Cas. 836; 43 A. 139 18 A. L. J. 1017; 2 U. P. L. R. (A.) 394, referred to.

In Statutes of taxation the imposition of a duty must be in plain terms. Such a Statute must be construed strictly and the onus lies upon the Crown to show that the person whom it is sought to tax falls clearly within its operation. [p. 785, col. 2; p. 786, col. 1.]

Inland Revenue Commissioners v. *Gribble*, (1913) 3 K.B 212 at p. 219; 82 L. J. K. B. 900; 108 L. T. 887; 57 S. J. 476; 29 T. L. R. 481 and *Whiteley* v. *Burns*, (1908) 1 K. B. 705 at p. 709; 77 L. J. K. B. 467; 98 L. T. 836; 72 J. P. 127; 24 T. L. R. 319, referred to.

If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible, in any Statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing Statute, where simply the words of the Statute must be adhered to. [p. 786, col. 1]

Partington v. *Attorney-General*, (1869) 4 H. L. 100 at p. 122; 38 L. J. Ex. 205; 21 L. T. 370, *Attorney-General* v. *Selborne* (*Earl of*), (1902) 1 K. B. 388 at p. 396; 71 L. J. K. B. 289; 85 L. T. 714; 50 W. R. 210; 66 J. P. 132; 18 T. L. R. 111, *Oriental Bank* v. *Wright*, (1880) 5 A. C. 842 at p. 856; 50 L. J. P. C. 1; 43 L. T. 177, relied upon.

The benefit of the doubt is the right of the subject. [p. 786, col. 2.]

Studdert, In re, (1900) 2 Ir. R. 400 at p. 410; 5 Ir. L. R. 441, relied upon.

Case referred by the Financial Commissioner, Burma, under section 51 of Indian Income Tax Act, 1918.

Mr. *Leach*, for the Appellant.

Mr. *Higinbotham*, for the Respondent.

JUDGMENT.

ROBINSON, C. J.—This is a Reference under the Income Tax Act, VII of 1918. It refers to the business premises occupied by Messrs. Rowe and Company. They built these premises for their own use as a shop, godown and offices, and they occupy them themselves and carry on their business there.

The Collector of Income Tax held that the premises owned by Messrs. Rowe and Company were assessable under section 8 as "house property," and that in consequence thereof they were entitled to the allowance set out in section 9 (2) (1) of the Income Tax Act, 1918.

Messrs. Rowe and Company appealed to the Commissioner who relied on the words "in respect of sums paid" which appear in section 9 (2) of the Act. He held that as no sum was paid in respect of the allowance made for the annual value of their premises, no allowance was permissible under section 9 (2) (1), and though apparently he was of opinion that these premises would be included in the expression "house property," he held that there was no need to re-assess such value under section 8.

Messrs. Rowe and Company appealed to the Financial Commissioner, who would restore the order of the Collector, but he has referred two questions to this Court for decision:—

(1) Are business premises, such as shops, offices and godowns, included in the term "house property" as used in section 8 of the Indian Income Tax Act, 1918, previous to its amendment by the Act of 1920? and

(2) If the answer to the above is in the affirmative, does the allowance in respect of the *bona fide* annual value of business premises occupied by the owner made under section 9 (2) (1) bar the assessment of the said annual value under section 8 or section 11 of the Act?

As regards the second question referred, I do not fully appreciate the points raised by it, and the learned Government Advocate in addressing us said that it need not be considered.

In the first place, if the annual value of these premises is assessable under section 8 of the Act, there can be no question that section 11 would not apply, since that section deals only with income derived from other sources if not included under any of the preceding heads. If the question refers to the grant of an allowance in itself, excluding assessment of the same income, then it appears to me that it is an entirely different matter and that the question of liability under section 8 is entirely separate from the question of an allowance under section 9. However, in view of the opinion that I have arrived at with reference to the answer to be given to the first question referred, it is not necessary for me to say anything more on this point.

Under the Act in question what is liable to assessment is income; all income, subject to the exceptions laid down in sections 3 and 4. Section 5 then specifies various classes of income that are chargeable to Income Tax and the following sections deal with each of these classes separately:—

Section 8 deals with income derived from house property and lays down that the tax shall be payable by an assessee under this head in respect of the *bona fide* annual value of any house property of which he is the owner. The section provides a definition of the expression "annual value" for the purposes of sections 8 and 9.

Section 9 deals with income derived from business in respect of the profits of the business, and it grants certain allowances in respect of sums paid or, in the case of depreciation, debited, and the first of these allowances is the rent paid for the premises in which such business is carried on or, where the premises are owned by the assessee, the *bona fide* annual value thereof.

It is agreed on all hands that Messrs. Rowe and Company are entitled to this allowance, and the only question that we have to decide is whether they are liable to be assessed on the annual value of these premises under section 8; in other words, the sole question is whether business premises such as these fall within the expression "house property."

It will be well first to consider what are the rules governing the interpretation of Taxing Acts. In *Tennant* v. *Smith* (1) Lord Halsbury, L. C. said:—"This is an Income Tax Act, and what is intended to be taxed is income. And when I say 'what is intended to be taxed,' I mean what is the intention of the Act as expressed in its provisions, because in a Taxing Act it is impossible, I believe, to assume any intention, any governing purpose in the Act, to do more than take such tax as the Statute imposes. In various cases the principle of construction of a Taxing Act has been referred to in various forms, but I believe they may be all reduced to this, that inasmuch as you have no right to assume that there is any governing object which a Taxing Act is intended to attain other than that which it has expressed by making such and such objects the intended subject for taxation, you must see whether a tax is expressly imposed. Cases, therefore, under the Taxing Acts always resolve themselves into a question whether or not the words of the Act have reached the alleged subject of taxation. Lord Wensleydale said in *Micklethwait, In re,*(2) 'it is a well-established rule, that the subject is not to be taxed without clear words for that purpose; and also, that every Act of Parliament must be read according to the natural construction of its words.'"

In *Attorney-General* v. *Milne* (3) Viscount Haldane, L. C., said:—"It may be that, if probabilities, apart from the words used, are to be looked at, there is, on the construction which the Court of Appeal have put on the Statute, a *casus omissus* which the Legislature was unlikely to have contemplated. But, my Lords, all we are permitted to look at is the language used. If it has a natural meaning we cannot depart from that meaning unless, reading the Statute as a

(1) (1892) A. C. 150 at p. 154; 61 L. J. P. C. 11; 66 L. T. 327; 56 J. P. 596.

(2) (1855) 11 Ex. 452 at p. 456; 25 L. J. Ex. 19; 105 R. R. 614; 156 E. R. 908.

(3) (1914) A. C. 765 at p. 771; 83 L. J. K. B. 1083; 111 L. T. 343; 58 S. J. 577; 30 T. L. R. 476.

whole, the context directs us to do so. Speculation as to a different construction having been contemplated by those who framed the Act is inadmissible, above all in a Statute which imposes taxation," and in the same case Lord Atkinson said :—"To succeed the Crown must bring the case within the letter of that enactment. It is not enough to bring the case within the spirit of it, or to show that if the section be not construed as the Crown contends it should be construed property which ought to be taxed will escape taxation, or will enjoy . . . an immunity from successive levies of estate duty. These evils, if such they be, must, if they exist, be cured by legislation. Judicial Tribunals must in interpreting these Taxing Acts stick to the letter of the Statute." Again in *Lumsden* v. *Inland Revenue Commissioners* (4) Viscount Haldane, L. C., said :—

"The duty of a Court of construction in such cases is not to speculate on what was likely to have been said if those who framed the Statute had thought of the point which has arisen ; but, recognizing that the words leave the intention obscure, to construe them as they stand, with only such extraneous light as is reflected from within the four corners of the Statute itself read as a whole."

The High Court of Calcutta, relying on those and other cases, in *Killing Valley Tea Company, Limited* v. *Secretary of State for India* (5), said:—"Now there is no room for controversy that the Crown seeking to recover the tax, must bring the subject within the letter of the law, otherwise the subject is free, however much within the spirit of the law the case might appear to be. There can be no equitable construction admissible in a fiscal Statute : the benefit of the doubt is the right of the subject."

What has to be considered, therefore, is whether premises built for and used as business premises are included in the expression "house property," if their natural meaning be assigned to these words. It is not for the Court to speculate what classes of property the Legislature meant to include in the term "house property;" nor is it for the Court to speculate what the result will be from deciding the question in this way or that. There is nothing in the Act that I have discovered, or to which we have been referred, which throws any light on the interpretation to be given to these words. To my mind, the expression "house property" would convey to the ordinary person the idea of buildings used for residential purposes. It is for the Crown to show that Messrs. Rowe and Company's premises are "house property," and that can only be done by saying that "property" is the general word, while the expression "house" preceding it describes the kind of property referred to.

It is argued that the word "house" means any building erected for the use of man and, therefore, includes all buildings of any description. If this argument were sound, the expression "house property" would include mills, lime-kilns, godowns, warehouses and various other classes of buildings. I find it quite impossible to hold that in the ordinary sense of the words a lime-kiln, or rice-mill could be described as a "house."

It is argued that the allowance is granted under section 9, because that property would already be liable for taxation under section 8, and that, therefore, it is clear that the language used by the Legislature must be given its widest sense. It is not, however, by any means certain that the allowance was given for these reasons. What is taxable under section 9 is the income derived from, that is, the profits of, a business, and as it is obviously just and proper that essential expenses that must be incurred before profits can be realized should be deducted in arriving at the profits to be taxed, therefore, the allowance was granted. But, as I have said above, it is not open to the Court to speculate on the intention of the Legislature.

Again, it is argued that if a man builds business premises, such as these, and hires them out, the rent received by him would be liable to taxation as part of his income under section 8 of the Act, and that if such premises be not included in the expression "house property," the result of

(4) (1914) A. C. 877 at p. 887; 84 L. J. K. B. 45; 58 S. J. 738; 30 T. L. R. 673.

(5) 61 Ind. Cas. 107; 48 C. 161 at p. 175; 32 C. L. J. 421.

the interpretation would be that the owner who rented them out would be liable to be taxed, while the owner who occupied them himself would not.

Again, it may be doubted if this argument is sound. It assumes that he would be liable to be taxed under section 8; whereas, it may well be that he would not be liable under section 8, but under section 11 of the Act. In the one case, income is actually received, in the other case no income is actually received, though a benefit is obtained in that the owner occupier has not to pay rent for other premises that he would have to occupy for his business.

On this point the case of *Tennant v. Smith* (1) is instructive. It dealt with the question whether a Bank Manager who was required to live in a part of the Bank's business premises as custodian of the whole premises, and also for the transaction of any special Bank business after Bank hours, was liable to have included in his total income the yearly value of his privilege of free residence in the Bank's premises. Lord Halsbury said:—"Now, it is certainly true that the occupation of a house rent-free is not income," and again "Now, Mr. Tennant occupies this house without paying any rent for it. It may be conceded that if he did not occupy it under his contract with the Bank rent-free, he would be obliged to hire a house elsewhere, pay rent for it, and *pro tanto* diminish his income. And if any words could be found in the Statute which provided that besides paying income-tax on income, people should pay for advantages or emoluments in its widest sense, ...there is no doubt of Mr. Tennant's possession of a material advantage, which makes his salary of higher value to him than if he did not possess it, and upon the hypothesis which I have just indicated would be taxable accordingly."

While, therefore, the rent received by the owner is taxable as a part of his income the advantage derived by the owner who occupies his own premises could not be regarded as income.

The Chief Controlling Revenue Authority has referred to a case decided by the late Chief Judge and myself and has drawn attention to a sentence in Sir Daniel Twomey's judgment: "These Bazar companies are admittedly not businesses for the purposes of the Income Tax Act any more than professions are business for the purposes of the Act. They are assessed to income-tax as house property and not as businesses."

The question that was before us in that case was whether the Bazar companies carried on a business which made them liable to Excess Profits Duty under the Excess Profits Duty Act. The question as to whether they were liable to taxation under section 8 was not before us, and the extract cannot be used for the purpose it is sought to put it to. There is nothing in my judgment which would support that statement, and it was not one that in any way influenced our decision.

It is my opinion, therefore, that it is for the Crown to show that these premises fall within the expression "house property" and that that could only be done by giving a very wide and extended meaning to the expression, straining the language used and that it is not the right interpretation, and that, therefore, Messrs. Rowe and Company are not liable to be assessed under section 8. Nor are they liable, in my opinion, to be assessed under any other section of the Act on this head. If the intention of the Legislature was that they should get an allowance under section 9, only because they were liable to assessment under section 8, then much clearer language should have been used than has been employed, and if the result is not what was in the contemplation of the Legislature, that is the result of faulty drafting, which it is not open to the Court to make good.

I would, therefore, answer the first question referred in the negative; and this renders any answer to the second question unnecessary.

The respondent must pay the costs of this reference. Advocate's fee ten gold *mohurs*.

MAUNG KIN, J.—I have had the advantage of reading the learned Chief Judge's judgment and I have very little to add.

It is a commonplace that in Statutes of taxation the imposition of a duty must be

in plain terms [Per Buckley, L. C., in *Inland Revenue Commissioners* v. *Gribble* (6)]; such a Statute must be construed strictly and the onus lies upon the Crown to show that the person whom it is sought to tax falls clearly within its operation [Per Lord Alverstone, C. J. in *Whiteley* v. *Burns* (7).] In *Partington* v. *Attorney-General* (8) Lord Cairns says: "I am not at all sure that in a case of this kind—a fiscal case—form is not amply sufficient; because, as I understand the principle of all fiscal legislation, it is this: If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown seeking to recover the tax cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible in any Statute what is called an equitable construction, certainly such a construction is not admissible in a Taxing Statute, where you can simply adhere to the words of the Statute." These observations were cited by Collins, M. R. in *Attorney-General* v. *Selborne* (*Earl of*) (9) and the learned Judge proceeded to say: "Therefore, the Crown fails, if the case is not brought within the words of the Statute, interpreted according to their natural meaning; and if there is a case which is not covered by the Statute so interpreted that can only be cured by legislation, and not by an attempt to construe the Statute benevolently in favour of the Crown."

In *Oriental Bank* v. *Wright* (10) Lord Blackburn, who delivered the judgment of their Lordships of the Privy Council, observed with regard to a fiscal Act that if the Legislature, from want of foresight or for any other cause, has omitted to provide for a case, it is the province of the Legislature itself, and not of the Courts, to supply the omission.

In *Finance Act*, 1894 and *Studdert, In re* (11) Fitzgibbon, L. J., said: "The benefit of the doubt is the right of the subject."

We have to construe the expression, "house property" in section 8 of the Indian Income Tax Act of 1918. I think the word "property" is a general word and the word "house" limits its meaning. What is, therefore, referred to by the expression is house which is a kind of property. The Legislature might very well have used the word "house" alone and say "Income derived from a house" instead of what it has used, "Income derived from house property." That being the case, what is the meaning of the word "house"?

In *John & Co., In the matter of* (12) the point arose as to whether mill premises could be treated as house property and two out of three learned Judges who disposed of the case held that they could not be so treated. Piggot, J., inclined to the view that the premises in question fell within the meaning of the expression.

To my mind the ordinary meaning of the word "house" is a building used for human habitation or as the dwelling place of human beings and when it is used with other words, as in "coffee-house," "play-house," "ware-house," the previous word is regarded as the defining prefix indicating a meaning different to the ordinary meaning of the general word "house." We must, therefore, construe it as meaning a dwelling house, unless, as Viscount Haldane, L. C., said, reading the Statute as a whole the context directs us to depart from that meaning. It was pointed out by the Chief Revenue Authority which made the above reference to the Allahabad High Court that the whole tenor of section 8 concerns property of the nature of residential property. There does not appear to be any good reason for differing from this view. Piggot, J. in the course of his judgment observed that the difficulty which he had felt throughout was that, if a firm in the position of the assessee in that case had been called upon for a return of its "house property"

(6) (1913) 3 K. B. 212 at p. 219; 82 L. J. K. B. 900; 108 L. T. 887; 57 S. J. 476; 29 T. L. R. 481.

(7) (1908) 1 K. B. 705 at p. 709; 77 L. J. K. B. 467; 98 L. T. 836; 72 J. P. 127; 24 T. L. R. 319.

(8) (1869) 4 H. L. 100 at p. 122; 38 L. J. Ex. 205; 21 L. T. 370.

(9) (1902) 1 K. B. 388 at p. 398; 71 L. J. K. B. 289; 85 L. T. 714; 50 W. R. 210; 66 J. P. 132; 18 T. L. R. 111.

(10) (1880) 5 A. C. 842 at p. 856; 50 L. J. P. C. 1; 43 L. T. 177.

(11) (1900) 2 Ir. R. 400 at p. 410; 5 Ir. L. R. 411.

(12) 58 Ind. Cas 836, 43 A. 190; 18 A. L. J. 107; 2 U. P. L. R. (A.) 394.

in or about the city of Agra, he thought it would have been expected to include ware-houses and factories as falling within the meaning of that expression These remarks came immediately after the learned Judge had indicated the view that coffee-houses, play-houses and ware houses would fall within the meaning of the expression "house property." But my view, as above stated, is that in those hyphenated expressions the previous word is only a prefix defining or limiting the ordinary meaning of the word "house." So that it is not of much importance whether a man may regard factories and shops as his "house property."

Moreover, under section (9) (2) (i) the assessee is given an allowance to the extent of the annual value of the premises when they are owned by him. In fact he is taxed on his balance sheet. The question then arises as to whether this allowance can be taken into consideration for the purposes of taxation under any other section, for instance, section 8. We may speculate on this question but the rules of construction of a Taxing Act debars us from doing so. If it was the intention of the Legislature to use the allowance made under section 9 (2) (i) for the purposes of section 8, clear words should have been used, and we are not at liberty to supply the omission. I have expressed this view, although the expression "house property" may probably be capable of being given the most liberal and extensive interpretation.

I would answer the first question referred in the negative. In this view it is not necessary to answer the second question referred.

Answered in the negative.

S. D.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1165 OF 1920.

February 9, 1922.

Present:—Mr Justice Greaves and Mr. Justice Panton.

ANUKUL CHANDRA DHAR—DEFENDANT No. 2—APPELLANT

versus

KAMALA KANTA ROY AND OTHERS—PLAINTIFFS—RESPONDENTS.

Evidence—Ex parte *rent-decree—Evidence of relation of landlord and tenant—Evidence Act (I of 1872), ss. 11, 13—Relevant fact—Ejectment suit by landlord—Defendant claiming occupancy rights as being in possession for 12 years after abandonment by recorded tenant—Rent-decree obtained by landlord against heirs of recorded tenant within 12 years of suit, admissibility of.*

An *ex parte* rent-decree obtained by a landlord against the heirs of a tenant which is satisfied by payment of the decretal amount is evidence sufficient to show that, at the date of the decree, the heirs were paying rent and occupying the position of tenants [p. 788, col 2.]

In a suit by a landlord to eject the transferee of a non-transferable occupancy holding where the defendant alleges that he is entitled to remain in possession on payment of rent on the ground that he has been in possession for more than 12 years after the abandonment of the tenancy by the previous tenant, an *ex parte* decree obtained by the landlord against the heirs of the latter within 12 years of the suit is admissible in evidence to show that there was no abandonment of the tenancy at the date of the decree [p. 788, col. 2.]

Ram Narain Rai v. *Ram Coomar Chunder Poddar*, 11 C. 562; 5 Ind. Dec. N. S. 1183 and *Gujja Lall* v. *Fatteh Lall*, 6 C. 171; 6 C. L. R. 429; 3 Shome L. R. 132; 3 Ind. Dec. (N. S.) 112, referred to.

Appeal against a decree of the Additional District Judge, Tipperah, dated the 16th of February 1920, affirming that of the Munsif, Second Court, at Comilla, dated the 19th of September 1918.

FACTS appear from the judgment.

Babu *Krishna Kamal Moitra* for Babu *Sasadhar Roy*, for the Appellant.—The suit for *khas* possession is clearly barred by limitation. The plaintiff is entitled to rent only. The view taken by the lower Appellate Court that the cause of action did not arise at the date of the transfer is wrong. Reads *Ram Narain Rai* v. *Ram Coomar Chunder Poddar* (1). Refers to *Probhabati Dasi* v. *Taibatunnessa Chowdhurani* (2), *Panchkari*

(1) 11 C. 562; 5 Ind. Dec. (N. S.) 1183.
(2) 20 Ind. Cas. 664; 17 C. W. N. 1088; 19 C. L. J. 62.

Chattapadhya v. *Maharaj Bahadur Singh* (3). The right of re entry of the landlord arises on the date of the transfer of the whole holding. The case in *Raktoo Singh* v. *Sudhram Ahir* (4) relied upon by the lower Appellate Court is really in my favour.

[GREAVES, J. refers to *Ishan Chandra Dhupi* v. *Nishi Chandra Dhupi* (5)].

That case is not against me. The *ex parte* rent decree is not admissible in evidence against me because I was not a party to the decree nor do I claim through the recorded tenant. See *Ram Narain Rai* v. *Ram Coomar Chunder Poddar* (1).

Dr. *Sarat Chandra Basak* (with him Babu *Bhagirath Chandra Das*), for the Respondents. —The decision in *Ram Narain Rai* v. *Ram Coomar Chunder Poddar* (1) is based on the decision in *Gujja Lall* v. *Fatteh Lall* (6) which has been considerably modified by the decision of the Privy Council reported as *Ram Ran an* v. *Ram Narain Singh* (7). The *ex parte* rent-decree was also admissible in evidence under sections 11 and 13 of the Evidence Act. Refers to *Tepu Khan* v. *Rojoni Mohun Das* (8).

Babu *Krishna Kamal Moitra* in reply.—The case in *Tepu Khan* v. *Rojoni Mohun Das* (8) has, it is true, considerably modified the decision in *Gujja Lall* v. *Fatteh Lall* (6). But the modification is to this extent only that the decree was admissible in evidence to show that there was such a decree. But no authority has been cited by my learned friend to show that an *ex parte* decree for rent was evidence of possession in favour of the landlord against the transferee of a non-transferable occupancy holding.

JUDGMENT.—This is an appeal by the defendant against a decision of the Additional District Judge confirming a decision of the Munsif. The suit out of which this appeal arises was brought by a co sharer landlord to recover *khas* possession from the purchaser of a non-transferable occupancy holding. The defence alleged was that the defendant had been in possession of the holding for a period of some 16 or 17 years and that, under the circumstances, the plaintiff could not recover *khas* possession but could only get rent. The only question that really arises in the appeal is with regard to the admissibility of a certain *ex parte* rent-decree passed in the year 1912 against the heirs of the recorded tenant Rafi Mahomed. It is urged on behalf of the appellant that as he was not a party to this decree it cannot be used in evidence against him and it has been further urged that, even if it is admissible in evidence, it is only admissible with regard to the fact that such a decree was in fact passed. We should say that, although the decree was an *ex parte* decree, it was satisfied by payment of the decretal amount. Now, the learned Vakil for the appellant in support of his argument with regard to the non-admissibility of the *ex parte* decree referred to the case of *Ram Narain Rai* v. *Ram Coomar Chunder Poddar* (1). As against this it has been pointed out that that decision is based upon the Full Bench case of *Gujja Lall* v. *Fatteh Lall* (6) referred to at page 516 of the judgment and that the case of *Gujja Lall* v. *Fatteh Lall* (6) has been considerably modified by recent decisions of the Judicial Committee; and we were further referred in answer to the appellant's contention as to the non-admissibility of the decree to section 11 and also to section 13 of the Indian Evidence Act, it being urged that the *ex parte* decree is admissible in evidence to show the existence of the relevant fact of the existence of the tenancy of Rafi Mahomed as lately as the year 1912 and, accordingly, the landlord's rights as arising from such tenancy. We think that these arguments are well-founded and that the *ex parte* decree has rightly been admitted in evidence to show that there was no abandonment of the tenancy by Rafi Mahomed or his heirs prior to the year 1912. It may be that, as licensee or otherwise, the appellant was in possession for the period stated, namely, 16 or 17 years, but that is not, in our opinion, sufficient. It must be shown that the appellant has been in possession for a period of more than 12 years after Rafi Mahomed abandoned the tenancy.

(3) 28 Ind. Cas. 708; 19 C. W. N. 136.
(4) 8 C. L. J. 557.
(5) 41 Ind. Cas. 378; 22 C. W. N. 853; 29 C. L. J. 1.
(6) 6 C. 171; 6 C. L. R. 439; 3 Shome L. R. 132; 3 Ind. Dec. (N. S.) 112.
(7) 22 C. 533; 22 I. A. 60; 5 M. L. J. 7; 6 Sar. P. C. J. 530; 11 Ind. Dec. (N. S.) 355 (P. C.).
(8) 2 C. W. N. 501; 25 C. 522.

It appears to us, therefore, that there is satisfactory evidence that, as lately as 1912, Rafi Mahomed, or, rather, his heirs were paying rent in respect of the land and occupying the position of tenants. This being so, we think both the lower Courts have rightly decided in favour of the plaintiff's contention and have passed the decree for *khas* possession.

The appeal, accordingly, fails and must be dismissed with costs.

N. H.

Appeal dismissed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2140 OF 1917.

June 24, 1921.

Present :—Mr. Justice Wilberforce and Mr. Justice Abdul Qadir.

Musammat MAYA WANTI AND OTHERS—DEFENDANTS – APPELLANTS

versus

ISHAR SINGH AND OTHER SONS AND REPRESENTATIVES OF LAL SINGH, DECEASED—PLAINTIFFS AND *Musammat* GURDEVI—DEFENDANT—RESPONDENTS.

Appeal, second—Hindu joint family—Question of jointness—Question of fact, when.

A decision whether persons form a Hindu joint family or not is ordinarily a question of fact, when the correct legal principles on which the point should be decided have been appreciated, and as such cannot be assailed in second appeal.

Second appeal from a decree of the District Judge, Rawalpindi, dated the 20th June 1917, affirming that of the Subordinate Judge, Second Class, Rawalpindi, dated the 18th March 1917.

Pandit *Sheo Narain*, R. B., and Mr. *M. S. Bhagat*, for the Appellants.

Messrs. *Aziz Ahmad* and *Sewaram Singh*, for the Respondents.

JUDGMENT.—The dispute in this case between Lal Singh and his deceased brother's wife, *Musammat* Maya Wanti, is, whether the two brothers constituted a joint Hindu family and whether succession goes by survivorship or not.

The lower Courts have both found that the two brothers formed a joint Hindu family and that succession goes by survivorship. Against this decree *Musammat* Maya Wanti has preferred a second appeal and we have heard her case argued by Mr. Sheo Narain.

The learned Counsel's main argument is that there is a good ground for second appeal, inasmuch as the lower Courts have not appreciated that a separation of interest is all that it was necessary for his client to prove and not a partition by metes and bounds or any other form of partition. He cites *Shyamananda Das* v. *Ramkanta Das* (1) and other judgments and his views on this point are not contested as, indeed, they cannot be by Counsel for the respondents. The reply, however, to Mr. Sheo Narain's arguments is that this principle of Hindu Law was thoroughly appreciated by the lower Appellate Court and that, in the light of these principles, the District Judge has discussed the evidence produced and that his finding is, therefore, a finding of fact. We agree with this contention, and we think that a decision whether persons form members of the joint Hindu family or not is ordinarily a question of fact when the correct legal principles on which the point should be decided have been appreciated.

We think that no ground of second appeal has been made out in this case and we dismiss it with costs.

N. H.

Appeal dismissed.

(1) 42 Ind. Cas. 258; 21 C. W. N. 1142; (1917) M. W. N. 642 (P. C.).

AITHAN GOPE v. KHAKHAR SAHU.

PATNA HIGH COURT.
LETTERS PATENT APPEAL No. 97 OF 1921.
April 28, 1922.
Present :—Sir Dawson Miller, Kt., Chief Justice, and Mr Justice Adami.

AITHAN GOPE AND OTHERS—DEFENDANTS—APPELLANTS

versus

KHAKHAR SAHU AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Joint family—Debt—Legal necessity, want of, for stipulated rate of interest—Issue, whether must be raised in pleadings—Onus.

In a suit to enforce a debt incurred by the manager of a joint Hindu family, if the plea of want of necessity of the particular rate of interest at which the money was borrowed is to be taken in addition to that of want of necessity for the debt itself, it must be raised in the pleadings The facts necessary to prove legal necessity for the debt may be entirely different from those which may be necessary to prove the necessity for borrowing money at the particular rate of interest, and unless the plea is taken in the pleadings, the only onus which remains on the plaintiff is that of proving that the borrowing of the money was justified by legal necessity. A defendant cannot be allowed to raise the plea for the first time in appeal [p. 79, col. I.]

Hurro Nath Rai Chowdhri v *Randhir Singh*, 18 C. 311; 18 I. A. 1; 15 Ind. Jur. 34; 5 Sar. P. C. 612; 9 Ind. Dec. (N. S.) 207 (P. C. and *Nawab Nazir Begam* v *Rao Raghunath Singh*, 50 Ind. Cas. 4[illegible]4; 28 C. [illegible] N. 700; 41 A. 571; 36 M. L. J. 52; 17 A. L. J. 591; 21 Bom. L. R. 484; 26 M. L. T. 40; 20 C. L. J. 86; (1919) M. W. N. 49[illegible]; 1 U. P. L. R. P. C.) 49; 11 L. W. 188; 46 I. A. 145 P. C., distinguished

Jag Sahu v. *Radha Kishun*, 56 Ind. Cas. 867; 1 P. L. T. 209; 5 P. L. J. 287; (1920) Pat. 211; 2 U. P. L. R. (Pat.) 127, followed.

Letters Patent Appeal against the decision, dated the 26th July 1921, passed by Mr. Justice Ross, reversing that of the District Judge, Darbhanga, dated the 9th December 1919, modifying that of the Munsif, Madhubani, dated the 18th June 1919.

Mr. *Siva Narayan Bose*, for the Appellants.

Mr. *Sudanshu Kumar Mittra*, for the Respondents.

JUDGMENT.

MILLER, C. J.—In this case the defendants have appealed under the Letters Patent from a decision of Mr. Justice Ross, dated the 26th July last year, in which he set aside the decree of the District Judge and restored that of the Munsif.

The only question for our decision in this case is, whether the learned District Judge was right or not in refusing the interest payable under the mortgage-bond at the compound rate, and, in order to determine that question, it becomes necessary to consider whether or not the plea was taken in the written statements of the defendants to the effect that the interest prescribed by the mortgage bond was not justified by legal necessity.

The defendants were the sons and grandsons of the mortgagor who had executed a mortgage bond in favour of the plaintiffs at a rate of interest of Rs. 1-9-0 per month compounded with yearly rests. The defendants raised various pleas by their written statements, amongst others, that the mortgage-bond was not executed for legal necessity and did not benefit the defendants. They further contended that the interest was excessive and by way of penalty. But assuming that the issue as to legal necessity for the execution of the bond was decided against them, they nowhere in their written statements took the specific plea that the rate of interest was not justified by legal necessity.

There were two written statements delivered in this case, the first on behalf of Aithan Gope, the defendant No. 2, and the second on behalf of Ramrup Gope, the defendant No. 3, who appeared through his guardian, Babu Makund Krishna Das, a pleader. In the first written statement the plea with regard to interest was in these terms :—

"That a reference to the plaint will show that the plaintiff's claim for mesne profits is quite invalid and useless and it is by way of penalty. The plaintiff is not entitled to get compound interest."

That plea is set out in paragraph 6 of the written statement of the defendant No. 2. Then, the plea with regard to legal necessity is in these terms :—

"That even if it be proved that this defendant's father took the loan and executed the bond, as is falsely alleged by plaintiffs and totally denied by the defendant, then as the debt was not applied to legal necessities and it did not benefit this defendant or any other defendant, the plaintiffs are not entitled to a decree, nor can a mortgage decree be passed (paragraph 10)."

AITHAN GOPE v. KHAKHAR SAHU.

The written statement of the defendant Ramrup Gope denied that the bond was genuine and in paragraph 2 pleaded: "that even if the bond be genuine, it cannot be binding upon this defendant as it did not benefit the joint family, either the executant of the bond or this defendant."

In paragraph 3 he pleaded that the stipulation for compound interest is by way of penalty and the plaintiffs are not entitled to get it. He further raised a somewhat extraordinary plea that he, the defendant No. 3, being the grandson of the executant of the bond, was not liable on that account to pay interest. These are the only pleas raised material for the present purpose. The learned Munsif came to the conclusion that the bond was justified by legal necessity, that the money raised thereunder was required for the purpose of paying rent, purchasing bullocks for the family cultivation, and some paddy for the use of the family, and he decreed the suit as prayed, coming to the conclusion that there was nothing unreasonable or unusual, certainly not unconscionable, in the rate of interest stipulated in the bond.

When the matter came before the District Judge, that learned Judge accepted the findings of the Munsif on the question of legal necessity for the raising of the money, but arrived at a conclusion that, although the rate of interest was not unusual as found by the Munsif, nevertheless, there was no legal necessity proved by the plaintiffs for borrowing money at compound interest. He, therefore, reduced the interest awarded allowing only simple interest at the bond-rate and not compound interest.

On appeal to this Court, the learned Judge before whom the appeal came, after considering the authorities which were referred to him on the point, dissented from the view taken by the District Judge and restored the decree of the Munsif, and the conclusion he came to was that, although the onus is undoubtedly upon the plaintiffs suing under the mortgage bond executed by the *karta* of the family, where the interest of minor members are concerned, to prove not only the necessity for the loan but the necessity for the interest at the rate stipulated, still the onus thus arising on the plaintiffs was discharged if the defendants did not raise specifically the plea, and that, unless it was specifically pleaded that the interest was not justified by legal necessity, there was no burden upon the plaintiff to prove by evidence that issue. In the present case I have referred to the issues which were raised by the defendants, and it seems to me that, although it may be said that the issue of legal necessity for the execution of the bond was raised, there was clearly no issue raised in the pleadings as to the necessity for the onerous interest stipulated in the bond. The facts necessary to prove legal necessity for the execution of the bond may be entirely different from those which are necessary to prove that there was necessity for borrowing money at a particular rate of interest or compound interest, and unless the plea is taken by the defendants it seems to me that the only onus which remains upon the plaintiffs is that of proving that the bond itself was justified by legal necessity, that is to say, that the borrowing of the money was justified by legal necessity. That fact in the present case has been found by all the Courts in favour of the plaintiffs, and I think it would be creating an altogether unjust burden upon the plaintiffs, where the question has not been specifically raised, if we were to allow the defendants in appeal to raise the point that the plaintiffs had failed to discharge the burden of proof upon an issue which was never in fact raised.

We have been referred to certain cases, some of them decisions of the Judicial Committee, in order to support the contention that in cases of a suit by a mortgagee against the members of the joint family it is not necessary in the pleadings for the defendants to raise the specific plea that the rate of interest stipulated in the bond was not justified by legal necessity and that it is sufficient merely to raise the general question as to whether the loan itself was justified by legal necessity. In the first case, that of *Hurro Nath Rai Chowdhri* v. *Randhir Singh* (1), the interest was reduced by the High Court at Calcutta from 18 per cent. to 12 per cent. and this decision was affirmed by their Lordships of the Privy Council. But

(1) 18 C. 311; 18 I. A. 1; 15 Ind. Jur. 34; 5 Sar. P. C. J. 642; 9 Ind. Dec. (N. S.) 207 (P. C.).

in that case no question at all was raised that the pleadings and issues did not permit of such a course, and even if it is left in doubt, as it certainly is, as to what the exact form of the plea taken by the defendant was, as the point was never raised before their Lordships, it is certainly no authority in favour of the view now put forward by the defendant, and one must assume that the point decided both by the High Court of Calcutta and by their Lordships of the Judicial Committee was a point which it was competent for them to decide upon the pleadings as originally framed or at all events upon the issues framed in the suit The next case was that of *Nawab Nazir Begam* v. *Rao Raghunath Singh* (2). The passage relied upon in that case in which the interest was reduced is a passage in the judgment of Lord Phillimore on page 702* of the report. It is in these terms:—

"In the written statement filed on behalf of the defendants, one of the points taken was that the property mortgaged was ancestral property, and that there was no legal necessity to execute the document sued upon. In the view which the High Court took of this plea, a view from which their Lordships see no reason to differ, it made it open for the defendants to contend that though the necessity for borrowing the principal sum was accepted, there was no necessity to borrow on the very onerous terms of this mortgage."

The plea taken in that particular case is merely referred to in general terms by Lord Phillimore in his judgment and it must be presumed that their Lordships had before them in that case the actual words of the plea as they appeared in the pleadings, and on referring to the decision of the High Court, which is reported as *Rao Raghunath Singh* v. *Nazir Begam* (3), one finds the defence of the defendants referred to on page 640†. It is there stated:—

"The defense of the sons and grandsons was that there was no legal necessity either for the loan or for the exorbitant rate of interest agreed to be paid such as would render the family property liable for it."

It appears, therefore, quite clear on a closer reference to the actual document in the case that the plea as to the necessity or the rate of interest was specifically pleaded; and the decision of the Judicial Committee in *Nawab Nazir Begam* v. *Rao Raghunath Singh* (2) is certainly no authority for the contention put forward before us in this appeal. But the whole question was carefully considered in a recent judgment of this Court in the case of *Jag Sahu* v. *Radha Kishun* (4) where the cases I have referred to and several others were considered, and the learned Judges, of whom my learned brother sitting with me to-day was one, came to the conclusion that, before the defendants can raise the point that the plaintiff had failed to satisfy the burden of proof as to the rate of interest being justified by legal necessity, there must be a specific plea to that effect in the written statement. If in fact no plea of that sort was taken then it must be assumed that the defendants did not intend to raise the plea and no proof is required from the plaintiffs; in other words, the burden of proof which is originally on the plaintiff is either waived or satisfied by reason of the absence of any plea requiring him to discharge that burden. Indeed, it would be most unjust and unfair upon the plaintiff where no issue has been raised in the case, to turn round afterwards and say, there is no evidence in support of the issue, the initial burden of proving it was upon you and, therefore, your case must fail, if in fact the point has never been taken from the beginning and no issue has been raised upon it. In my opinion, the learned Judge of this Court was quite right in the decision which he arrived at and this appeal should be dismissed with costs.

ADAMI, J.—I agree.

N. H.

Appeal dismissed.

(2) 50 Ind. Cas. 434; 23 C. W. N. 700; 41 A. 571; 36 M. L. J. 521; 17 A. L. J. 591; 21 Bom. L R 484; 26 M. L. T 40; 30 C. L. J. 86; (1919) M W. N. 498; 1 U. P. L. R. (P. C.) 49; 11 L. W. 188; 46 I. A. 145; (P. C.).

(3) 19 Ind. Cas. 639.

(4) 56 Ind. Cas 867; 1 P. L. T. 209; 5 P. L. J. 287; (1920) Pat 211; 2 U. P. L. R. (Pat.) 127.

*Page of 23 C. W. N.—[*Ed.*]

†Page of 19 Ind. Cas.—[*Ed.*]

HAR PRASAD v. SHEO GOBIND.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 823 OF 1920.

March 17, 1922.

Present:—Mr. Justice Lindsay and Mr. Justice Stuart.

HAR PRASAD TEWARI—PLAINTIFF—APPELLANT

versus

SHEO GOBIND TEWARI—DEFENDANT—RESPONDENT.

Agra Tenancy Act (II of 1901), mortgage, invalid under—Personal covenant to pay mortgage-debt, whether enforceable—Contract Act (IX of 1872), s. 24, application of.

Where a mortgage is unenforceable, being in contravention of the provisions of the Agra Tenancy Act, any personal covenant entered into by the mortgagor and embodied in the mortgage-deed, to pay the mortgage-debt in the event of the mortgage being held to be invalid, is also unenforceable, as to enforce such an agreement would be contrary to the provisions of section 24 of the Contract Act.

Kanhai v. *Tilak*, 16 Ind. Cas. 42, followed.

Second appeal against a decree of the Subordinate Judge, Jaunpur, dated the 2nd of March 1920.

Mr. *P. L. Banerji*, for the Appellant.

Mr. *Haribans Sahai*, for the Respondent.

JUDGMENT.—We have heard the learned Counsel for the appellant in this case and we think the appeal ought to fail. The facts are that the defendant-respondent, Sheo Gobind Tewari, made three mortgages of property in favour of the plaintiff on successive dates. These mortgages were usufructuary mortgages and in the case of the first two the property mortgaged was admittedly portions of an occupancy holding. In the third mortgage the property consisted partly of fixed-rate tenancy and partly of occupancy holding. It appears that after these mortgages were executed, two-thirds of the mortgaged property was lost to the mortgagee owing to its being discovered that the mortgagor had a right in these properties only to the extent of one-third. Having thus been deprived of a portion of the mortgage security this suit was brought by the plaintiff purporting to be a suit under section 68 of the Transfer of Property Act. The plaintiff asked for a simple money-decree. Both Courts have refused to give him one on the ground that the mortgage contracts were void, being forbidden by the provisions of the Agra Tenancy Act. It has been argued before us that, inasmuch as there was a personal covenant in each of these mortgages, the plaintiff was entitled to resort to those covenants and to ask at least for a simple money-decree. It seems that when these mortgage-deeds were executed a covenant was entered into by the mortgagor on behalf of himself and his successors-in-interest whereby he undertook to pay interest at the rate of 2 per cent. per mensem on the principal sum in case the mortgagee lost possession owing to any default on the part of the mortgagor. We may mention here that the arrangement was that the mortgagee was to be in possession under these mortgages in lieu of interest.

It appears to us that the decision of the Courts below ought to be upheld and we have an authority directly in point in this case in a decision of Mr. Justice Chamier which is reported as *Kanhai* v. *Tilak* (1). That case purports to follow the decision of a Full Bench in *Murlidhar* v. *Pem Raj* (2). That Full Bench ruling in turn followed the ruling of a Division Bench in *Bhawani Prasad* v. *Ghulam Muhammad* (3). It is true that both these latter cases related to transactions of sale. Those were cases in which the vendee sought to get back the purchase money from his vendor when it was found that possession could not be obtained inasmuch as the transaction involved the transfer of *sir* land and the relinquishment of ex-proprietary rights. We agree with the view taken by Mr. Justice Chamier in the case above mentioned that to enforce an agreement of this kind would be contrary to the provisions of section 24 of the Contract Act. Under that section the entire contract is deemed to be void, and that being so, the personal covenants upon which the plaintiff relies in this case and which are embodied in these three mortgage-bonds must fall along with the contract of mortgage. The decision of the Court below must be upheld. The appeal fails and is dismissed with costs including fees in this Court on the higher scale.

Appeal dismissed.

N. H.

(1) 16 Ind. Cas. 42.

(2) 22 A. 205; A. W. N. (1900) 10; 9 Ind. Dec. (N. S.) 1167 (F. B.).

(3) 18 A. 121; A. W. N. (1896) 12; 8 Ind. Dec. (N. S.) 787.

RADHA KISHEN v. MADAN GOPAL.

LAHORE HIGH COURT.

MISCELLANEOUS SECOND CIVIL APPEAL No. 10 OF 1921.

March 15, 1921.

Present :—Mr. Justice Scott-Smith.

RADHA KISHEN—CREDITOR—APPELLANT

versus

MADAN GOPAL—INSOLVENT, CHUNI LAL —OFFICIAL RECEIVER—RESPONDENTS.

Punjab Laws Act (IV of 1872), insolvency proceedings under, whether "suit"—Order, whether decree —Appeal.

Insolvency proceedings under the special provisions of the Punjab Laws Act do not amount to a "suit", as the term is used in section 13 of the Civil Procedure Code; an order in such proceedings, therefore, is not a decree, and is, consequently, not appealable.

Ram Lal v. *Ladha Singh*, 62 P. R 1886, *Amanullah* v. *Abdul Ghafur*, 13 Ind. Cas. 808; 85 P. R. 1911; 209 P. W. R. 1911, *Chiranji Mal* v. 145 *Creditors*, 145 P. R. 1884, relied upon.

Miscellaneous second appeal from an order of the District Judge, Amritsar, dated the 20th of August 1920, affirming that of the Judge, Insolvents' Estates Court, at Amritsar, dated the 7th of April 1920.

Messrs. *Manohar Lal* and *D. C. Ralli*, for the Appellant.

Bakhshi *Tek Chand*, for the Respondents.

JUDGMENT.—This appeal arises out of proceedings in insolvency in the Insolvents' Estates Court at Amritsar under Punjab Laws Act IV of 1872. Madan Gopal was adjudicated an insolvent under the provisions of that Act, and in accordance with the conditions of a trust deed the Judge of the Insolvents' Estates Court has released from attachment the insolvent's residential house. From this order Seth Radha Kishen, one of the creditors, filed an appeal to the District Judge who held that as the order appealed from was one under Act IV of 1872 and did not amount to a decree no appeal lay. He, therefore, dismissed the appeal. From this order a second appeal has been preferred to this Court.

In *Ram Lal* v. *Ladha Singh* (1) it was held, following the previous decision that no appeal lies against an order passed in insolvency proceedings under Act IV of 1872 unless "the order amounts to a decree." This was followed in *Amanullah* v. *Abdul Ghafur* (2). It was nowhere stated in either of those decisions that an order passed under the provisions of Act IV of 1872 could in any case be a decree. On the contrary, in *Ram Lal* v. *Ladha Singh* (1) the view was expressed that such insolvency proceedings could not be held to be a 'suit' within the definition of the term "decree" in the Civil Procedure Code of 1882. Mr. Manohar Lal, on behalf of the appellant, refers to the definition of "decree," in section 2 of the Civil Procedure Code of 1908. He says that the order of the Insolvents' Estates Court amounts to a "decree" because it was the formal expression of an adjudication which conclusively determined the rights of the parties with regard to a matter in controversy in the suit. He urges that the proceedings in the Insolvency Court are a "suit" within the meaning of the definition. Mr. Mulla, in his commentary of the Civil Procedure Code, 7th Edition, at page 5 says: "There are several Acts relating to special subjects, under which proceedings have to be commenced by a petition and not by a plaint. Decisions on petitions under those Acts would not, therefore, be decrees. Thus, a decision on a petition under the Religious Endowments Act appointing a new member to fill a vacancy in a committee of trustees of an endowment is not a decree" The meaning of the word "suit" in the definition of decree was also considered in *Chiranji Mal* v. 145 *Creditors* (3) where it was held that insolvency proceedings under the special provisions of the Punjab Laws Act do not amount to a "suit" as the term is used in section 13 of the Civil Procedure Code. Counsel for the appellant is unable to point to any decision of this Court or the Chief Court wherein it was held that proceedings under the special provisions of the Punjab Laws Act amount to a suit. I am of opinion that they do not amount to a suit, and that the order appealed from is, therefore, not a decree. I, therefore, hold that the District Judge was right in his view that no appeal lay from the order of the First Court.

Counsel asked that, if I was of opinion that no appeal lay, I should consider the order of the First Court on the revision side. Certain evidence was heard by the

(1) 62 P. R. 1886.

(2) 13 Ind. Cas. 808; 85 P. R. 1911; 209 P. W. R. 1911.

(3) 145 P. R. 1884.

KULDIP SINGH v. RAM SEWAK SINGH.

Insolvents' Estates Court as to whether the insolvent had complied with the conditions of the trust-deed. The Judge has not referred to this evidence, which has been read to me, and after hearing it I am of opinion that there is no ground for revision of the order complained of. I accordingly decline to interfere with it. The appeal fails and is dismissed with costs.

W. C. A.

Appeal dismissed.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 933 OF 1920.

March 16, 1922.

Present :—Mr. Justice Coutts and Mr. Justice Das.

KULDIP SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

RAM SEWAK SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Adverse possession— Joint collection of rent—Failure to deliver share, whether amounts to assertion of hostile title.

In cases of joint collection of rent, the failure of one party to deliver to the other his share of the rent cannot be held to amount to an assertion of adverse title or to dispossession until it is shown that the other party's title was definitely denied.

Shiva Prasad Singh v. *Hira Singh*, 62 Ind. Cas. 1; 6 P. L. J. 478; (1921) Pat 305; 2 P. L. T. 487; 3 U. P. L R (Pat) 81 (F. B.), *Maharajah Koowur Baboo Nitrasur Singh* v. *Babu Nund Loll Singh*, 8 M. I. A. 199; 1 Suth P. C. J. 420; 1 Sar. P. C. J. 744; 1 W. R. P. C. 51; 19 E. R. 506, cited.

Appeal from a decision of the District Judge, Gaya.

Messrs. *Susil Madhab Mullick*, *S. N. Rai* and *S. N. Bose*, for the Appellants.

Messrs. *Manuk* and *Nawal K. Prasad*, No. II, for the Respondents.

JUDGMENT.

COUTTS, J.—This appeal arises out of a suit for recovery of possession of a 2-anna share in village Manikpore on the allegation of the plaintiffs' *ijara* right. It appears that the plaintiffs' ancestor took a 2-anna *ijara* from one Fazal Hussain who had a 4-anna *mokarrari* interest in the village. This was in the year 1879. In 1882 the defendants' ancestor purchased Fazal Hussain's 4 anna *mokarrari* but before this date Fazal Hussain had mortgaged his remaining 2-annas to the plaintiffs' ancestor. In the year 1897 the plaintiffs sued on the mortgage and got a decree, and the position of the parties now is, that the plaintiffs are the 2 anna *ijaradars* and the defendants are the 2 anna *mokarraridars*. The suit was decreed in the Court of first instance and this decree was upheld on appeal by the District Judge. The defendants have now appealed to this Court.

The point taken in appeal is that the suit being one in ejectment the plaintiffs must show possession within 12 years and it is contended that on the finding of the District Judge the suit is governed by the Full Bench decision of this Court in the case of *Shiva Prasad Singh* v. *Hira Singh* (1) and that the plaintiffs' suit must fail. The finding of the District Judge on this point is as follows :

"On the evidence I feel constrained to agree with the Subordinate Judge that neither party has satisfactorily proved his possession during the period between 1304 and 1315." But the District Judge has brought to his aid the title which the plaintiffs admittedly had in the year 1304 and has decreed the plaintiffs' suit. The learned Vakil for the appellants contends that the learned District Judge should not have brought to his aid the title of the plaintiffs and for this he relies on the Full Bench decision already referred to, where the learned Judges have said : "If it is found that the evidence produced by both the plaintiff and the defendant as to possession is unworthy of credit the plaintiff's suit must fail, inasmuch as the presumption which arises upon proof of title cannot be called in aid to give weight to evidence unworthy of credit any more than if no evidence at all had been given." On the other hand, Mr. Manuk appearing on behalf of the respondents relies on that portion of the judgment of the Full Bench where the decision in the case of *Maharajah Koowur Baboo Nitrasur Singh* v. *Babu Nund Loll Singh* (2) is relied on, *viz.*, "where there is

(1) 62 Ind. Cas. 1; 6 P. L. J. 478; (1921) Pat. 305; 2 P. L. T. 487; 3 U. P. L. R. (Pat.) 81 (F. B.).

(2) 8 M. I. A. 199; 1 Suth. P. C. J. 420; 1 Sar. P. C. J. 744; 1 W. R. P. C. 51; 19 E. R. 506.

evidence on both sides of more or less equal weight so as to create a doubt as to where the truth lies, the probabilities may be regarded and may supply the additional weight necessary to turn the scale in favour of one side or the other." In the present case it is somewhat difficult to discover under which of these categories the finding of the learned District Judge comes, and if this appeal had to be decided on this point alone I should be inclined to direct that the appeal be remanded for clear decision by the District Judge. The appeal before us, however, must be dismissed on another ground.

The position of the parties, as I have already said, is that the plaintiffs are *ijaradars* in respect of 2-annas and the defendants are *mokarraridars* of another 2-annas. There was a partition between the defendants and their co-sharers and the learned District Judge says that, "it is admitted that up to the time of the Civil Court partition collection was Ijmal." No question of limitation, therefore, can arise, because the collection being joint there could be no adverse possession by the defendants until, at all events, the year 1906, and 1906 was within 12 years of the institution of the suit. As the learned District Judge says: "If there was joint collection at the time then any failure to deliver to the plaintiffs their share of the rent can hardly be held to amount to assertion of adverse title to or to dispossession until it is shown that the plaintiffs' title was definitely denied." The decision of the learned District Judge is certainly correct and I would dismiss this appeal with costs.

DAS, J.—agree.

N. H. *Appeal dismissed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 298 OF 1921.

April 21, 1921.

Present:—Mr. Justice Wilberforce.

BALMOKAND AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Musammat LACHHMAN BAI AND OTHERS—DEFENDANTS—RESPONDENTS.

Punjab Pre-emption Act (I of 1913), s. 22 (1)—Deposit—Time limit—Duty of Court—Failure to fix time for deposit—Pre-emptors, position of.

Under section 22 (1) of the Punjab Pre-emption Act, it is imperative for the Court to fix a time within which the deposit must be made, and if the Court fails to do so, and the pre-emptors do not pay in the deposit, they cannot be penalized for having disobeyed an order which was never made.

Second appeal from a decree of the District Judge, Dera Ghazi Khan, dated the 9th of October 1920, affirming that of the Subordinate Judge, Dera Ghazi Khan, dated the 6th of May 1920.

Dr. *Nand Lal*, for the Appellants.

Bakhshi *Tek Chand*, for the Respondents.

JUDGMENT.—In this suit for pre-emption the plaint was lodged on December the 11th and on the same date pre-emptor was ordered to deposit one-fifth of the sale-price and the case was fixed for the 15th January. An adjournment took place to the 4th February and another to the 11th March when issues were struck. On the 11th March the vendees applied that the plaint should be rejected as the necessary deposit had not been put in. It was put in on the 12th March. On this the Court rejected the plaint as the deposit was not put in within time. An appeal to the District Judge was unsuccessful and the pre-emptors have preferred a second appeal to this Court. It is urged on their behalf that, under section 22 (1) of the Punjab Pre-emption Act of 1913, it is imperative for the Court to fix a time within which the deposit must be made and that the Court having failed to do so the pre-emptors could not be penalized for having disobeyed an order which was not made. This propostion appears to me obvious. The view of the lower Courts was that the deposit should have been made at the next hearing or, at any rate, at the settlement of issues, but there is no authority to this effect.

ABDUL RAZZAQ v. MUHAMMAD HAJJAM.

No plea was taken regarding the insufficiency of the deposit.

I accept the appeal and remand the case for trial on the merits. Costs will be costs in the cause and Court-fee on appeal will be be refunded.

N. H. *Appeal accepted.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 295 OF 1921.

January 19, 1922.

Present:—Mr Lyle, A. J. C.

ABDUL RAZZAQ AND OTHERS—PLAINTIFFS—APPELLANTS

versus

MUHAMMAD HAJJAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Execution sale—Several judgment-debtors—Property sold as belonging to one of them—No objection by the rest—Sale confirmed—Execution purchaser, bona fide—Suit for possession by remaining judgment-debtors—Estoppel—Person not party to decree, position of—Appeal, second—Finding of ownership—Finding of fact.

Where judgment-debtors allow an execution sale of the whole of their property to proceed without raising any objection of insufficient description or to the effect that part ought to have been sold instead of the whole, the sale cannot afterwards be set aside at their instance on those grounds. [p. 799, col. 2.]

Arunachellam Chetti v. *Arunachellam Chetti*, 15 I. A. 171; 12 M. 19; 5 Sar. P. C. J. 265; 12 Ind. Jur. 371; 4 Ind Dec. (N. S.) 363 P. C.), followed.

Thus where in execution of a decree against certain persons, their joint property is put up for sale as belonging to one of them and the rest who are present at the sale knowing that the execution purchaser is ignorant of the true state of affairs and has no means of finding out the real facts, stand by and allow the sale to take place and be confirmed without lifting a hand to assert their title, they are estopped afterwards, especially after a lapse of three or four years, to question the sale by a suit for possession. [p. 800, col. 1.]

Olpherts v. *Mahabir Pershad Singh*, 10 I. A. 25; 9 C. 656; 11 C. L. R. 494; 7 Ind Jur. 164; 4 Sar. P. C. J. 417; 4 Shome L. R. 285; 4 Ind. Dec. (N. S.) 1086 (P. C.), followed.

A person whose property is sold in execution of a decree against another to which he was not a party is not bound by the sale when there is nothing to show that the judgment-debtor was the ostensible owner with his consent, either express or implied. [p. 800, col. 1.]

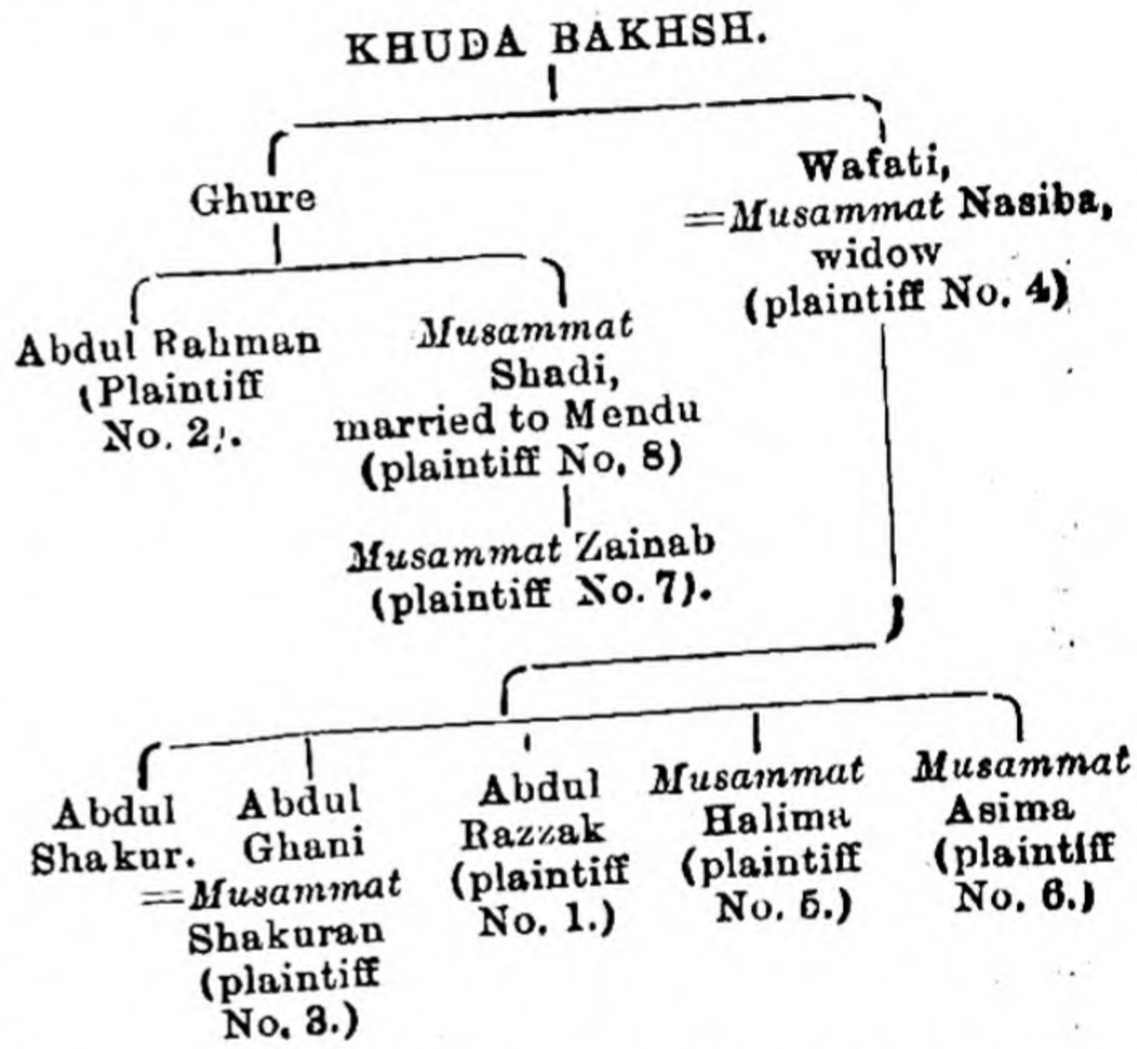
A finding that a certain person is or is not the owner of a certain property is a finding of fact and cannot be assailed in second appeal. [p. 798, col. 2.]

Appeal from a decree of the Subordinate Judge, Fyzabad, dated the 27th June 1921, upholding that of the Munsif, Akbarpur, dated the 14th September 1920.

Mr. *Haidar Husain*, holding brief of Mr. *Niamat Ullah*, for the Appellants.

Messrs. *M. Wasim* and *Ali Mohammad*, for the Respondents.

JUDGMENT.—In order to understand the facts of this case the following pedigree will be useful:—



The suit out of which this appeal arises was for possession of a 14 annas 4 pies share in a house and shop which had belonged to Khuda Bakhsh and for Rs. 60 on account of mesne profits. *Musammat* Abbas Bandi and *Musammat* Qasim Bandi, Taluqdars, obtained a decree for rent against Abdul Shakur, Abdul Razzak, Abdul Rahman and *Musammat* Shakuran on the 14th of November 1912. In execution of this decree the house and the shop in suit were put to sale but in the application for execution they were shown as the property of Abdul Shakur alone. At the auction-sale, which took place in November 1914, they were purchased by Muhammad Hajjam, defendant No. 1. The sale was confirmed on the 2nd of February 1915. On the 5th of December 1918 Muhammad

Hajjam obtained possession. On the 2nd of April 1918 he mortgaged the property to Shafi Muhammad, defendant No. 2, and on the 2nd of January 1919 he sold his equity of redemption to Nur Muhammad, defendant No. 3. It would appear that after possession had been given an objection was filed by Abdul Rahman, Abdul Razzak, *Musammat* Shakuran and one Khalil Ahmad but that objection was dismissed by an order of the 6th of March 1919. It has not been explained what interest the fourth objector, Khalil Ahmad, had in the property in suit. The third objector *Musammat* Shakuran was the transferee of the share of her husband, Abdul Ghani, under a registered sale deed dated the 5th of November 19.0. The plaintiffs alleged that they with Abdul Shakur held joint possession of the property in suit, that their share amounted to 11 annas 4 pies and that they were unlawfully dispossessed on the 5th of December 1918.

The defendants pleaded that the property in suit never belonged to the plaintiffs, but it was owned solely by Abdul Shakur. They also pleaded an alleged custom by which daughters were excluded from inheritance and that the suit was barred by limitation. It was further urged that the plaintiffs were estopped from claiming any share in the house and shop and that the defendant No. 3 was the purchaser in good faith for valuable consideration from the ostensible owner and the suit was, therefore, barred by section 41 of the Transfer of Property Act.

The Court of first instance found that the custom of exclusion of daughters from inheritance was proved and that, therefore, the share of the remaining plaintiffs amounted to 13 annas 8 pies but it further found that Abdul Shakur was the sole proprietor of the house in suit by virtue of a private partition. It held that the suit was not barred by limitation but the defendants Nos. 2 and 3 were transferees in good faith for consideration from the ostensible owner and in view of these findings it dismissed the plaintiffs' suit without deciding the question of estoppel.

Against this decision the plaintiffs appealed. Their grounds of appeal were that the custom of exclusion of daughters had not been proved, that the plaintiffs had been proved to be owners of the shares claimed by them, that in any case as they had been found to be the owners of a 13 annas 8 pies share a decree should have been passed in their favour to that extent, that the suit was not barred by time and that as the defendants had not set up partition in their pleadings they ought not to have been allowed to make out a new case which the plaintiffs had no opportunity to meet. The lower Appellate Court has held that the custom of exclusion of daughters is proved, that the defendants did not set up a new case inconsistent with or additional to their pleadings, that the plaintiffs Nos. 1 to 3 and 7 and 8 were the owners of the property in suit, along with Abdul Shakur, that their share amounted to 13 annas 8 pies and that the suit was not barred by limitation. It held, however, that the plaintiffs were estopped by their conduct from bringing the suit, and that as the plaintiffs had not in their grounds of appeal impeached the finding of the Court of first instance that the suit was barred by section 41 of the Transfer of Property Act and had not even attempted to raise the point in their opening arguments they could not be allowed in reply to re-open the question and the finding of the Court of first instance on that point was final and was fatal to the suit.

The decision of the lower Appellate Court has been attacked in this Court on two grounds: first, that the plaintiffs were not estopped from asserting their title, and, secondly, that they should have been allowed by the lower Appellate Court to dispute the finding of the Court of first instance that the suit was barred by section 41 of the Transfer of Property Act and it should have been found that the suit was not so barred. I may note here that the learned Counsel for the appellants in the course of arguments wished to dispute the finding of the lower Appellate Court that Abdul Shakur was not the sole owner of the property in suit but as that finding is a pure finding of fact based on a consideration of the evidence it cannot be disputed in second appeal. A patent mistake has, however, been made in the judgment of the lower Appellate Court which is admitted by both sides and which I think ought to be corrected

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The lower Appellate Court, while holding that the custom of exclusion of daughters from inheritance has been proved, has mentioned plaintiffs Nos. 7 and 8, who claim through *Musammat* Shadi, the daughter of Ghure, as co sharers in the property along with plaintiffs Nos. 1, 2 and 3 and has omitted to mention *Musammat* Nasiba, the widow of Wafati, as a co-sharer. This is patently an error and the sharers in the property, according to the finding of the lower Appellate Court, are in addition to Abdul Shakur, plaintiffs Nos. 1, 2, 3 and 4. Plaintiffs Nos. 7 and 8 can have no share in the property.

The plea of estoppel put forward by the defendants respondents is based on the fact that the plaintiffs, though parties to the decree and the execution proceedings, allowed the sale of the property to take place as belonging to Abdul Shakur alone, that it was their duty to assert their title to a share in the property, that they failed to do so and thereby permitted the purchaser defendant No. 1 to believe that Abdul Shakur alone was the owner of the property and to act upon that belief and purchase the property as belonging to Abdul Shakur alone. The learned Counsel for the appellants urges that there was no misrepresentation, that the defendant No. 1 knew that Abdul Shakur's interest alone was put up for sale and that his clients were not bound to assert their title in the course of the execution proceedings. At the outset I may state that *Musammat* Nasiba, the widow of Wafati, was no party to the decree or to the execution proceedings, and clearly there can be no estoppel as against her. With regard to plaintiffs appellants Nos 1, 2 and 3, however, the case is different. They were parties to the execution proceedings and had knowledge of those proceedings. They knew that the house was being sold as belonging to Abdul Shakur alone. They were present at the sale and yet they raised no objection whatsoever to the proceedings and allowed the sale to take place and the defendant No. 1 to purchase the house as if it belonged to Abdul Shakur alone. The defendant was a stranger, and even by the exercise of reasonable care he could not have discovered that the plaintiffs Nos. 1 to 3 were co-sharers in the property, as the *khasra* shows that the house and shop are the sole property of Abdul Shakur. Even after the sale had taken place, the plaintiffs Nos. 1 to 3 did not object to its confirmation on the ground that they had an interest in the property. The plaintiffs Nos. 1 and 2 and the husband of plaintiff No. 3 filed an objection to the sale (Exhibit C-1) not on the ground that they had a share in the property but on the ground that it had been sold for an insufficient price. They allowed the sale to be confirmed on the 2nd of February 1915 and it was not until after the purchaser obtained possession on the 5th of December 1918 that they made any attempt whatsoever to assert their title. In the case of *Arunachellam Chetti* v. *Arunachellam Chetti* (1), it was held by their Lordships of the Privy Council that where the ment-debtors allowed the execution sale of the whole of their property to proceed without raising any objection of insufficient description or to the effect that part ought to have been sold instead of the whole, the sale could not afterwards be set aside at their instance on those grounds, and at page 174 their Lordships remarked: "The judgment-debtors knowing, as they must have known, what the description was in the proclamation, allowed the whole matter to proceed until the sale is completed, and then asked to have it set aside on account of this, as they say, misdescription. It appears to come within what was laid down by this Board in *Olpherts* v. *Mahabir Pershad Singh* (2), that if there was really a ground of complaint, and if the judgment-debtors would have been injured by these proceedings in attaching and selling the whole of the property whilst the interest was such as it was, they ought to have come and complained. It would be very difficult indeed to conduct proceedings in execution of decrees by attachment and sale of property if the judgment debtor could lie by and afterwards take advantage of any misdescription of the property attached, and about to be sold, which he knew well but of which the execution-creditor or decree holder might be perfectly ignorant

(1) 15 I. A. 171; 12 M. 19; 5 Sar. P. C. J. 265; 12 Ind. Jur. 371; 4 Ind Dec. (N. S.) 363 (P. C.).

(2) 10 I. A. 25; 9 C. 656; 11 C. L. R. 494; 7 Ind. Jur. 164; 4 Sar. P. C. J. 417; 4 Shome L. R. 285; 4 Ind. Dec. (N. S.) 1086 (P. C.).

—that they should take no notice of that, allow the sale to proceed, and then come forward and say the whole proceedings were vitiated. That, in their Lordships' opinion, cannot be allowed." In that case the sale took place on the 22nd of July 1882 and objection was first made on the 29th of July 1882, only seven days after the sale and before the sale was confirmed. In the case before me the sale took place in November 1914, and was confirmed on the 2nd of February 1915 and yet the plaintiffs-appellants remained quiet and made no attempt whatsoever to assert their title until some time in the beginning of 1919.

I have no hesitation in holding on the facts before me that the plaintiffs-appellants Nos. 1, 2 and 3 are estopped from bringing the present suit. In this view of the case it is unnecessary to consider the application of section 41 of the Transfer of Property Act. The learned Counsel for the respondents admits that that provision is not applicable as against *Musammat* Nasiba, the widow of Wafati, as she was no party to the decree and she was not bound to take any action until she was ousted from possession on the 5th of December 1918. The property had actually been mortgaged to the defendant No. 2 long before that date and the sale-deed in favour of defendant No. 3 was executed on the 2nd of January 1919 and there is nothing to show that the defendant No. 1 was the ostensible owner of the property with her consent, express or implied.

The result is that I allow the appeal to the extent that I give *Musammat* Nasiba a decree for possession of a 1 anna share in the property in dispute. In other respects the appeal is dismissed. *Musammat* Nasiba will be allowed proportionate costs in all Courts. The defendants-respondents will get proportionate costs in all Courts in respect of the portion of the claim which is dismissed from the other appellants who will bear their own costs.

N. H. *Appeal partly allowed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 2747 OF 1919.

January 27, 1922.

Present:—Justice Sir N. R. Chatterjea, Kt., and Mr. Justice Pearson.

NARENDRA CHANDRA LAHIRY —DEFENDANT—APPELLANT

versus

HON'BLE *Maharaja* SIR MANINDRA CHANDRA NANDI, BAHADUR, K. C. I. E.—PLAINTIFF—RESPONDENT.

Landlord and tenant—Rent, suspension of—Lessee in possession of portion of jote*—Settlement taken of remaining portion knowing same to be in wrongful possession of third party—Lessor, failure of, to deliver possession of access portion, effect of.*

Where a lessor evicts a lessee from a part of the land demised, the entire rent is suspended. But where the lessee, being already in possession of a part, takes a settlement of an entire *jote*, knowing the access portion to be in the wrongful possession of a third party, and the lessor never puts any obstruction in the way of the lessee's recovering possession and there is no question of *mala fides* on the part of the lessor, the entire rent should not be suspended and the lessee is liable to pay proportionate rent in respect of the land in his possession. [p. 802, col. 1; p. 803, col. 2.]

Saroda Prosad Bhattacharjee v. *Rai Manmotho Nath Mitter Bahadur*, 28 Ind. Cas. 371; 19 C. W. N. 870, approved.

Narainsawmy Naidu Garu v. *Yerramali Ram Krishnaya*, 5 Ind. Cas. 479; 33 M. 499; 7 M. L. T. 119; (1910) M. W. N. 221 and 280, *Annada Prosad Mukhopadhya* v. *Mathura Lal Nag Mazumdar*, 2 Ind. Cas. 128; 13 C. W. N. 702; 9 C. L. J. 585 and *Manendra Chandra Nandi* v. *Narendra Chandra Lahiri*, 52 Ind. Cas. 13; 23 C. W. N. 585; 46 C. 956, distinguished.

Appeal against the decree of the Officiating Subordinate Judge, Rangpur, dated the 4th of August 1919, modifying that of the Munsif, Second Court at Kurigram, dated the 4th of May 1918.

FACTS appear from the judgment.

Babu *Nagendra Nath Ghose* (with him Babu *Jatindra Nath Sanyal*), for the Appellant.—The facts shortly are that plaintiffs purchased a *jote* of 244 *bighas* at a sale held in execution of a rent decree. He then brought a suit against Helaluddin and others for declaration of title and recovery of possession inasmuch as they had been in possession of a portion of the *jote*. The suit was compromised and by the *solenama* the defendants took lease of the entire *jote*. They also agreed to pay mesne profits. The present suit is for rent of the

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entire *jote*. The defense is that the defendant not having been given possession of 19 *bighas* was not bound to pay any rent at all. The lower Courts have given decree for proportionate rent. Hence the appeal is by the defendant. I submit there was one entire rent for the entire *jote* and it is impossible to assess a proportionate rent. Refers to *Manindra Chandra Nandi* v. *Narendra Chandra Lahiri* (1). The case in *Annada Prasad Mukhopadhya* v. *Mathura Lal Nag Mazumdar* (2), *Saroda Prasad Bhattacharjee* v. *Rai Manmotho Nath Mitter Bahadur* (3) are distinguishable. The case in *Annada Prasad Mukhopadhya* v. *Mathura Lal Nag Mazumdar* (2) has been disapproved by Fletcher, J., in *Manindra Chandra Nandi* v. *Narendra Chandra Lahiri* (1). Refers to *Smith* v. *Raleigh* (4), *Reeve* v. *Bird* (5). The landlord is bound, in the absence of a contract to the contrary, to give the lessee possession of the land demised. Refers to section 108, Transfer of Property Act, clause (6); *Hurish Chunder Koondoo* v. *Mohinee Mohun Mitter* (6), *Bullan* v. *Lalit Jha* (7), *Udhab Chandra Singh* v. *Narain Manjhi* (8). If the land is in possession of a third person to the knowledge of both the lessor and the lessee, even in that case it would be the duty of the lessor to make it possible for the lessee to take possession. Refers to *Narainsawmy Naidu Garu* v. *Yerramali Ram Krishnaya* (9), Halsbury's Laws of England, Volume XVIII, page 485. *Zamindar of Vizianagram* v. *Behara Suryanarayana Patrulu* (10). To make out a case for suspension of rent it is not necessary to establish that the landlord has been guilty of tortious dispossession. It is enough that he has failed to do his part of the duty. The question of the *bona fide* or otherwise of the landlord is immaterial.

Babu *Ram Charan Pitter* (with him Babus *Ram Chandra Majumdar*, *Dwarka Nath Chatterbutty*, *Hemendra Nath Sen*, *Jyoti Prosad Parvadhikari* and *Sarat Kumar Pitter*), for the Respondents.—I submit the case in *Manindra Chandra Nandi* v. *Narendra Chandra Lahiri* (1) is quite distinguishable. Here the land was in possession of a trespasser to the knowledge of both the parties and the defendant had paid mesne profits for the three years at the proportionate rate. That amounts to acquiescence. The settlement was taken with full knowledge that the land was in possession of a trespasser. This clearly indicates an intention that the liability to pay rent did not depend on the delivery of possession of that part of the *jote*. Further neither has there been any request to be put in possession.

Babu *Nagendra Nath Ghose* in reply.—We state in the written statement that repeated requests had been made. This question was gone into by the Courts below.

JUDGMENT.—This appeal arises out of a suit for rent. It appears that the plaintiff purchased a *jote* of 244 *bighas* 18 *cottas* 14 *chitaks* at a sale for arrears of rent, but found that 225 *bighas* was in the possession of the defendant and the rest in the possession of one Helaluddin and others. He thereupon brought a suit for declaration of his title to and *khas* possession of the 225 and odd *bighas* in the possession of the defendant against him. The suit was compromised, and under the compromise the defendant took a lease of the entire land 244 *bighas* 18 *cottas* 14 *chittaks* at a rent of Rs. 200 from the plaintiff from the year 1321 B. S. It was stated in the *solenama* that the defendant would pay mesne profits for the 225 *bighas* of land which were in his possession for the years 1317 to 1320 at the rate of Rs. 184 per year, that being the proportionate rent payable in respect of the lands which were in his possession. A decree was accordingly passed upon the *solenama*. It is found that the defendant did not obtain possession of the 19 and odd *bighas* of land which were in the possession of Helaluddin. The Courts below held that the entire rent should not be suspended and gave the plaintiff a decree for proportionate rent in respect of the 225 *bighas* in the possession of the defendant, and disallowed the rent for the 19 *bighas* and odd which were not in his possession.

(1) 52 Ind. Cas. 13; 23 C. W. N. 585; 46 C. 956.
(2) 2 Ind. Cas. 123; 13 C. W. N. 702; 9 C. L. J. 585.
(3) 28 Ind. Cas. 371; 19 C. W. N. 870.
(4) (1814) 3 Camp. 513; 14 R. R. 829.
(5) (1834) 1 C. M. & R. 31 at p. 36; 4 Tyr. 612; 3 L. J. Ex. 282; 149 E. R. 980.
(6) 9 W. R. 582.
(7) 3 B. L. R. (App.) 119.
(8) 58 Ind. Cas. 186.
(9) 5 Ind. Cas. 479; 33 M. 499; 7 M. L. T. 119; (1910) M. W. N. 221 and 280.
(10) 25 M. 587 at p. 596; 12 M. L. J. 249.

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The defendant has appealed to this Court, and it is contended that the plaintiff having failed to deliver possession of the 19 and odd *bighas* of land, there should be suspension of the entire rent.

There is no doubt that where the lessor has evicted the lessee from a part of the land demised the entire rent is suspended [see the cases on the point collected in *Saroda Prasad Bhattacharjee* v. *Rai Manmotho Nath Mitter Bahadur* (3)]. In the present case, however, there is no question of any eviction by the lessor or by anyone claiming under him or by his procurement. The question is whether the plaintiff not having delivered possession of the 19 *bighas* of land which was in the wrongful possession of a third party, the entire rent should be suspended. That question was not directly decided in any of the cases cited before us. In the cases of *Hurish Chunder Koondoo* v. *Mohinee Mohun Mitter* (6), and *Bullan* v. *Lalit Jha* (7), the tenant did not obtain possession of the demised land at all, and it was held that he was not liable to pay rent. In *Narainsawmy Naidu Garu* v. *Yerramali Ram Krishnaya* (9), it was held that where the lessor does not put the lessee in possession but there is no obstruction or likelihood of obstruction to the lessee taking possession of the same, and he neither tries nor requests the lessor to put him in possession, the lessee is bound to pay rent. In that case the learned Judge (sitting singly) observed: "But if the land is already in possession of a third person to the knowledge both of the lessor and the lessee, I should be inclined to hold that it would be the duty of the lessor to make it possible for the lessee to take possession by removing the third person from the possession thereof, even though no express request for the purpose is made by the lessee." The lessee in that case appears not to have obtained possession of the land demised at all, and the observations were *obiter*. In *Annada Prasad Mukhopadhya* v. *Mathura Lal Nag Mazumdar* (2) the lessee was prevented from taking possession of a proportion of the demised land by another lessee to whom the said portion was demised by a subsequent lease. One of the Judges, Chitty, J., was of opinion that there was no eviction properly so called of the lessee by the landlord, while Vincent, J., was of opinion that there was eviction of the first lessee by the second by the procurement of the landlord. The land in that case was in the Sunderbans; there was a dispute as to the boundaries of the lands let out to the two lessees respectively, and the landlord was found not to have acted *mala fide*. The lessee (under the first lease) so far from repudiating the lease kept possession of the remaining portion and even paid rent subsequently to the creation of the second lease, and it was held by both the learned Judges that the lessee could not ask for a suspension of the whole rent and was bound to pay proportionate rent. Chitty, J., in that case observed: "It may be questioned how far the technicalities to be found in the English Law should be allowed to affect the relations of landlord and tenant in this country. In one respect the principle underlying the English decisions appears to be inapplicable to this present case. Eviction is regarded as a wrong done by the landlord to this tenant, for which the former is to be penalized. Here not only, as I have said, was there no eviction properly so called, but there is no proof of *mala fides* on the landlord's part. It may be that by a careless statement of boundaries in the two *pottas* lands which should be included in the defendant's holding are also included in those of Rasik Lal Dutta. But that is all that can be alleged against the plaintiff on the facts of this case as admitted and as found by the lower Appellate Court. I think that the defendant has no defence to the plaintiff's suit for rent."

In the case of *Manindra Chandra Nandi* v. *Narendra Chandra Lahiri* (1) (which was between the same parties as in the present case) Fletcher, J., appears to have taken a different view. He pointed out that the case of *Stokes* v. *Cooper* (11) relied upon by Chitty, J., had been disapproved of in *Smith* v. *Raleigh* (4) and also in another case [*Reeve* v. *Bird* (5)] and that in England there is no difference between the case where the landlord has ousted the tenant from a portion of the holding and the case where the landlord has let out the property to the lessee having already put an earlier and prior lessee in

(11) (1814) 3 Camp. 514*n*; 14 R. R. 829*n*.

possession of it, and referred to the case of *Neale* v. *Mackenzie* (12).

Those cases, however, are distinguishable from the present, as the lessee in those cases could not obtain possession, nor could the lessor deliver possession by reason of the lessor having granted a lease in favour of a third person in respect of a portion of the land demised to the lessee in question. The defendant in the present case pleaded that the plaintiff was in possession of the 19 *bighas* by letting out the same to Helaluddin. That case has not been accepted by the Courts below. The learned Vakil for the appellant, however, referred to a passage in Halsbury's Laws of England, Volume XVIII, page 485 where it is stated: "where part of the premises is held by a third person rightfully claiming under a title adverse to the lessor, so that the lessee cannot obtain possession, the result is the same as in the case of unlawful eviction by the lessor, and no part of the rent is recoverable." [*Holgate* v. *Kay* (13)]. Reference was also made to section 108 (*b*) of the Transfer of Property Act which provides that, in the absence of a contract to the contrary, the lessor is bound on the lessee's request to put him in possession of the property. It is pointed out that the defendant in the written statement stated that he had requested the plaintiff to put him in possession of the land. The question, however, does not appear to have gone into in either of the Courts below.

It is unnecessary in the present case to consider the broad question whether, ordinarily, the entire rent should be suspended when the lessor is unable to deliver possession of a portion of the land demised whatever might be the reason for his inability and whether the view taken by Chitty, J., in the case of *Annada Prasad Mukhopadhya* v. *Mathura Lal Nag Mazumdar* (2) that the English rule should not be applied to this country is correct.

The present case is not an ordinary case of settlement, where the lessor has to deliver possession of the land demised to the lessee. The defendant was already in possession (though wrongful) of 225 *bighas* for several years and, as stated above, 19 *bighas* of land was at the date of the *solenama*, in the possession of Helaluddin. The *solenama* was executed on the 30th May, 1914 corresponding to the 16th Jaistha 1321 but the tenancy in respect of 244 *bighas* was to be operative retrospectively from the beginning of 1321 *i.e.*, 1st Baisakh 1321. The defendant took a settlement of the entire 244 *bighas* though he was perfectly aware that a portion of it, *viz.*, 19 *bighas*, was in the wrongful possession of a third party. These indicate an intention that the liability of the defendant to pay rent in respect of the 225 *bighas* which was in his possession already did not depend upon the delivery of possession of the 19 *bighas* which was in the possession of Helaluddin. The plaintiff never put any obstruction in the way of defendants recovering possession, and there is no question of *mala fides* on the part of the plaintiff. We think that, in the circumstances of the case, the Courts below were right in holding that the entire rent should not be suspended, and that the defendant is liable to pay proportionate rent in respect of the 225 *bighas* of land in his possession.

The appeal is accordingly dismissed. Each party to bear his own costs.

B N.

Appeal dismissed.

(12) (1836) 1 M. & W. 747; 2 Gale 174; 6 L. J. Ex. 263; 150 E. R. 635; 46 R. R. 478.

(13) (1844) 1 Car. & Kir. 341; 70 R. R. 800.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 323 OF 1921.

January 23, 1922.

Present:—Mr. Lyle, A. J. C.

NIAMAT ALI—DEFENDANT—APPELLANT

versus

ASHIQ ALI—PLAINTIFF—RESPONDENT.

Custom—Succession—Sunni Muhammadans—Wajib-ul-arz, construction of—Construction, whether may be influenced by principles of Muhammadan Law—"Qarib," meaning of—Appeal, second—Finding of fact—Pedigree, finding as to.

In a family of Sunni Muhammadans where succession is regulated not by the Muhammadan Law

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but by custom as recorded in the *wajib-ul-arz*, the entry in that document being—"*aur hissa malik mutvaffi ka woh shakhs pawega jo qarib hai*," the word "*qarib*," in the absence of words limiting the succession to relatives in the male line only, means that relatives "nearest in degree" succeed, and not those "nearer in degree through the male line." [p. 805, col. 2.]

Where among Mohammadans it has been proved that inheritance is governed not by the Muhammadan Law but by the custom a Court is not entitled to put a strained or limited interpretation on the words used in defining the custom merely because in some instances, if the words were interpreted in their ordinary sense, succession would not be in accordance with the rule of Muhammadan Law. [p. 805, col. 2.]

A finding of fact, such as a pedigree set up by the plaintiff which is based on evidence, cannot be challenged in second appeal. [p. 805, col. 1.]

Appeal from the decree of the Subordinate Judge, Sultanpur, dated 10th August 1921, confirming with a little modification the decree of the Munsif, Sultanpur, dated the 14th September 1920.

Mr. *Niamat Ullah*, for the Appellant.

Mr. *Bisheshwar Nath Srivastava*, for the Respondent.

JUDGMENT.—The suit out of which this appeal arises was brought for possession of a half share of certain property which had belonged to one Muhammad Bakhsh, a Sunni Muhammadan, and for Rs. 200 mesne profits for two years. The plaintiff's case was that, on the death of Muhammad Bakhsh, the property devolved on his widow, *Musammat* Abadi, for her life by virtue of a family custom, that *Musammat* Abadi had executed a deed of gift on the 10th of October 1880 in favour of Niamat Ali, the defendant, and that that deed of gift could have effect only for the lifetime of *Musammat* Abadi. It was claimed that, on the death of *Musammat* Abadi in May 1918, by virtue of the family custom, the nearest heirs of the husband were entitled to succeed to the property and that daughters and daughters' sons were excluded, and the plaintiff alleged that he and one Wajid Ali were the nearest heirs to Muhammad Bakhsh both according to the custom and under the Muhammadan Law, and that he (the plaintiff) was entitled to recover possession from the defendant of a one half share in the property and to mesne profits for the previous two years.

The defendant denied the pedigree put forward by the plaintiff. He pleaded that he himself was the nearest heir of Muhammad Bakhsh, and that, both under the custom and under the Muhammadan Law, he was entitled to succeed. He further pleaded that he had been in possession of the property ever since execution of the deed of gift in 1880 and that the suit was barred by limitation.

The Court of first instance held that the pedigree set up by the plaintiff was proved, and that as *Musammat* Abadi died in the year 1918 and the cause of action arose at the time of her death the suit was within limitation. It also held that the custom set up by the plaintiff was proved and that the plaintiff was entitled under that custom to a half share in the property. It gave the plaintiff a decree for possession of a half share and for Rs. 70 mesne profits and dismissed the rest of the claim.

From this decision the defendant appealed and it was urged that the pedigree put forward by the plaintiff was not proved, that the Court of first instance had wrongly interpreted the village *wajib-ul-arz*, that the claim was time-barred, and that the plaintiff was not entitled to possession of a half share in the property or to mesne profits. The lower Appellate Court has found that the suit is not barred by limitation, that the pedigree put forward by the plaintiff is established and under the custom the plaintiff is entitled to a half share in the property with the exception of a house which was not proved to have belonged to Muhammad Bakhsh. The lower Appellate Court held that all the oral evidence relative to the alleged custom was valueless and based its finding as to the custom solely on the entry relating to the custom in the *wajib-ul-arz*.

The defendant has come to this Court in second appeal and he bases his appeal on two grounds, first, that the pedigree set up by the plaintiff has not been proved, and, secondly, that the lower Appellate Court has wrongly interpreted the entry in the *wajib-ul-arz* relating to the claim. He admits that *Musammat* Abadi had only a life-interest and that succession to the estate left by Muhammad Bakhsh is governed not by the ordinary rule of Muhammadan Law but by the custom set forth in the *wajib-ul-arz* but he contends that, according to that custom, he and he alone is entitled to succeed.

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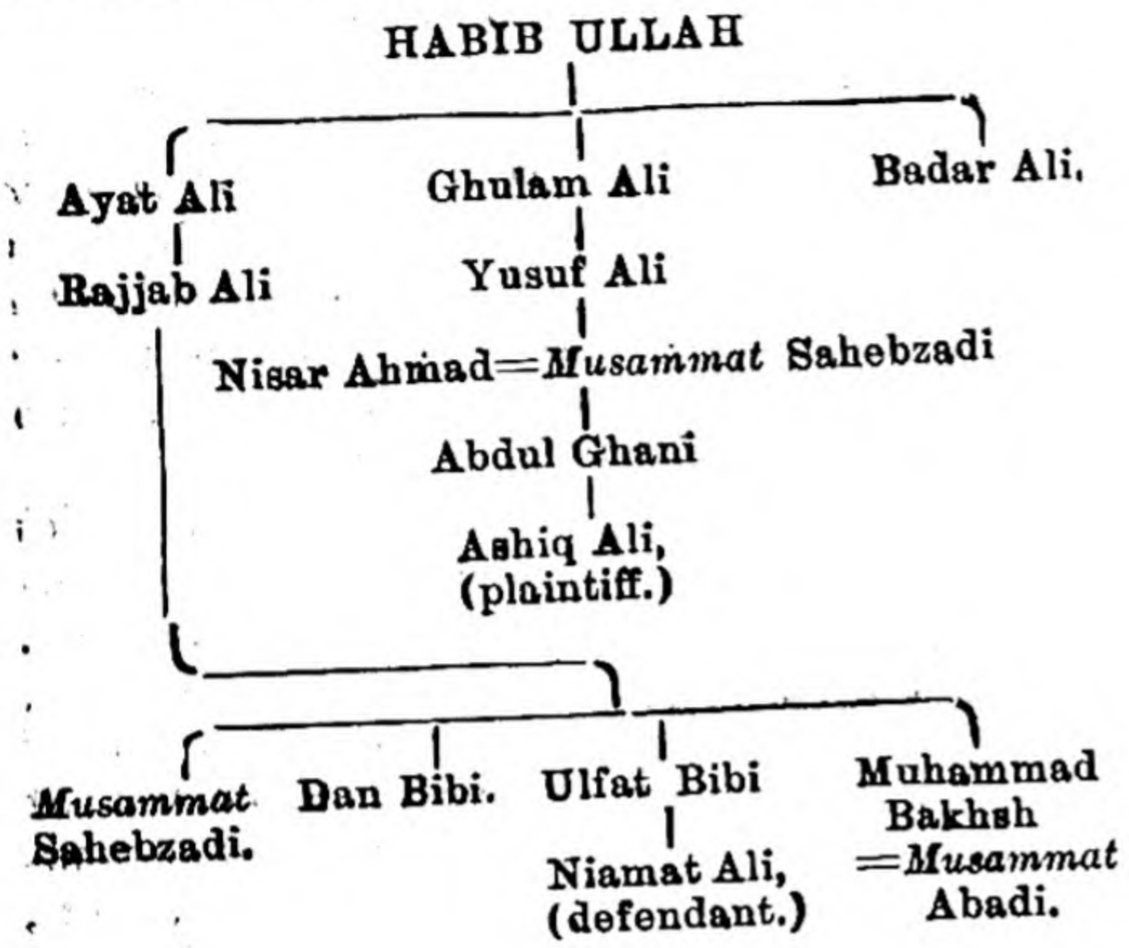
The finding of both the Courts below that the pedigree set up by the plaintiff has been established is a pure finding of fact based on evidence and cannot be disputed in second appeal. That pedigree, so far as it affects the parties, is as follows :—



It will be seen from this pedigree that the defendant is the son of Muhammad Bakhsh's sister, while the plaintiff is the great-great-great-grandson of Muhammad Bakhsh's great-grandfather, that is, he is in the eighth degree from Muhammad Bakhsh. The words used in the *wajib-ul-arz* on which both the parties rely are as follows :— "*aur hissa malik mutvaffi ka woh shakhs pawega jo qarib hoga.*" The learned Counsel for the defendant-appellant argues that, even though the pedigree put forward by the plaintiff-respondent be accepted as correct, his client must be held to be "*qarib*" as against the plaintiff, the word "*qarib*" meaning nearest in degree. For the plaintiff-respondent, on the other hand, it is urged that the word "*qarib*" must be interpreted as meaning nearest in degree through the male line. In this connection, it is difficult to understand the reasoning of the learned Subordinate Judge. He says: "It has been contended before me that the word '*qarib*' does not mean to include the descendants of a common ancestor. I do not see that this contention has any force. The word '*qarib*,' used without any restrictions, should be interpreted in its widest meaning, and it does mean that descendants of a common ancestor were meant." Yet, the learned Subordinate Judge goes on to hold that the plaintiff has a better title than the defendant under the custom as recorded in the *wajib-ul arz* and, in coming to that decision, he appears to have been influenced by the fact that, under the ordinary Muhammadan law, the plaintiff would be entitled to succeed as a residuary in preference to the defendant who is merely one of the distant kindred. I agree with the remark of the learned Subordinate Judge that as the word "*qarib*" stands alone it must be interpreted in its widest sense, that is, near in degree, and we are not entitled to restrict its meaning and interpret it as meaning near in degree through the male line. Nor do I think, where it has been proved that inheritance is governed not by the Muhammadan Law but by the custom, we are entitled to put a strained or limited interpretation on the words used in defining the custom merely because in some instances, if the words were interpreted in their ordinary sense, succession would not be in accordance with the rule of Muhammadan Law. An examination of this *wajib-ul arz* shows that in this family there are many customs which cannot be reconciled with the Muhammadan Law : for example, there is a custom of adoption, there is a custom by which a widow takes a life-estate and there is a custom by which daughters are excluded from inheritance in the presence of sons. It seems to me that, had it been the intention to record a custom by which relatives in the male line only were entitled to succeed, the necessary limiting words would have been placed in the *wajib-ul-arz*. As there are no such words, we must interpret the word "*qarib*" in its widest sense as "nearest in degree" and the defendant is certainly much nearer in degree to Muhammad Bakhsh than the plaintiff.

The result is that the appeal is allowed, the decree of the lower Appellate Court is set aside and the plaintiff's suit will stand dismissed with costs in all Courts.

W. C. A. & N. H. *Appeal allowed.*

MANGULAL v. NANHI.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 81 OF 1921.
September 3, 1921.
Present:—Sir Henry Drake-Brockman, KT., J. C.

MANGULAL—APPLICANT
versus
Musammat NANHI—NON-APPLICANT.

Minor, liability of—Guardian acting bona fide *for his interest—Vendor and purchaser—Default by purchaser—Deposit, retention of, by vendor.*

A minor is bound by the act of his guardian done *bona fide* and for his benefit in the management of his estate. [p. 807, col. 1.]

Seth Ghasiram v. *Musammat Binia*, 1 N. L. R. 66, referred to.

Where a contract goes off by default of the purchaser, the vendor is entitled to retain the deposit. [p. 807, col. 2.]

Natesa Aiyar v. *Appavu Padayachi*, 19 Ind. Cas. 462; 38 M. 178; (1913) M. W. N. 341; 24 M. L. J. 488; 13 M. L. T. 391 and *Bishan Chand* v. *Radha Kishan Das*, 19 A. 489; A. W. N. (1897) 123; 9 Ind. Dec. (N. S.) 316, referred to.

In this case the vendor was allowed to retain a deposit which amounted to Rs. 240 out of the total price fixed of Rs. 300.

Application for revision of an order of the District Judge, Saugor, dated the 4th December 1920.

Mr. *S. B. Gokhale*, for the Applicant.

Messrs. *G. L. Subhedar*, and *K. V. Deoskar*, for the Non-Applicants.

ORDER.—The facts of this case may be briefly stated as follows. The plaintiff Nanhi with her two sons, Haziralal and Gorelal, of whom the latter is still a minor, owned a part of certain premises in Mouza Gadola, the rest of which belongs to the minor Dhannalal, the son of Nanhi's deceased brother Motilal. Dhannalal lives at Khurai, five miles from Gadola, with his paternal uncle Mangulal who is his natural guardian. Dhannalal was only six years old when the suit was filed in March 1920. Early in 1917 Mangulal decided to sell Dhannalal's part of the premises as the minor did not require it. A purchaser was found for Rs. 240 in one Khushalchand, but before the sale could be completed *Musammat* Nanhi and Haziralal deposited Rs. 240 with Mangulal on the understanding that Dhannalal's house would be sold to them and Gorelal for Rs. 300 if Khushalchand could be induced to relinquish his claim. Khushalchand on being approached agreed to relinquish his right, but the plaintiffs did not carry out the bargain. The suit was brought to recover the sum deposited with interest on the ground that there was no binding agreement on the plaintiffs' part to purchase the house and that, even if such an agreement was reached, it could not be enforced by either side because the plaintiff Gorelal and the defendant Dhannalal are both minors.

The Trial Judge held that there was a binding agreement by the plaintiffs to buy the house for Rs. 300 and that the plaintiffs could not claim refund of their deposit in the absence of anything to show that the minor defendant's guardian was unwilling to execute the necessary conveyance.

The plaintiffs appealed to the District Court which held that the plaintiffs' agreement to buy was void and unenforceable. The reasons given for this view are, firstly, that the defendant Dhannalal and the plaintiff Gorelal are minors, so that, by reason of section 10, Indian Contract Act, the agreement does not amount to a contract, and, second, that there being no mutuality between the parties the contract is unenforceable and, therefore, void. It was further held that Mangulal who received the money and subsequently transferred it to the credit of his ward Dhannalal, must re-pay it but without interest.

Mangulal has applied to this Court in revision and at his request his place as Dhannalal's guardian *ad litem* has been taken by *Musammat* Kesar, a sister of Dhannalal's father. It is urged on behalf of the applicant that section 10, Indian Contract Act, has no application, inasmuch as the agreement was made not with the minor defendant but with his natural guardian, while Haziralal as Gorelal's adult brother was competent to act for him so as to bind him by the transaction. For the plaintiffs, on the other hand, it is contended that the decision of the District Court really rested upon the view that the agreement between the parties did not amount to a contract, and that, even if the District Judge was wrong in his application of section 10, Indian Contract Act, this Court is powerless to interfere.

It is certainly difficult to understand why section 10, Indian Contract Act, was cited at all, for the lower Appellate Court went on to treat the agreement as a contract which it then pronounced to be void because neither side could in its opinion claim specific per-

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formance. In my opinion the District Judge acted with material irregularity in assuming that Dhannalal himself made the agreement, the obvious fact being that it was made by his natural guardian on his behalf and under circumstances which show that the minor was to be benefited. The plaintiffs were willing to pay Rs. 60 more than Khushalchand and a period of 12 years at least will have to elapse before Dhannalal can require a house of his own. Moreover, it is settled law that a minor is bound by the act of his guardian done *bona fide* and for his benefit in the management of his estate. See *Seth Ghasiram* v. *Musammat Binia* (1). Lastly, it was no part of the plaintiffs' case that the agreement did not amount to a contract. In these circumstances, I consider it open to me to interfere under section 115, Civil Procedure Code, with the obviously incorrect finding that there was no contract between the parties.

With regard to the conclusion of the District Court that the contract between the parties was void because there was no such mutuality as would enable either side to enforce specific performance, it is urged for the applicant that the authorities cited by the District Judge, namely, *Jhitibai* v. *Tejmal* (2) and *Muliabai* v. *Garud* (3) do not support the finding that the contract was void. It is also urged that the decision of the Privy Council in *Sarwarjan* v. *Fakhruddin Mahomed* (4), cited in the Trial Judge's judgment, does no more than lay down that a minor cannot obtain specific performance of a contract for the purchase of immoveable property made by his guardian on his behalf. For the plaintiffs it is contended that the District Court's conclusion upon a point of law cannot be interfered with in revision.

In my views the conclusion that the contract was void merely because specific performance could be obtained by neither side is a pure *non sequitur*. For reasons already given, the contract was certainly not void; at most, any conveyance executed under it could be avoided entirely by Dhannalal or partly by Gorelal on attaining majority. Each of the minors was represented in the matter by a person competent to act for him. The applicant, as Dhannalal's natural guardian, is still willing to execute a conveyance in favour of the plaintiffs and I agree with the Trial Judge in thinking that the question whether specific performance can be claimed does not really arise at all. The plaintiffs do not allege that the contract for sale went off owing to any default by the vendor and they seek to be put in the same position as if they were entitled to resile from the contract, a position for which no authority is cited. It was for the plaintiffs to tender the necessary conveyance for execution by Dhannalal's guardian and, as already stated, he is still willing to execute such a document. Where a contract goes off by default of the purchaser, the vendor is entitled to retain the deposit: See *Natesa Aiyar* v. *Appavu Pattayachi* (5), *Bishan Chand* v. *Radha Kishan Das* (6) and *Roshan Lal* v. *Delhi Cloth & General Mills Company Limited* (7). Thus, the District Court has, in my view, while professing to decide one question, decided quite another, there being no real connection between the two. In "Fry, on Specific Performance" (6th Edition, page 319) it is laid down on the authority of Lindly, C. J., in *Lumley* v. *Ravenscroft* (8), that an infant cannot sue because he could not be sued for specific performance, and at page 400 of the same work the cases in which the want of mutuality may be a ground justifying rescission of a contract are mentioned. Those cases do not include one like the present, nor would the plaintiffs be entitled to rescission under Chapter IV of the Specific Relief Act, 1877. The circumstances in which a contract is voidable are given in sections 19, 19A, 39, 53 and 55 of the Indian Contract Act, and none of these are pleaded or proved in the present case.

My conclusion is, that the District Court failed to decide the real question which

(1) 1 N. L. R. 66.
(2) 41 Ind. Cas. 35; 13 N. L. R. 109.
(3) 53 Ind. Cas. 65; 15 N. L. R. 149.
(4) 13 Ind. Cas. 231; 39 C. 232; 16 C. W. N. 74; (1912) M. W. N. 22; 9 A. L. J. 33; 15 C. L. J. 69; 14 Bom. L. R. 5; 21 M. L. J. 1156; 11 M. L. T. 8; 39 I. A. 1 (P. C.).
(5) 19 Ind. Cas. 462; 38 M. 178; (1913) M. W. N. 341; 24 M. L. J. 488; 13 M. L. T. 391.
(6) 19 A. 489; A. W. N. (1897) 123; 9 Ind. Dec. (N. S.) 316.
(7) 7 Ind. Cas. 794; 33 A. 166; 7 A. L. J. 1019.
(8) (1895) 1 Q. B. 683 at p. 684; 64 L. J. Q. B. 441. 14 R. 347; 72 L. T. 382; 43 W. R. 584; 59 J. P. 277

arose for decision and that, with reference to that question the plaintiffs have no case. The decree of the lower Appellate Court is, therefore, set aside and that of the First Court dismissing the suit is restored. The plaintiffs will pay all the costs throughout. I allow Rs. 16 for the hearing in this Court. No separate costs will be allowed for the non applicant Dhannalal in this Court, he having made common cause with the applicant.

N. H. *Decree set aside.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 316 OF 1921.
February 15, 1922.
Present :—Pandit Kanhaiya Lal, J. C.
SAT DEO—DEFENDANT—APPELLANT
versus
JAI NATH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Landlord and tenant—Biswi *mortgage—Right of redemption, extinction of*—Paramsana *rent, recovery of*—Paramsana *rent, what is—Suit for recovery whether lies in Revenue Court—Revenue Court—Exclusive jurisdiction—Decision, whether assailable in Civil Court—Hindu Law—Joint family—Manager, whether sufficient party in proceeding against family.*

Where land held by a tenant is mortgaged to him by the proprietor in consideration of a sum of money, it is not unusual for the tenant to appropriate a portion of the rent, for which he was originally liable, towards interest due on his loan and to pay the balance to the mortgagor. *Biswi* is the name usually given in Eastern Oudh to such mortgages of land in sub-tenure. The sum representing the difference between the full rent and the interest of the money advanced, which is still payable to the mortgagor landlord, is called *paramsana*. [p. 810, col. 1.]

The extinction of the right of redemption of a mortgage of this kind does not destroy the right of the mortgagor or of his successor to claim the *paramsana* as rent, because the *paramsana* does not fall within the rights to which the mortgagee is entitled. It is payable to the mortgagor irrespective of the mortgage on account of the extra profits which the mortgagee derives from the occupation of the mortgaged property. A decree for arrears of this *paramsana* can be executed against the mortgagee-tenant even after the landlord has lost the right to redeem the mortgage tself. [p. 810, col. 2.]

A suit for arrears of *paramsana* rent lies in a Court of Revenue under section 108, clause (2) of the Oudh Rent Act in the same way as a suit for arrears of rent of any other kind payable in respect of a cultivatory holding. [p 811, col. 1.]

A suit for a declaration that the decree of a Revenue Court in a matter in which that Court had exclusive jurisdiction is void and ineffectual is not maintainable in the Civil Court on the bare ground that the proceedings in that Court were contrary to law. [p. 811, col. 2.]

Rai Krishen Chand v. *Mahadeo Singh*, A. W. N. (1901) 49 and *Uman Shanker* v. *Bhagwan Din*, 8 Ind. Cas. 568; 7 A. L. J. 1064, followed.

Where the members of a joint Hindu family are properly and effectively represented in a suit by the managing members, a Court is not bound to set aside the execution proceedings, where substantial justice has been done, merely because every existing member of the family was not made a party to the suit. [p. 811, col. 2.]

Sheo Shankar Ram v. *Jaddo Kunwar*, 24 Ind. Cas. 504; 36 A. 383; 18 C. W. N. 868; 16 M. L. T. 175; (1914) M. W. N. 593; 1 L. W. 645; 20 C. L. J. 282; 12 A. L. J. 1173; 16 Bom. L. R. 810; 41 I. A. 216 (P. C.), followed.

Appeal from a decree of the Subordinate Judge, Sultanpur, dated the 8th July 1921, modifying a decree of the Munsif, Sultanpur, dated the 14th September 1920.

Mr. *Niamat Ullah*, for the Appellant.
Mr. *A. P. Sen*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiffs for possession of certain plots of land with mesne profits. Their allegation was that the said plots were held by them and Adnath, the brother of the plaintiff No. 1, and the father of plaintiffs Nos. 3, 4 and 5, as mortgagees, that the time for the redemption of the mortgage had expired and that the defendants Nos. 1 and 2, who are the proprietors of the village in which the disputed plots are situated, wrongfully obtained a decree for arrears of rent against them and in execution thereof brought the mortgagee rights of the plaintiffs and of defendant No. 4 therein to sale. There was a further allegation that the plaintiffs Nos. 1 and 2 were minors and were represented in that suit by their brother Adnath, who had not been formally appointed their guardian *ad litem*, that Adnath had been guilty of gross negligence in taking no steps to protect the rights of his minor brothers and that the decree aforesaid and the sale held in execution thereof, in respect of the mortgagee rights, were without jurisdiction and not binding on the plaintiffs. The auction-purchaser is the defendant No. 3 who is

alleged to have ejected the plaintiffs from the disputed plots in February 1919.

The suit was resisted on various grounds. The Courts below found in favour of the plaintiffs and decreed the claim for possession of a 11·12ths share in the plots in suit and for Rs. 150 damages. The Court of first instance had passed a decree for damages as against the defendants Nos. 1 to 3 but the lower Appellate Court exempted the defendant No. 3 from liability.

The plots in dispute were originally in the cultivation of Chaudhri, the great-grand-father of the plaintiffs Nos. 1 and 2, and of Adnath, the father of the plaintiffs Nos. 3, 4 and 5. At some time, long before the annexation of Oudh, they had been mortgaged by the then proprietor of the village in which they are situated, with the predecessor-in-title of Chaudhari for a sum of Rs. 50-4-0. At the time of the first Regular Settlement, which took place in 1274 Fasli, Chaudhari was entered as holding the said plots on a rental of Rs. 23 per year (Exhibit B4). In 1879 Umresh Singh, the then proprietor of the village, issued a notice of ejectment against Chaudhari who contested its validity on the ground that he was a mortgagee. He said at the time that he held four mortgage-deeds for an aggregate sum of Rs. 50-4-0 in his possession, ranging from the years 1804 to 1816 *Sambat*, that he was in possession of 10 *bighas* 8 *biswas* of land rented at Rs. 23-12-0 in that capacity, that he had constructed six wells thereon at a cost of Rs. 850 and that he was not liable to ejectment (Exhibit 1). His claim was decreed on the 7th August 1879 and the notice of ejectment was cancelled (Exhibit 4). The name of Chaudhari, however, still continued to be recorded as a tenant of the disputed plots. In fact, in the year 1299 Fasli he was recorded as holding 10 *bighas* 8 *biswas* 10 *biswansis* of culturable, and 13 *biswas* of non-culturable land, rented at Rs. 18-6-0, out of which a portion had been paid by him in that very year (Exhibits B5 and B6).

In 1893 when the new Settlement operations were in progress Chaudhari made an application, stating that he was an old *Biswidar* in respect of 11 *bighas* 9 *biswas* of land rented at Rs. 17-9-3 and that he might be recorded as the holder of that *Biswi* in the Settlement papers (Exhibit 5). Gauri Shankar, the general agent of Ugrasen Singh, the proprietor of the village, appeared and stated that the said land, measuring 11 *bighas* 9 *biswas* and rented at Rs. 17-9-3, had been mortgaged by the previous proprietor with the then applicant who was in possession and that he had no objection to his name being entered as a mortgagee (Exhibit B1). Chaudhari made a similar statement, admitting that 11 *bighas* 9 *biswas* of land aforesaid, rented at Rs. 17-9-3, was *biswi* land in his possession from a long time and that he might be entered as a mortgagee (Exhibit B2). An order was passed accordingly on the 19th October 1893, directing an entry of the mortgage to be made, as desired by the parties (Exhibit B3). Ugrasen Singh was, therefore, recorded as the mortgagor and Chaudhari as the mortgagee (Exhibit 9).

After the death of Chaudhari an application was made by Behari Pande and Chandrika, who had succeeded to the rights of Ugrasen Singh, for the correction of the entry in the revenue papers, stating that Adnath was only an ordinary tenant of the disputed land and that he was improperly recorded as a mortgagee. This application was rejected on the 10th August 1914 (Exhibit 16). A suit was then filed by Behari Pande and Chandrika for a declaration that the present plaintiffs and the defendant No. 4 did not hold any mortgagee rights in the disputed land. That suit was dismissed and it was held that though the original deeds of mortgage were not forthcoming and the terms thereof had not been proved the then defendants had acquired right to hold the plots in question as mortgagees by reason of their adverse possession of such limited interest since 1879 (Exhibits 10 to 15).

A suit for arrears of rent was thereafter filed by Behari and Chandrika against the present plaintiffs Nos. 1 and 2 and Adnath, their brother, for the recovery of arrears of rent for 1322 to 1324 Fasli which was decreed *ex parte* by the Revenue Court. In that suit the present plaintiffs Nos. 1 and 2 were described as minors under the guardianship of their brother, Adnath, but no formal application was made for the appointment of Adnath as their guardian *ad litem*. In the plaint it was stated that the present plaintiffs Nos. 1 and 2 and the defendant No. 4 held

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the disputed land as mortgagees and were liable to pay the rent claimed. No defence was put forward on their behalf. The Courts below have treated that decree as invalid and without jurisdiction, holding that the plaintiffs Nos. 1 and 2 were not duly represented by a guardian *ad litem* appointed in the manner required by law, and there was gross negligence on the part of Adnath to protect the rights of his minor brothers. It is said that the suit should have been defended by Adnath on behalf of the plaintiffs Nos. 1 and 2 on the ground that the mortgages had lapsed by reason of limitation and that the said plaintiffs could not have been made liable for any rent in view of the decision of the Civil Court in the previous suit.

Where land held by a tenant is mortgaged by the proprietor with the tenant in consideration of money paid by the latter, it is not unusual for the tenant to appropriate a portion of the rent, for which he was originally liable, towards interest due on his loan and to pay the balance to the mortgagor. *Biswi* is the name usually given in Eastern Oudh to mortgages of land in sub tenure. The old Settlement report of the Fyzabad District states that, "when a whole village or an entire share was mortgaged under the native rule it was usual for the mortgagee to obtain both possession of the land and engagement with the Government. Occasionally, however, the mortgagee obtained possession only without direct engagement, and in such cases, after deducting his interest from the assumed rental, he paid the estimated difference in the shape of a quit rent to the mortgagor under the name of *paramsana*. The tenure, so formed, was called *biswi* and the holder a *biswidar*. In the case of land less in extent than an entire share of a village, such holding under the Native Government always remained attached to the parent village. The gross rental of the mortgaged lands was estimated at the time of the transaction. The interest of the loan was then deducted from the amount so formed and the difference, called *paramsana*, was the quit rent to be paid by the mortgagee to the mortgagor." Lieutenant Colonel MacAndrew similarly describes *biswi* as a mortgage by a proprietor to a cultivator of the latter's holding for a sum of money paid down, reserving a low rent representing the difference between the full rent and the interest on the money, generally known as *paramsana* (MacAndrew's Some Revenue Matters, page 39). Sykes discusses the same and describes *biswi* as a kind of under-proprietary tenure arising out of a special class of mortgage by the proprietor to a cultivator of the latter's holding for a sum of money paid down, for which a low rent, called *paramsana*, is generally reserved to the mortgagor (Chhail Bihari Lal's Taluqdari Law of Oudh, Second Edition, page 210).

It is unnecessary to consider whether on the expiry of the period of limitation for the redemption of such a mortgage, the *biswi* right becomes an under-proprietary right. It is sufficient for the purposes of this case to say that the extinction of the right of redemption of a mortgage of that kind does not destroy the right of the mortgagor or his successor to claim the *paramsana* as rent, because the *paramsana* does not fall within the rights to which the mortgagee is entitled. It is payable to the mortgagor irrespective of the mortgage on account of the extra profits which the mortgagee derives from the occupation of the mortgaged property. If the mortgage becomes irredeemable, the mortgagee still continues to be liable for the *paramsana* or quit rent, payable to the mortgagor on account of surplus rent of the land in his possession. The decision in the previous suit upheld the right of the descendants of Chaudhari to hold the disputed land as mortgagees so long as the mortgages were not redeemed. If the mortgages have become irredeemable, a matter on which no opinion need be expressed here, their liability to pay the *paramsana* rent to the present proprietors of the village, to whom the rights of the original mortgagor have passed, remains unaffected. In the suit filed by Chaudhari to contest the notice of ejectment the land in dispute was described as *biswi* land and it was not asserted that no rent was payable to the mortgagor. In fact a rent of Rs. 23-12-0 was actually mentioned as assessed on the land from which the ejectment was sought to be made. In the proceedings which took place in 1893 Chaudhari made a statement admitting that he held 11 *bighas* 9 *biswas* of land rented at Rs. 17-9-3.

It is suggested on behalf of the plaintiffs-respondents that the rent then mentioned

was the rent which Chaudhari was entitled to recover from his tenants but it does not appear from the revenue papers that the land had been let out by Chaudhari or his descendants to other persons. A rental of Rs. 17-9-3 in respect of an area of 11 *bighas* 9 *biswas* of land can only be explained on the hypothesis that the land was held under a mortgage and that the rent aforesaid was only the *paramsana* or quit-rent which the mortgagee was liable to pay to the mortgagor after appropriating the interest due on his mortgage money. A suit for arrears of *paramsana* rent would lie in a Court of Revenue under section 108, clause (2), of the Oudh Rent Act (XXII of 1886) in the same way as a suit for arrears of rent of any other kind payable in respect of a cultivatory holding. The plaintiffs might have acquired the rights of the mortgagor *qua* the rights mortgaged on the expiry of the period of limitation prescribed for the redemption of the mortgages, but *qua* the extra rent payable to the mortgagor or his successors in interest the liability of the mortgagee to pay the same can still be enforced whether the mortgage has expired or not.

The learned Counsel for the plaintiffs-respondents refers to the decision in the previous suit in which it was held that no such rent had actually been received by Behari and Chandrika and contends that the question of tenancy cannot now be re-opened. But the only question directly and substantially in issue in the previous suit was whether the present plaintiffs and Adnath held the disputed land as mortgagees or not. Any incidental decision arrived at in that case, upholding their right to remain in possession of the said land as mortgagees, does not affect the right of the successors of the mortgagor to claim the rent, which was payable to the mortgagor in excess of the mortgage. The suit for arrears of rent was filed in a Court which had exclusive jurisdiction to entertain it. There was no formal order appointing Adnath as guardian *ad litem* of the plaintiffs Nos. 1 and 2 but Adnath was the manager of the joint family of which the plaintiffs were parties, and as such he sufficiently represented the members of the family who cannot escape their liability for the decree passed in that suit on the bare ground that no formal order of appointment of Adnath as their guardian *ad litem* had been made. In *Sheo Shankar Ram* v. *Jaddo Kunwar* (1) it was held that where the members of a joint Hindu family were properly and effectively represented in a suit by the managing members the Court was not bound to set aside the execution proceedings, where substantial justice had been done, merely because every existing member of the family was not formally made a party to the suit. In *Rai Krishen Chand* v. *Mahadeo Singh* (2) and *Uman Shanker* v. *Bhagwan Din* (3) it was held that a suit for a declaration that the decree of the Revenue Court in a matter in which that Court had exclusive jurisdiction was void and ineffectual was not maintainable in the Civil Court on the bare ground that the proceedings in that Court were contrary to law.

In view of the facts stated above, there was indeed no defence open to Adnath, which he could have effectively put up on behalf of the minors, and no grounds for attributing gross negligence to him have been made out. The Courts below thought that Chaudhari held a mortgage of the entire interest of the mortgagor in the disputed plots, but that was not really so, because the subsequent conduct and admissions disclosed by the proceedings of 1879 and 1893 read with the *jamabandi* for 1299 Fasli show that a *paramsana* or quit rent had been reserved to the mortgagor, which his successors were entitled to recover. The sale held in execution of the decree for arrears of rent, so far as it affected the mortgagee rights sold for Rs. 100 on the 20th December 1918 (Exhibit B13) was not invalid and is binding on the plaintiffs. Any antecedent rights, proprietary or under-proprietary, possessed by them will not be affected by it.

The appeal is, therefore, allowed and the suit of the plaintiffs, so far it affects the mortgagee rights sold by auction and purchased by the defendant-appellant, will be dismissed with costs, throughout.

N. H. *Appeal allowed.*

(1) 24 Ind. Cas. 504; 36 A. 383; 18 C. W. N. 968; 16 M. L. T. 175; (1914) M. W. N. 593; 1 L. W. 645; 20 C. L. J. 282; 12 A. L. J. 1173; 16 Bom. L. R. 810; 41 I. A. 216 (P. C.).

(2) A. W. N. (1901) 49.

(3) 8 Ind. Cas. 568; 7 A. L. J. 1064.

JUMMA RAM v. MANSAB RAI.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 405 OF 1919.

January 9, 1922.

Present:—Mr. Justice Broadway and Mr. Justice Martineau.

JUMMA RAM—DEFENDANT—APPELLANT

versus

MUNSAB RAI—PLAINTIFF AND ANOTHER—DEFENDANT—RESPONDENTS.

Hindu Law—Joint family—Separation—Proof—Intention—Share specified in Will.

An unequivocal declaration by a member of a joint Hindu family of his intention to be divided in status is sufficient to effect a severance of the co-parcenary body without an agreement between all the co-parceners being required.

Suraj Narain v. *Iqbal Narain*, 18 Ind. Cas. 30; 35 A. 80; 13 M. L. T.194; 17 C. W.N. 333; 11 A.L. J. 172; (1913) M. W. N. 183; 17 C. L. J. 288; 24 M. L. J. 345; 15 Bom. L. R. 456; 16 O. C. 129; 40 I. A. 40 (P. C.), *Girja Bai* v. *Sadashiv Dhundiraj*, 37 Ind. Cas. 321; 43 C. 1031; 20 C. W. N. 1085; 14 A. L. J. 822; 20 M. L. T.78; 12 N. L. R. 113; (1916) 2 M. W. N. 65; 18 Bom. L. R. 621; 4 L. W. 114; 24 C. L. J. 207; 31 M. L. J. 455; 43 I. A. 15 (P. C.), *Sikhamani Pandithar* v. *Ammani Ammal*, 40 Ind. Cas. 36, *Sashi Bhusan Paniganahi* v. *Labanyabati Debya*, 43 Ind. Cas. 981, *Vanjapuri Goundan* v. *Pachamuthu Goundan*, 45 Ind. Cas. 62; 7 L. W. 225; 35 M. L. J. 609 and *Amritrao* v. *Mukundrao*, 53 Ind. Cas. 866; 15 N. L. R. 165; 13 L. W. 112 (P. C.) relied upon.

The execution of a Will by a member of a joint Hindu family in which he specifies his share in the joint family property, is sufficient to effect a severance.

Second appeal from a decree of the District Judge, Montgomery at Lahore, dated the 31st October 1918, varying that of the Senior Subordinate Judge, First Class, Montgomery, dated the 30th April 1918.

Lala *Jagan Nath*, for the Appellant.

Dr. *Gokal Chand Narang*, for the Plaintiffs-Respondents.

JUDGMENT.—The house in dispute belonged to the plaintiff, the first defendant Jumma Ram, and their uncle Tabla Ram, who were members of a joint Hindu family. Tahla Ram died in 1915 leaving a Will, which he had made in 1913, bequeathing all his property to the plaintiff, who accordingly sues for possession of two-thirds of the house. Jumma Ram maintains that the plaintiff is entitled only to half of the house disputing the competency of Tahla Ram to make the Will. The Subordinate Judge held that as no partition had taken place, Tahla Ram was not competent to make the Will, and he gave the plaintiff a decree for half of the house. On appeal the District Judge has passed a decree for two-thirds of the house, holding that a document D-1, executed by the parties and Tahla Ram on the 14th June 1914, in which it was stated that they had equal shares in the house, and that one Tara Chand was appointed to partition the house according to their shares, showed that from that date the joint Hindu family ceased to exist, and that, therefore, Tahla Ram had power to devise his share to the plaintiff. Jumma Ram has preferred a second appeal to this Court.

The learned District Judge appears to have overlooked the fact that the Will executed by Tahla Ram is of an earlier date than Exhibit D-1, and was not, therefore, rendered valid by the fact that the shares of the members of the family were specified in the later document. Nevertheless, there is the fact that the shares are specified also in the Will, the testator's share being mentioned therein as one-third, and we think that this would suffice to constitute a separation in law, an unequivocal declaration by a member of the co-parcenary body of his intention to be divided in status being sufficient to effect a severance without an agreement between all the co-parceners being required. Among the authorities on this point there are *Sikhamani Pandithar* v. *Ammani Ammal* (1), *Girja Bai* v. *Sadashiv Dhundiraj* (2), *Suraj Narain* v. *Iqbal Narain* (3), *Amritrao* v. *Mukundrao* (4), *Vanjapuri Goundan* v. *Pachamuthu Goundan* (5), and *Sashi Bhusan Paniganahi* v. *Labanyabati Debya* (6). There having been a severance of the joint status, Tahla Ram was competent to bequeath his share in the property to the plaintiff, and we, therefore, affirm the decree of the lower Appellate Court, and dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

(1) 40 Ind. Cas. 36.

(2) 37 Ind. Cas. 321; 43 C. 1031; 20 C. W. N. 1085; 14 A. L. J. 822; 20 M. L. T. 78; 12 N. L. R. 113; (1916) 2 M. W. N. 65; 18 Bom. L. R. 621; 4 L. W. 114; 24 C. L. J. 207; 31 M. L. J. 455; 43 I. A. 15 (P. C.).

(3) 18 Ind. Cas. 30; 35 A. 80; 13 M. L. T. 194; 17 C. W. N. 333; 11 A. L. J. 172; (1913) M. W. N. 183; 17 C. L. J. 288; 24 M. L. J. 345; 15 Bom. L. R. 456; 16 O. C. 129; 40 I. A. 40 (P. C.).

(4) 53 Ind. Cas. 866; 15 N. L. R. 165; 13 L. W. 112 (P. C.).

(5) 45 Ind. Cas. 62; 7 L. W. 225; 35 M. L. J. 609.

(6) 43 Ind. Cas. 981.

RAJENDRA NARAIN v. KALIM.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 78 OF 1920.

February 10, 1922.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Cuming.

RAJENDRA NARAIN MAZUMDAR CHOUDHURY AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Sheikh KALIM AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 109, application of—Defence to suit or application, whether barred.

Section 109 of the Bengal Tenancy Act bars the entertainment of an application or a suit in respect of any matter which is or has been the subject of a proceeding under sections 105 to 108 of the Act, and not the entertainment of a defence to an application or a suit. [p. 814, col. 1.]

Apurba Krishna Roy v. *Syama Charan Pramanik*, 54 Ind. Cas. 952; 24 C. W. N. 223, distinguished.

Letters Patent Appeal against a decree of Mr. Justice Panton, dated the 18th August 1920, in Appeal from Appellate Decree No. 121 of 1919.

FACTS appear from the judgment.

Babu *Bankim Chandra Mukerjee*, for Babu *Kalikinkar Chakravartty*, for the Appellants.

—The plaintiffs are the appellants. The appeal arises out of a suit for rent, at the rate of Rs. 22-1-0 per year. The defence was that rent was payable at the rate of Rs. 12-2. All the Courts decreed the suit at the admitted rate. The question now is whether the tenants are entitled to dispute the rate claimed which was also settled in a proceeding under section 105, Bengal Tenancy Act. I submit that decision would operate as *res judicata*. Section 109, Bengal Tenancy Act, would apply. The date of the institution of that proceeding is to be taken into account and not the date of the judgment. Refers to *Apurba Krishna Roy* v. *Syama Charan Pramanik* (1).

Babu *Annada Charan Karkoon*, for the Respondent, was not called upon to reply.

JUDGMENT.—This is an appeal under clause 15 of the Letters Patent from the judgment of Mr. Justice Panton in a suit for recovery of arrears of rent.

The plaintiff claimed rent at the rate of Rs. 22-1 per year in respect of four years from the 14th April 1913 to the 13th April 1917. The defendants pleaded that rent was payable at the rate of Rs. 12-2 per annum. The suit was instituted on the 21st April 1917 and was decided by the First Court on the 16th April 1918. The claim of the plaintiffs was founded upon a *kabuliyat* executed by the predecessors of the defendants on the 19th April 1894. The rent payable thereunder was that claimed in the suit. The defendants contended that the *kabuliyat* was in contravention of section 29 (*b*) of the Bengal Tenancy Act. The Trial Court held that the defendants had successfully proved by the production of Road-Cess Return filed by the landlords on the 26th May 1885 that the rent was originally fixed at the rate of Rs. 12-2. Consequently, there was, *prima facie*, an increase of Rs. 9-15 by means of the contract of the 19th April 1894. This was plainly in contravention of section 29. In these circumstances, from the decision of this Court in the case of *Manindra Chandra Nandi* v. *Upendra Chandra Haira* (2), it followed that as the previous rent of the tenant had been proved, it was for the plaintiffs to justify the enhancement of the rent claimed which was obviously in excess of the enhancement allowed by the Statute. The plaintiffs tried to discharge this burden by the allegation that at the time of the execution of the *kabuliyat* it was discovered that the defendants were in occupation of excess lands. But this was not established to the satisfaction of the Trial Judge who consequently held that the rent as fixed in the *kabuliyat* was not recoverable. The plaintiffs, however, contended that they were entitled to the benefit of a decision under section 105 of the Bengal Tenancy Act which had been pronounced on the 19th September 1917 subsequent to the institution of this suit for arrears of rent and before the trial thereof. This contention was overruled and the rent was decreed at the rate admitted by the defendants. On appeal to the Subordinate Judge the decision of the Primary Court was affirmed and Mr. Justice Panton has confirmed the decree of the Subordinate Judge.

In this Court the substantial contention on behalf of the plaintiff-appellant is that, by virtue of section 109, it is not open to the tenants to contend, contrary to the

(1) 54 Ind. Cas. 952; 24 C. W. N. 223.

(2) 2 Ind. Cas. 828; 36 C. 604; 9 C. L. J. 343.

decision in the proceeding under section 105, that the rent was payable, not at the rate of Rs. 22·1 but at the rate of Rs. 12 2. In support of this proposition reliance has been placed upon the decision of this Court in the case of *Apurba Krishna Roy* v. *Syama Charan Pramanik* (1). We are of opinion that this contention cannot be supported, however much the plain language of section 109 may be strained.

Section 109 is in the following terms: "Subject to the provisions of section 109A, a Civil Court shall not entertain any application or suit concerning any matter which is or has already been the subject of an application made, suit instituted or proceedings taken under sections 105 to 108 both inclusive." Let it be assumed for the moment that the expression "entertain an application or suit" includes an application or suit made or instituted before the date of the application, suit or proceeding under sections 105 to 108. It is clear that what is barred is the entertainment of an application or suit and not the entertainment of a defence to an application or suit. In the case before us, if the contention of the appellants were to prevail, the Court would be incompetent to entertain their suit for rent, and this undoubtedly is not their object in invoking the aid of section 109. The decision in *Apurba Krishna Roy* v. *Syama Charan Pramanik* (1) is of no assistance to them. It was there ruled that section 109 was a bar to a civil suit by a person claiming a rent-free title when in a proceeding under section 105 the same question arose and rent was assessed on account of the failure of the defendant in the proceeding under section 105 to adduce evidence in support of his allegation of the rent-free title. In that case, the suit which was held to be barred under section 109 had been instituted by the tenant who had failed to adduce evidence in support of his defence in the proceedings for settlement of fair rent under section 105. In the present case the suit has been instituted by the landlord. It is clear that the fair rent which had been settled in the proceeding under section 105 cannot possibly have retrospective effect. The rent was claimed from the 14th April 1913 to the 13th April 1917. The proceeding for the assessment of fair rent was instituted under section 105 in 1914 and the decision thereunder was pronounced on the 19th September 1917. Under section 110 the rent settled by the Revenue Officer would take effect from the beginning of the agricultural year next after the date of the decision fixing the rent, that is next after the 19th September 1917. This could not alter the liability for rent already incurred in respect of the period between the 14th April 1913 and the 13th April 1917. We are clearly of opinion that the view taken by Mr. Justice Panton is correct and his judgment must be affirmed.

The appeal is accordingly dismissed with costs.

N. K.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 281 OF 1921.
February 13, 1922.
Present:—Mr. Daniels, A. J. C.

MAHESH DAT—DEFENDANT—APPELLANT
versus
RAM ASRE AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Joint family—Alienation, invalid, suit to set aside—Manager, position of—Individual members, position of—Individual members to sue only for their own shares.

Although the manager of a joint Hindu family can, in the case of an alienation of the family property, sue to recover the entire property on behalf of the family, individual members of the family cannot claim to do so, but can only maintain a suit in respect of their own shares. [p. 815, col. 2.]

MAHESH DAT v. RAM ASRE.

Jamuna Parshad v. *Ganga Pershad Singh*, 19 C. 401; 9 Ind. Dec. (N. S.) 712, referred to.

Babu Bhan Partab Sahi v. *Babu Sudisht Narain Singh*, 11 O. C. 15, followed.

Second appeal from a decree of the Subordinate Judge, Gonda, dated the 28th May 1921, confirming a decree of the Probationary Munsif, Gonda, dated the 15th December 1920.

Mr. *Niamat Ullah*, for the Appellant.
Mr. *Ali Mohammad*, for Respondent No. 1.

JUDGMENT.—Bihari, Gajadhar and Ram Asre were three brothers constituting a Hindu joint family. In 1904 Bihari was of age while the other two were minors. On 24th May 1904 a sale-deed of the shares of all three brothers was executed in favour of Bhagwan Dat, father of the defendant-appellant Mahesh Dat. The sale-deed was executed by Bihari on his own behalf and by *Musammat* Sukhdei as mother and guardian of the two younger bothers. The plaintiff Ram Asre has now attained majority but is deaf and dumb. It is said that he became deaf and dumb owing to an illness about ten years before this suit. The present suit was filed on his behalf by his uncle Data Ram, as his next friend, to recover the property on the ground that the sale was invalid and without legal necessity and that his mother was not entitled to execute the sale-deed on his behalf. The suit has been decreed by both the Courts below subject to payment of Rs. 62 which has been found to be for legal necessity.

The defendant appeals on the ground that, on the findings of the Court below, the suit should only have been decreed for recovery of the plaintiff's one-third share in the property subject to payment of one-third of the amount found to be for legal necessity. Other grounds of appeal are not pressed.

It is pointed out that if the suit had been brought on behalf of all the members of the joint family equities would have arisen, at any rate, against Bihari, which do not arise against the plaintiff. Bihari, having executed the sale-deed in respect of his own share at a time when he was under no disability, could not have recovered the share without, at any rate, refunding the benefit which he had received under the sale-deed. *Jamuna Parshad* v. *Ganga Pershad Singh* (1). In this case if the other two brothers had attempted to join in the suit, limitation would have been successfully pleaded against them—in the case of Bihari because the alienation was made nearly sixteen years before the suit and in the case of Gajadhar because he attained majority more than three years before the suit was brought. The defendant cannot be placed in a worse position owing to the fact that against two out of three members of the family a claim to recover the property has become time-barred.

The case of *Babu Bhan Partab Sahi* v. *Babu Sudisht Narain Singh* (2) is a direct authority in the appellant's favour. In that case it was held that while the manager of a Hindu joint family can sue to recover the entire property on behalf of the family individual members cannot claim to do so but can only maintain the suit in respect of their own shares. That case is on all fours with the case now before me. If the sale-deed in question had been executed by either of the defendants as manager of the family it is now fully established that it would not bind any part of the family property and could not be enforced even against his own share. Here, although Bihari was at the time the only adult member of the family, he did not purport to execute the sale-deed as manager. The sale deed purported to be executed on behalf of all the members of the joint family, the two younger brothers being represented by their mother. The rulings applicable to sales by the *karta* of the family as such are, therefore, not applicable. As the present suit has been brought on behalf of Ram Asre alone and a claim by the other brothers to recover has become barred by time I see no reason for not following the Bench ruling of this Court in *Babu Bhan Partab Sahi* v. *Babu Sudisht Narain Singh* (2).

I accordingly allow the appeal and modify the lower Court's decree by giving a decree for possession of the plaintiff's one third share only on payment

(1) 19 C. 401; 9 Ind. Dec. (N. S.) 712.
(2) 11 O. C. 15.

of one-third of the sum of Rs. 62. As the memorandum of appeal raised other pleas which have not been pressed I direct that the parties bear their own costs in this Court. In the Courts below the plaintiffs will get their costs on the amount awarded to them.

R. N. *Appeal allowed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1559 OF 1920.

February 9, 1921.

Present:—Mr. Justice Leslie-Jones.

Bhagat LACHMAN SINGH—PLAINTIFF—APPELLANT

versus

Babu SUNDAR DAS AND OTHERS—DEFENDANTS—RESPONDENTS.

Punjab Pre-emption Act (I of 1913), s. 14—Agricultural land in Municipality, sale of—Non-agriculturist, whether can pre-empt.

Although a non-agriculturist may buy land from a member of an agricultural tribe without restriction in a Municipality, he cannot pre-empt a sale of such land.

Second appeal from a decree of the District Judge, Rawalpindi, dated the 27th March 1920, reversing that of the Sub-Judge, Rawalpindi, dated the 23rd December 1919.

Messrs. *M. L. Puri* and Mr. *Bishen Narain*, for the Appellant.

Pandit *Sheo Narain*, R. B., for Sundar Das, Respondent.

JUDGMENT.—This judgment deals with Civil Second Appeals Nos. 1559 and 2270 of 1920. They arise out of a sale of agricultural land, within the limits of Rawalpindi Municipality, by one Nathu Khan to a non-agriculturist. Four suits for pre-emption were brought regarding this sale and all four were dismissed on appeal by the District Judge. The present appeals are by two of the pre-emptors, and they are on common grounds, both of which have been argued only by Mr. M. L. Puri, Counsel for the appellant in Appeal No. 1559, Mr. Bishen Narain not arguing his case separately.

Only two points have been discussed. In ground No. 3 of Appeal No. 1559 it is urged, that the lower Courts are wrong in holding that "Trunds," (the tribe to which Nathu Khan belongs) are Rajputs. This ground of appeal obviously recognizes the finding of the District Judge that Nathu Khan is a member of an agricultural tribe as one of fact. Counsel for the appellant has, however, attempted to argue that the finding is uncertain because Mr. Bird, the District Judge, who has a penchant for indefinite language, has remarked that "the matter is not wholly clear but Nathu Khan appears to be a "Rajput", but he went on later to say that "the Senior Sub-Judge appears to be justified in his finding" and there is no doubt that that is the conclusion to which the District Judge himself arrived although as usual he has clothed it in words indicative of hesitation. The finding is one of fact which cannot be touched on second appeal nor can Counsel for the appellant be allowed now to take new ground that the evidence on which the finding was based is inadmissible.

The second point is an argument that section 14 of Act I of 1913 is of no application to land sold within the Municipal limits. It is urged that, as according to Notification No. 84, dated 14th May 1902, passed under the Alienation of Land Act, a non-agriculturist may buy land from a member of an agricultural tribe without restriction in a Municipality, it is anomalous that a non-agriculturist should be unable to pre-empt such land and that section 14 of the Pre-emption Act must be taken to be governed by the aforesaid notification. Counsel for the appellant is, however, unable to cite any authority for this proposition, and it is not for the Courts to go into the objects of the Legislature. They are concerned only with what the law says and section 14 of the Pre-emption Act is quite clear.

Both the appeals fail and are dismissed with costs.

W. C. A. *Appeals dismissed.*

WARYAM SINGH v. EMPEROR.

LAHORE HIGH COURT.

CRIMINAL REVISION No. 1755 OF 1921.

June 11, 1921.

Present :—Mr. Justice Abdul Qadir.

WARYAM SINGH AND OTHERS —PETITIONERS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 193—Contradictory statements before two Magistrates—Sanction to prosecute—Proper Court—Criminal Procedure Code (Act V of 1898), s. 195, cl. 7 (a).

Where a witness makes contradictory statements in the Courts of two Magistrates, the Court competent to grant sanction for his prosecution under section 193, Penal Code, is the Court to which both the said Courts are subordinate. [p. 818, col. 1.]

Sobha Singh v. *Lal Chand*, 80 P. R. 1901 Cr., followed.

For the purpose of a sanction to prosecute a witness under section 193, Penal Code, the Court of a Magistrate of the Second Class, is subordinate to the District Magistrate and not to the Sessions Judge. [p 818, col 1.]

Dina Nath v. *Muhammad Abdulla*, 61 Ind. Cas. 53; 2 L. 57; 22 Cr. L. J. 325, followed.

Petition, under section 439 of Act V of 1898, for revision of an order of the Sessions Judge, Jullundur, dated the 9th August 1920.

Kanwar *Dalip Singh*, for the Petitioners.

Mr. *Carden Noad*, Additional Government Advocate, for the Respondent.

JUDGMENT.—A petition for revision has been filed on behalf of three men, Waryam Singh, Ram Singh and Gurnam Singh, praying that a sanction for their prosecution under section 193, Indian Penal Code, granted by the Sessions Judge of Jullundur may be revoked as having been made without jurisdiction. The circumstances of this case are somewhat peculiar and may be explained at some length. Bhagwan Singh was accused for having caused the death of his brother Mihan Singh in a fight that followed an altercation between them by hitting him on the head and leg with a heavy axle taken out of a wheel. Owing to near relationship between the parties, the village people first tried to hush up the matter and the dead body was specially cremated without any report being made to the Police. A few days later, however, the Police got information and investigated the case. They were told that the three petitioners were eye-witnesses of the occurrence. They took the witnesses as well as Bhagwan Singh to an Honorary Magistrate, Second Class, to have their statements recorded, so that, on account of the strong tendency in the village to hush up the matter, the witnesses may not deny in Court the facts they were ready to admit before the Police. These statements were recorded on 31st May 1919 before the Second Class Magistrate, where each of the three witnesses stated that he had seen Bhagwan Singh striking the deceased with the axle. Bhagwan Singh was then *chalanned* and placed before a First Class Magistrate, who recorded statements on the spot, on 24th June 1919, when the said three witnesses went back on the statements recorded under section 164, Criminal Procedure Code, and stated that they had seen the two brothers grappling with one another and catching one another by the hair but no blow with any sort of weapon had been struck in their presence. The prosecution thus failed and Bhagwan Singh was discharged for want of proof. The Court Inspector then applied to the Magistrate, First Class, that as each of the petitioners had told a deliberate lie in his Court, sanction to prosecute each one of them should be granted. Without passing any order on the merits the Magistrate ordered on 23rd April 1920 that separate applications for sanction against each witness should be filed. The Police, instead of complying with this order, decided to apply for sanction to the Sessions Judge, as they proposed to charge the men in the alternative for having perjured themselves either before the Second Class Magistrate or the First Class Magistrate. Applications on that basis were made to the Sessions Judge by the Public Prosecutor. It was urged before him that he could not grant a sanction with regard to an offence, if any, committed before the Second Class Magistrate, as the latter was subordinate to the District Magistrate. While recognising the validity of this objection, he took the view that as a Second Class Magistrate was subject to his control as a Court of Revision, he might grant the sanction as the witnesses had undoubtedly perjured themselves on one occasion or the other. He, therefore, granted the sanction asked for by his order dated 9th August 1920.

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It is contended in revision by Kanwar Dalip Singh, on behalf of the petitioners, that this order was without jurisdiction. Reference is made to *Sobha Singh* v. *Lal Chand* (1) for the *dictum* that, where the accused made contradictory statements in the Courts of a First Class Magistrate and of an Honorary Magistrate, the Court competent to grant sanction under such circumstances is the Court to which both the said Courts are subordinate, and it is argued that the two Courts in the present case were not subordinate to the Sessions Judge. A recent ruling of this High Court, *Dina Nath* v. *Muhammad Abdulla* (2), is referred to, in which it has been held by a Division Bench that, for granting sanction to prosecute, a Munsif's Court is subordinate to the Court of a Subordinate Judge, First Class, and an application for sanction has to be made to the Subordinate Judge and not to the District Judge. Following the principle laid down in *Dina Nath* v. *Muhammad Abdulla* (2), it must be held that the Sessions Judge could not grant sanction so as to cover an offence committed in either of the two Courts, as one of them was subordinate to the District Magistrate and the other to himself.

I have heard the learned Government Advocate on the point. He admits that the Sessions Judge was probably not the proper authority to give the requisite sanction in the present case but invites attention to the seriousness of the perjury committed by the petitioners in an important criminal case which renders some action necessary against them. Mr. Dalip Singh, in this connection, points out the possibility of these men not having been real eye-witnesses and of there having given false evidence in their statements under section 164, Criminal Procedure Code and relies on *Emperor* v. *Sailendra Kumar Das* [*Tripura Shankar*] (3) where sanction was refused on the ground that a man who first told a lie and in a subsequent contradictory statement told the truth, sanction should not be granted for his prosecution for perjury. In this case, however, it is difficult to say on facts that these men made false statements before the Honorary Magistrate, in the face of distinct indications to the contrary. The Government Advocate points out that subsequent statements before the Magistrate, First Class, are presumably false. Under these circumstances, all that I can do is to cancel the sanction granted by the Sessions Judge as not granted according to law, leaving it open to the Public Prosecutor to obtain a proper sanction, if so advised.

N. H.

Petition allowed.

(1) 30 P. R. 1901 Cr.
(2) 61 Ind. Cas. 53; 2 L. 57; 22 Cr. L. J. 325.
(3) 6 Ind. Cas. 476; 37 C. 618; 14 C. W. N. 767; 11 Cr. L. J. 360 (S. B.).

BOMBAY HIGH COURT.
CRIMINAL APPEAL No. 856 OF 1921.
April 13, 1922.
Present Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.
EMPEROR—PROSECUTOR
versus
AMIRUDDIN SALEBHOY TYABJEE—ACCUSED.

Penal Code (Act XLV of 1860), ss. 116, 161, 107—Public servant—Illegal gratification—Abetment—Offer—Instigation—Offering money for charities in which public servant interested.

The accused called on *C.*, a Municipal Commissioner, to express acknowledgments for the withdrawal of objections against a building which a cousin of his wished to erect. In the course of the conversation the accused enquired if he should put in a tender for some cement about which the Municipality had advertised, remarking that it was no good putting in a tender unless one had influence. After this the accused said to *C.* "when shall I see you again." *C* replied that there was no need. The accused again said, "shall I see you here or elsewhere" *C.* said, "what about" Accuseds aid, "about that Rs 5,000." *C.* enquired, "what Rs 5,000." Accused replied, "my cousin wishes to give you Rs. 5,000." *C.* became suspicious and called a colleague *K* who was in the adjoining room and told him that the accused had offered him a bribe. The accused in the presence of the colleague admitted that he offered the money on behalf of his cousin. When asked to leave the office, the accused was profuse in his apologies and reluctantly withdrew. The accused was charged under section 116, Indian Penal Code, for the abetment of an offence under section 161. He stated in

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his defence that the sum offered was for certain charities in which *C.* was interested, and that *C.* did not allow him to make himself clear. As a matter of fact *C.* was interested in certain charities and had requested many gentlemen to subscribe to them. The accused was acquitted at the trial. The Government appealed:

Held, per *Shah, J.* (1) that the appeal failed and the accused was rightly acquitted as the conversation did not amount to an offer, nor did it amount to an instigation within the meaning of section 107 of the Indian Penal Code; [p 823, col 2.]

(2) that even assuming that the words amounted to an instigation within the meaning of section 107 of the Indian Penal Code the question was whether it was for doing anything which, if done, would be punishable under section 161, Indian Penal Code, but the sum which the cousin was to pay could have reference only to the objections against the building already withdrawn and could not refer to any future act such as the tender with which the cousin had no connection; [p. 824, cols. 1 & 2.]

(3) that although the explanation of the accused that the sum was meant for charities in which *C.* was interested was undoubtedly open to criticism, as the inference suggested by what happened at the interview was equivocal and the explanation put forward by the accused was reasonably possible, the theory of innocence could not be said to have been sufficiently negatived by the prosecution; [p. 825, col. 2.]

(4) that no inference could be drawn against the accused from his omission to mention that the sum was meant for charities when *C.* called in *K.* and told him that he had been offered a bribe as in such a position some persons may act with coolness while others may not be able to do so. [p. 825, col. 2.]

Per *Macleod, C. J.*—That the words "my cousin wishes to give you Rs. 5,000," did not legally amount to an offer, but they indicated a state of mind on the part of the cousin that, if asked, he might give the sum, that the words were an instigation stimulating *C.* towards making an attempt to get the amount and that even if it was assumed that the accused was instigating *C.* to get the sum for one of his funds, that would amount to no more than a mitigation of the offence since under section 161 gratification was not restricted to pecuniary gratification or to gratification estimable in money. [p. 821, col. 2; p. 822, col. 1.]

The distinction between offer and invitation to offer is well-recognised in the law of contract and there is no reason why the same should not be observed in a criminal case if the sole question is whether an offer has been made or not. [p. 821, col. 1.]

[In view of the fact that Shah, J. acquitted the accused, His Lordship refrained from expressing an opinion on the question whether the appeal should be allowed or not.—*Ed.*]

Criminal appeal by the Government of Bombay, from an order of acquittal passed by the Acting Chief Presidency Magistrate, Bombay.

Sir *Thomas Strangman*, Advocate-General, (with him Mr. *J. C. Bowen*, Public Prosecutor), for the Crown.

Messrs. *Inverarity* and *Jinnah*, (with them Mr. *M. B. Dave*, instructed by Messrs. *Captain* and *Vaidya*), for the Accused.

JUDGMENT.

MACLEOD, C. J.—The accused was charged before the Acting Chief Presidency Magistrate that he on or about the 14th day of October 1921 at Bombay abetted the commission by H. B. Clayton, Esquire, Municipal Commissioner of Bombay, a public servant, of an offence of taking gratification, as the said public servant, other than legal remuneration, as a motive for doing a future official act, *viz.*, giving contracts, punishable with imprisonment under section 161 of the Indian Penal Code, which said offence was not committed in consequence of the said abetment and thereby committed an offence punishable under sections 116 and 161 of the Indian Penal Code.

The accused was acquitted and Government have appealed.

The facts are shortly as follows:—A cousin of the accused, one Ebrahim Mahomedally, had submitted plans to the Municipality for a building on the Queen's Road, to which objections were raised. On the 21st September, accused called on Mr. Clayton and handed him a memorandum in respect of the objections. The Commissioner sent the memo. to the Executive Engineer for report and on his report the objections were eventually withdrawn. On the 21st September, the accused had spoken to the Commissioner about a tender he had made for the supply of sleepers in reply to an advertisement of the Municipality, and asked the Commissioner whether the result of the tenders was known. As a matter of fact, a tender was sent by the accused's firm over his signature on the 22nd September. On the 8th October, a notice was sent to Ebrahim that the objections B and C to the construction of his building had been waived by the Commissioner and he was asked to inform the accused of that fact. On the 12th October, the accused wrote to the Commissioner thanking him for waiving the objections and asking him to dine at the Willingdon Sports Club on any day that might suit him. On the 14th October, before the reply which was endorsed on the letter of invitation could be sent, the accused came to see the Commissioner. I

give the Commissioner's account of the conversation which then took place:—

"The accused thanked me for the concession I had made in respect of his cousin's building. He then referred to the tender he had put in for the sleepers. I told him that the contract was not disposed of and that I had not seen the papers. He then said: 'I think that the Municipality is asking for tender for 5,000 tons cement' or words to that effect. He asked me whether it was any good to put in a tender for the same. I told him that I would be glad if he would put in a tender because I wanted to have as many tenders as possible and he remarked that it was no good putting in a tender unless he had influence. I remember the word 'influence,' but I am not certain whether he said 'unless one had influence' or 'unless I had influence.' I told him that the tenderer who put in a tender for cement as per British specification and at the cheapest price would probably get the contract. I expected the accused to leave me at this stage and I asked whether he had anything else to say and the accused said: 'when shall I see you again.' I told him there was no necessity for him to see me again. He said, 'shall I see you here or elsewhere.' I said, 'what about.' He said, 'about that Rs. 5,000.' I said, 'what Rs. 5,000.' He replied, 'my cousin wishes to give you Rs. 5000.' I began to get suspicions about the accused's intention since he had mentioned the word 'influence.'"

The Commissioner then called in Mr. Kirpalani who was sitting in a screened off portion in the same room and said:—

"'This gentleman has just offered me a bribe of Rs. 5,000'...The accused in the presence of Mr. Kirpalani admitted that he had offered me a sum of money on behalf not of himself but of his cousin. I then requested the accused to leave my office at once and never to come back again. The accused was very reluctant to do so. He was profuse in his apologies."

In this statement to the Court the accused was asked:—

Q. Did you in your conversation with Mr. Clayton mention Rs. 5,000?

A. Yes.

Q. Did you offer that sum as a bribe?

A. No.

Q. Do you wish to say in what connection you made mention of that sum?

A. That offer was made on behalf of my cousin towards one of the funds.

Q. Do you wish to say to what funds?

A. I do not know to what funds the Commissioner was interested, but I thought the suggestion would come from the side of the Commissioner.

In the written statement, which was put in, the accused said that his cousin saw him and expressed his gratification at the result of the appeal to the Commissioner. Accused understood from him that he was contributing through Mr. Clayton a sum of Rs. 5,000 or so to some fund in which Mr. Clayton might be interested.

Paragraph 7 runs as follows:—

"I do not remember the exact words in which I replied (to the question 'what about') but I intended to convey to him that it was about that sum of Rs. 5,000 which my cousin was contributing through him to some fund and about which I believed that my cousin had spoken to or arranged with Mr. Clayton."

Now, to bribe or to attempt to bribe a public servant is only punishable under the Indian Penal Code as an abetment of the substantive offence of a public servant accepting or attempting to obtain an illegal gratification.

Under section 161 of the Indian Penal Code "whoever, being...a public servant, accepts or obtains, or agrees to accept or attempts to obtain, from any person, for himself or for any other person, any gratification whatever, other than legal remuneration, as a motive or reward for doing, or forbearing to do, any official act, etc., etc., shall be punished with imprisonment...or with fine, or with both." Section 116 deals with the abetment of an offence punishable with imprisonment if that offence be not committed in consequence of that abetment.

Under section 107 a person abets the doing of a thing who instigates any person to do that thing.

The question, therefore, in this case is whether the accused instigated the Commissioner to attempt to obtain an illegal gratification.

It was argued by the Advocate-General that what the accused said amounted to an offer of money as a bribe.

The learned Magistrate also in his judgment appeared to think that the only ques-

tion was whether an offer was made, or whether the accused was merely making preparation to make the offer.

I think the real aspect of the case has been obscured by the failure to observe that illustration (a) to section 116 is only an example of abetment of an offence under section 161. There are many other ways of instigating a public servant to commit an offence under section 161 besides by means of a direct offer of a bribe.

The words "my cousin wishes to give you rupees five thousand" do not legally amount to an offer. But they do indicate a state of mind on the part of the cousin that, if asked, he might give Rs. 5,000. The distinction between an offer and an invitation for offers to be made is well-recognised in the law of contract, and there is no reason why in a criminal case the same distinction should not be observed, if the sole question is whether an offer has been made or not.

Now, a person is said to intistigate another to an act when he actively suggests or stimulates him to the act by any means or language, direct or indirect, whether it takes the form of express solicitation or of hints, insinuation or encouragement: 1 Russell on Crimes, page 164. Taken in connection with what had previously occurred, the conversation on the 21st September about the tenders for the sleepers, the tender actually made by the accused on 22nd September, the conversation with regard to the tender for cement on 14th October, it cannot be denied that the words 'my cousin wishes to give you Rs. 5,000,' can properly fairly be considered as an instigation to the Commissioner to attempt to get the Rs. 5,000.

But the defence is that the Commissioner did not allow the accused to finish the sentence, he wanted to add the words "for one of your funds." That when Mr. Kirpalani was called in and told by the Commissioner that accused had offered a bribe, accused was pushed out of the office and was given no chance of explaining what he meant or of clearing up the misunderstanding which arose in the mind of the Commissioner, because the accused wrongly assumed that his cousin must have spoken to the Commissioner about the sum the accused thought his cousin was contributing.

This story is not borne out by the evidence of the Commissioner and Mr. Kirpalani. The Commissioner said he asked accused to repent his offer in the presence of Mr. Kirpalani and accused said he offered the money not on behalf of himself but on behalf of his cousin. He was reluctant to leave the office and was profuse in his apologies. He was not asked in cross-examination whether he pushed the accused out of his office without giving him any chance of explaining what he had said. The Commissioner is corroborated by Mr. Kirpalani. It is clear, therefore, that the accused had sufficient opportunity to explain, if he had wished to do so, that the money his cousin was willing to give was for one of the funds in which the Commissioner was interested, and nothing would have been simpler than for him to say, if, as a matter of fact, he was under the impression that his cousin had already spoken to the Commissioner about contributing Rs. 5,000 to some fund: "I was not suggesting that my cousin should give you Rs. 5 000 but that he should contribute Rs. 5,000 to one of your funds." I have not the slightest doubt in my own mind that at that time the accused had had no talk with his cousin about any contribution to some fund, and that he was not under the impression that his cousin had mentioned the matter to the Commissioner. His cousin had succeeded in getting the objections to his building removed and unless he went into the witness-box to say that he intended as a thanks-offering to contribute Rs. 5,000 to one of the Commissioner's funds there is not the slightest reason why we should infer that he was prepared to add another Rs. 5,000 to the cost of the building without any necessity therefor.

On the evidence for the prosecution there is a clear case of instigation. The Commissioner was stimulated towards making an attempt to get Rs. 5,000, and if he succeeded the accused might hope that his tenders would be considered more favourably in competition with others.

It was open to the accused to satisfy the Court by his own statement either alone, or supported by evidence, that the view of the prosecution evidence was not the right one. In my opinion he has failed to do so. He has relied solely on his own statement which is entirely opposed to the evidence and the

probabilities of the case. But even if I assume that the accused was merely instigating the Commissioner to make an attempt to get Rs. 5,000, for one of his funds, I do not see how that could do more than mitigate the offence since under section 161, gratification is not restricted to pecuniary gratification or to gratification estimable in money.

If, during the period prescribed for the making of tenders in answer to his invitation, the Commissioner was to accept or to attempt to obtain from the tenderers or their relations sums of money not for himself but for one of the funds in which he was interested, there can be no doubt he would be liable to be prosecuted under section 161, and any tenderer who paid him money or offered to pay him money in these circumstances, the obvious object being to induce the Commissioner to look favourably on his tender, would be guilty of abetment.

Mr. Inverarity contended that if offering monies for a charity amounted to offering a bribe a good many persons would be in jail, as many Indian Princes and others contributed large sums towards charities in which the Viceroy or the Governor of a Province was interested. They did so not because they cared for the charities but because they wanted to ingratiate themselves with the Viceroy or the Governor. I trust that persons of wealth take a higher view of their duties to humanity, but I am only concerned with the case before us, and I should be establishing a very dangerous precedent if I were to hold that an officer is protected if he agrees to allow his official acts to be swayed by the motive of accepting a gratification to be used not for his own personal benefit but for some public object such as charity, science or religion. The object of the abettor remains the same, to influence the public servant in his favour. In *Imperatrix* v. *Appaji* (1) Jardine, J., held that the plain words of section 161 of the Indian Penal Code excluded such a defence.

But having stated what I consider to be the law in the case, and what I consider to be the proper inferences to be drawn from the evidence, it remains to be considered whether the appeal should be allowed and the accused convicted. If I had been the Trying Magistrate I should not have taken a very serious view of the conduct of the accused considering all the circumstances of the case. If I had convicted, I should not have imposed a heavy penalty, and if it had been in my power I would have discharged the accused with a caution. Sitting to hear an appeal by Government from the order of acquittal, considering that my brother Shah is not in favour of a conviction, I am content to refrain from expressing an opinion which would necessitate another hearing. I feel quite sure that the accused must have realised by this time that at the best he acted very foolishly in using words which might be construed as an attempt to influence the Commissioner in his favour by suggesting that the Commissioner might be able to secure for himself or for some charity a monetary advantage. If he had only been wiser he should have known that nothing could be more likely to damage his case.

SHAH, J.—In this case Mr. Clayton, the Municipal Commissioner of Bombay, is the complainant. His complaint was that the accused offered him a bribe of Rs. 5,000 on the 14th October 1921 in his office, that the fact was admitted in the presence of his Deputy, Mr. Kirpalani, and that the accused was guilty of abetment of an offence under section 161, punishable under sections 161 and 116, Indian Penal Code. The complainant and his Deputy were examined as witnesses and a charge was framed against the accused to the effect that he abetted the commission of an offence by a public servant of taking gratification in that capacity other than legal remuneration as a motive for doing a future official act, *viz.*, giving contracts, and that as the offence was not committed in consequence of the said abetment his act was punishable under section 161 and 116, Indian Penal Code. The learned Chief Presidency Magistrate came to the conclusion that the abetment was not proved as the matter had not reached the stage of offer, that there was *locus penitentiæ*, that it was not clear beyond doubt that the alleged offer to the public servant was really as a motive or reward for any official favour, and accordingly acquitted the accused.

The present appeal is preferred by the Local Government against the order of acquittal.

(1) 21 B. 517 at p. 520; 11 Ind. Dec. (N. s.) 346.

EMPEROR v. AMIRUDDIN SALEBHOY.

It is urged on behalf of the Crown that what the accused said to the complainant at the interview amounted to an offer of Rs. 5,000 as a bribe, that whether it was an offer or not it amounted to instigating the public servant to agree to accept or to attempt to obtain a bribe or rather to do something which, if done, would amount to an offence punishable under section 161, Indian Penal Code. It is urged that in view of the proved conduct of the accused there was no *locus pœnitentiæ* and that the instigation, however feeble and ineffective, was complete, so as to bring the case within the scope of section 107 (*a*) read with section 161.

On behalf of the accused it is urged that there was no offer of the bribe, that the statement that his cousin wanted to give Rs. 5,000 had really no reference to any future official act, that, according to his then knowledge, he thought he intended to give it as a thanks offering to one of the public charitable funds in which the complainant was interested, that an innocent act of his was misinterpreted by the complainant without sufficient ground, and that owing to the somewhat unexpected and embarrassing position in which the accused found himself when Mr. Kirpalani was suddenly called in by the complainant he got confused and could not explain what he could have explained, if left to himself. The real nature of his statement, it is suggested, was misunderstood much too readily.

I may add that it is urged on behalf of the Crown that the accused has adduced no evidence in support of his statement made at the trial that his cousin intended to give the sum for the benefit of one of the funds and that he has not examined his cousin. On the other hand, it is pointed out that it was not thought necessary to do so, that, apart from the evidence of the cousin, there was no reason to distrust the explanation offered by the accused, and that his cousin can be examined even now, if his evidence is thought to be material by the Court.

There is really no dispute as to what happened in fact at the interview between the accused and the complainant. The real dispute is as to its effect and as to the intention of the accused. I do not consider it necessary to recapitulate the facts preceding the interview, which have been fully stated in the judgment of the lower Court nor do I consider it necessary to quote here the passage from the complainant's evidence as to the account of the interview. It is contained in the passage in the latter part of his examination in-chief commencing from his statement that, on the 14th October, the accused called on him in his office. I adopt that in its entirety as representing what happened then. This, too, has been stated with sufficient fulness in the judgment of the Trial Court. Mr. Kirpalani's evidence supports this account of the interview so far as it took place in his presence after he was called in. Both the witnesses are agreed that the accused was not in the room for more than two minutes after Mr. Kirpalani was called in. As regards the public funds the complainant's statement is as follows :—

"I am interested in getting contributions from persons of wealth for certain funds. The fund I am particularly responsible for is the Acworth Leper Asylum and I am the President of the Board of Management. I am interested in collecting subscriptions for a great many deserving objects. On certain occasions I have requested some of the leading men in Bombay to subscribe to a particular fund."

The evidence has been fully discussed before us, and after a careful consideration of the arguments and the evidence, I am unable to hold that the acquittal is wrong or that the accused has been shown to be guilty of having instigated the complainant to do something which, if done, would be punishable under section 161.

I shall briefly deal with the arguments in the light of the evidence.

It is urged that there was an offer of a sum of Rs. 5,000 by the accused. This position is taken up with reference to illustration (*a*) to section 116, Indian Penal Code. The illustration assumes the fact of an offer for an improper purpose as stated in section 161. It is in dispute here. All that the accused asked was as to when he could see the complainant again and explained that it was with reference to a sum of Rs. 5,000 which his cousin wanted to give. I do not think that the conversation amounted to an

offer. I do not desire to elaborate this point as the lower Court has taken this view and as the learned Chief Justice also takes the same view.

It is urged, however, that whether it was an offer or not, it really amounted to an instigation to do a thing punishable under section 161, Indian Penal Code, and that the accused is guilty of abetment. This argument requires a closer examination. A careful perusal of the evidence as to the interview shows that the accused inquired of the complainant as to when he could be seen again in connection with "that sum of Rs. 5,000," which the cousin of the accused wanted to give him. In order to bring the case within the ambit of the Penal Code, the prosecution must show that this was an instigation, and, further, it was an instigation to a public servant to agree to accept or to attempt to obtain from the accused or his cousin for himself or for any other person a gratification other than legal remuneration as a motive or reward for doing some official act or for showing any favour in the exercise of his official functions. In my opinion, it is far from clear that this conversation was really an instigation. It is not easy to define the word: and really it must be decided with reference to the facts of each case whether the words used have the natural effect—not necessarily effect in fact—of instigating a person to do that thing. I do not think that without straining the meaning of the language used it could be said that the accused instigated the complainant to do anything. Particularly where the conversation does not amount to an offer the Court should be slow to infer a sinister purpose from words, which do not naturally bear that interpretation.

Assuming, however, that it was instigation within the meaning of section 107 (*a*), the question is whether it was for doing something, which, if done, would be punishable under section 161. That is really the most important question and, in my opinion, more difficult than the question whether the conversation does amount to instigation; and it may be said at once that if the sinister purpose of the accused was clear, it might induce the Court to hold that there was instigation on his part from his conduct and words, which might not otherwise bear that interpretation.

In order to appreciate this part of the case it must be remembered that the cousin of the accused was building a house on the Queen's Road; and that there were certain conditions imposed by the Municipal Authorities, which were of a restrictive nature. On a representation made on his behalf these conditions were dispensed with by the complainant after reference to, and on the recommendation of, the Executive Engineer. These conditions were of a technical nature from the Municipal point of view as stated by the Authorities, but involved restrictions of a substantial character so far as the builder was concerned. The removal of these restrictions would naturally please the builder and the accused so far as he was interceding on his behalf. At the date of the interview this concession was an accomplished fact. Further, at that time the accused had put in a tender and was likely to put in another tender for certain contracts: and he might expect official favour in respect thereof. The charge refers to a future act and not to the act already done by the complainant. Though this limitation in the charge was not realised in the course of the argument it is as well to bear it in mind in determining the intention of the accused. The words used indicate an inquiry by the accused of the complainant as to that sum of Rs. 5,000 which his cousin wanted to give. That might refer and would refer to the favour already shown to him, if it has any reference to any favour. It does not refer to the favour which the accused might expect in respect of his tenders. If the case made in the charge is to be considered, and if the future act is to be looked to, as stated in the charge, I do not think that the conversation justifies such an inference. Of course, it is possible that the accused may have the prospect of such a favour in view. But the complainant did not make any further inquiry of the accused as to the reason why the cousin of the accused wanted to give Rs. 5,000, and in the absence of any indication to connect it with the future act, I do not think that any inference against the accused could be reasonably drawn. The fact that he

had expressed his opinion that without influence his (or one's) chance in respect of the tenders would not be worth considering is not sufficient, in my opinion, to alter the character of his statement. It is not suggested that his cousin had anything to do with the tenders and it is clear that his cousin was the person benefited by the restrictive conditions as to his building having been removed. On the statements made by the accused at the interview the theory that his cousin may have thought of giving Rs. 5,000 is perfectly possible, and, unless by implication or in terms that suggestion can be said to be excluded by the evidence in the case, I do not see how it could be said that the sum mentioned at the interview had any reference to any future act in respect of which the charge is framed.

There is a further difficulty in the way of the prosecution. It is not a necessary inference from the conversation between the accused and the complainant that the cousin proposed to give the sum for an improper purpose, that is, as a motive or reward for any favour having been shown to him by the complainant in the exercise of his public functions. The benefit, which he got from the removal of the restrictions on his building, was substantial, and there is nothing unlikely in his entertaining or, at any rate it is well within the range of reasonable possibility, that he may entertain a desire to please the Commissioner without meaning to offer it as a motive or reward for his official acts. If the complainant had pursued the inquiry a little further and ascertained or elicited some further facts to enable him to ascertain that it was really offered as a motive or reward for showing some official favour and not for any innocent purpose, the case would have been different. But, as he says, he began to get suspicious about the accused's intention since he had mentioned the word 'influence'. He at once called Mr. Kripalani, and when he came in instead of allowing the accused to state what he liked, he stated to Mr. Kirpalani that the accused had offered him a bribe and asked the accused to repeat what he had stated to him already. The interview ended in a very short time. The accused was very profuse in his apologies and admitted what he had stated to the complainant before Mr. Kirpalani came in. I am unable to draw any inference against the accused from his omission to mention during that short interval that the sum was really intended by his cousin for a contribution to some fund and for an innocent purpose. The accused saw that the complainant had already put a definite interpretation upon his conduct, and in the confusion of the moment, he might omit to mention what might be true from his point of view. Some persons in such a condition may act with coolness and composure and some may not: but I do not think that in a Criminal case it could be fairly treated as giving him an opportunity of explaining his position. He was at once told to go out: and though his reluctance to move out promptly has been referred to by the learned Advocate-General as telling against him I do not think that the circumstance can be treated as having any such significance. Thus the accused had really his first opportunity at the trial to explain his position. The accused has explained in his statement that his cousin wanted to contribute to one of the funds in which the complainant was interested, and that his information about it was incomplete and that he was under the impression that his cousin had spoken to the complainant about it. In short his defence is that his statement as to the sum of Rs. 5,000 had nothing to do with a future act of the complainant and that his enquiry about it was merely casual and on behalf of his cousin without the slightest intention of offering it as a motive or reward for any official act of the complainant. This explanation is undoubtedly open to the criticism that it may be—and it is contended by the Crown that it is —an afterthought and not true. Indeed if the case for the defence on this point rested on its being made out that it was true it might fail for want of evidence. But where the inference suggested by what happened at the interview is equivocal and where the explanation put forward by the accused is reasonably possible the theory of innocence cannot be said to have been sufficiently negatived by the prosecution. The absence of the cousin from the witness-box does not matter under the circumstances. It would matter if the accused had to

establish affirmatively the truth of his allegation. In view of the fact that the complainant was interested in the collection of several funds, it was particularly desirable for him to put it beyond question by further inquiry that the proposed donation was not meant for any such innocent purpose.

Taking a general view of all the facts and circumstances of the case, I think the complainant was justified in feeling suspicious about the accused's intention; but he was not justified in inferring, as he did by the time Mr. Kirpalani arrived on the scene, that the accused had offered him a bribe of Rs. 5,000. The case for the prosecution is not free from doubt and difficulty. On the whole I am not satisfied that there was any offer of a bribe nor am I satisfied that there was any instigation to the complainant to do something which is prohibited by section 161, Indian Penal Code. It is not clear that the instigation, if any, was to make the complainant agree to accept or attempt to obtain the sum as a motive or reward for any official act.

For these reasons I am of opinion that the appeal fails and must be dismissed.

I desire to make it clear that I do not wish to be understood as approving of the conduct of the accused in any sense, even taking it in the light most favourable to him. All that I hold is that the facts necessary to constitute the offense charged have not been made out, and that is all that I am concerned with in this appeal.

N. H.

Appeal dismissed.

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No. 319 OF 1922.

June 16, 1922.

Present:—Mr. Justice Ryves.

MANNU KHAN—

versus

CHANDI PRASAD AND OTHERS—

Criminal Procedure Code (Act V of 1898), s. 250, whether applicable to enquiry under s. 107.

Section 250 of the Criminal Procedure Code is only applicable in a case instituted by complaint, or on information given to a Police Officer, or to a Magistrate whereupon a person is accused before a Magistrate of an "offence," and does not apply to an enquiry under section 107 of that Code.

Ram Sukh Rai v. *Mahadeo Rai*, 7 Ind. Cas. 290; 7 A. L. J. 743; 11 Cr. L. J. 446 and *Queen-Empress* v. *Lakhpat*, 15 A. 365; A. W. N. (1893) 114; 7 Ind. Dec. (N. S.) 952, followed.

Criminal Reference made by the District Magistrate, Gorakhpur.

JUDGMENT.—Mannu Khan laid information before the Magistrate in consequence of which action was taken under section 107 of the Criminal Procedure Code against a number of persons. After enquiry, the Magistrate discharged these persons under section 119 of the Criminal Procedure Code and held that the complaint made against them was vaxatious and frivolous, and ordered the complainant to pay them each Rs. 15 as compensation under section 250 of the Criminal Procedure Code. On revision before the learned District Magistrate he has referred the case to this Court with a recommendation that the order under section 250 be set aside. Section 250 is only applicable in a case instituted by complaint or on information given to a Police Officer or to a Magistrate whereupon a person is accused before a Magistrate of "an offense." It has been held by this Court in *Ram Sukh Rai* v. *Mahadeo Rai* (1) that section 250 does not apply to an enquiry under section 107 of the Criminal Procedure Code. That ruling followed an earlier ruling of this Court which laid down the same principle, *viz.*, *Queen-Empress* v. *Lakhpat* (2). It seems to me that those cases are in point. I accordingly accept the reference and direct that if the fines ordered to be paid under section 250 have been paid they be refunded, otherwise the order for payment is set aside.

N. K.

Order set aside.

(1) 7 Ind. Cas. 290; 7 A. L. J. 743; 11 Cr. L. J. 446.

(2) 15 A. 365; A. W. N. (1893) 114; 7 Ind. Dec (N. S.) 952.

KANSHI RAM v. EMPEROR.

LAHORE HIGH COURT.
CRIMINAL APPEAL No. 508 OF 1921.
December 23, 1921.
Present:—Mr. Justice Chevis.
KANSHI RAM—CONVICT—APPELLANT
versus
EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 376—Rape—Conviction based solely on evidence of woman raped, whether justified.

In cases of rape, where the prosecution evidence is not sufficiently strong to warrant a conviction, it is unsafe to convict merely on the accusation of the woman who has been raped.

Appeal from an order of the Sessions Judge, Hissar, dated the 27th June 1921.

Mr. *Nanak Chand Pandit*, for the Appellant.

The Government Advocate, for the Respondent.

JUDGMENT.—The appellant, Kanshi Ram, has been convicted of raping *Musammat* Maro and sentenced to three years' rigorous imprisonment and fine. That *Musammat* Maro was raped by somebody there can be little room for doubt. The only difficulty in the case is whether there is sufficient evidence in the case to convict the appellant of the crime. *Musammat* Maro's story is that she was coming back with three other little girls after collecting wood for fuel when the offence was committed. Hakim and Ramzan are two witnesses who corroborate her. They say that they came to the spot on hearing her cries and that the appellant then ran away, but the defence has succeeded in proving enmity between both of these witnesses and the appellant's family and the learned Sessions Judge himself seems rather to hesitate in relying on the evidence of these two witnesses. The learned Government-Advocate states that he himself does not rely on these witnesses and that in his opinion the case rests simply on the evidence of *Musammat* Maro. If her evidence is to be believed implicitly the appeal must fail, otherwise there is no good evidence to warrant a conviction. The three little girls, who were with *Musammat* Maro at the time when the offence is alleged to have been committed, state that nothing of the kind occurred, and that they and *Musammat* Maro merely met the appellant who made them put down the wood which they had collected from his field. The learned Sessions Judge thinks that these witnesses give evidence as dictated by their parents who have been won over by the appellant's family. This, of course, is possible but there is no proof of their having been won over and I do not think a Court is justified in disregarding the fact that three witnesses for the prosecution utterly deny the facts alleged by the prosecution. As I have already stated there can be little doubt that *Musammat* Maro was raped by somebody, for I am not prepared to hold that her father or anybody else fabricated her bodily symptoms in order to bring a false charge against the appellant. When such an offence has been committed it seems improbable that the real offender should be let go in order to implicate somebody else, and beyond the fact that an uncle of *Musammat* Maro was evicted from some land belonging to the appellant's father though he clearly alleged that he was an occupancy tenant, there is nothing to prove enmity towards the appellant on the part of *Musammat* Maro's family. At the same time I think it would be quite unsafe in cases of this kind to convict an individual merely on the accusation of the woman who has been raped. It is not inconceivable that the real offender may in some cases be screened, either because he has bribed the person aggrieved not to accuse him or because the offender is a member of the same family as the person aggrieved. Several witnesses have appeared for the defence but their evidence has been rejected by the learned Sessions Judge on account of discrepancies. Without relying on the evidence of the defence witnesses, I still think that the prosecution evidence in this case is not sufficiently strong to warrant a conviction.

I, therefore, accept the appeal and, reversing the conviction and sentence, I acquit the appellant and order him to be released and the fine, if paid, to be refunded.

N. K.

Appeal accepted.

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REFERENCE No. 39 OF 1921.
October 25, 1921.
Present:—Mr. Kanhaiya Lal, J. C.
EMPEROR—COPLAINANT
versus
BABU RAM—ACCUSED.

U. P. Municipalities Act (II of 1916), s. 185—Infringement of sanction—Alterations in size or number of doors.

The mere raising of the plinth or making alterations in the size, position and number of the doors or windows of a house are not material alterations in the original plan, and consequently do not constitute an infringement of the sanction within the meaning of section 185 of the U. P. Municipalities Act.

Reference made by the Second Additional Sessions Judge.

Mr. *Adit Prasad*, for the Accused.

JUDGMENT.—The raising of the plinth and the alterations made by the accused in the size, position or number of the doors or windows cannot be treated as material alterations in the original plan so as to affect the Municipal Board. They cannot be treated as an infringement of the sanction within the meaning of section 185 of the Municipalties Act (U. P. II of 1916). The buildings have been made on the area covered by the sanction. The Overseer states that a portion of that land is *nasul* but a dispute of that nature does not fall within the purview of section 185, if the area built on does not exceed that entered in the sanctioned plan.

The recommendation is, therefore, accepted and the conviction of the accused under section 185 of the Municipalities Act is set aside. The fine, if realised, will be refunded.

N. H.

Conviction set aside.

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 20 OF 1920.
February 7, 1920.
Present:—Mr. Justice Chevis, Acting Chief Judge, and Mr. Justice Le-Rossignol.
FATTA AND ANOTHER—CONVICTS—APPELLANTS
versus
EMPEROR—RESPONDENT.

Approver, statement of, as to his accomplices—Corroboration, necessity of—Corroborative statemen made after long delay, reliability of.

The statement of an approver as to who were his accomplices must be corroborated by reliable evidence before it can form the basis of a conviction. [p. 829, col. 2.]

Where the corroboration offered is the statement of two men who apparently knew something about the matter from the very beginning but refused to make any statement until the third day of the Police investigation, the statement must be regarded with suspicion and as not sufficient corroboration. [p. 829, col. 2]

Appeal from an order of the Sessions Judge, Attock at Campbellpore, dated the 18th December 1919.

Messrs. *Miran Bakhsh* and *Badr-ud-Din Kureshi*, for the Appellants.

Sardar *Mahtab Singh*, S. B., Public Prosecutor, for the Respondent.

JUDGMENT.—The appellants Fatta and Khan Bahadur have been convicted of the murder of Muhammad Khan and sentenced to death. They have appealed through Counsel and the case is also before us for orders as to confirmation of the death sentences.

The deceased was murdered on the night of the 13/14th October last in his own field of *moth*. His body was discovered the next day and a report was made at the *thana*, which is six miles distant from the scene of the murder, by one Bahram Khan, younger brother of the deceased, at 8 P. M. on the 14th October. In his report Bahram Khan states that at the time when the body was

discovered Karam Khan stated that on the preceding night he was in his *jawar* field and that at *sikriwela* Muhammad Khan shouted "Karam Khan and Kalandar, come up, there are thieves," and that he had gone to the spot whence the deceased shouted. The reporter added that Karam Khan made no further statement and that Kalandar, when questioned, made no statement at all. The usual Police investigation began and Karam Khan and Kalandar were, of course, examined, but no information was obtained from them till the 17th of October when they made a statement to the Police implicating the present appellants and one Khoedad. On the same day Khoedad made a confession and was then offered a pardon, and on the 21st October made a full statement before a First Class Magistrate. The result was that the present appellants were arrested and committed to the Court of Session. The approver, Khoedad, gives evidence to the effect that he went with the two appellants to steal *moth* and that when they got to the field of the deceased the deceased challenged them and then called out to Kalandar and Karam Khan. Fatta then threw a stone which hit the deceased over the eye and knocked him down. Khan Bahadur then picked up a *sangal* or pitchfork which was lying by the deceased and struck him with the result that the *sangal* broke.

Fatta then put his foot over the neck of the deceased and the approver held down his legs and so they killed him. The approver says that the murder was committed because Muhammad Khan had recognised the thieves. The approver's story goes on to say that Kalandar's dog then barked and they went back some 34 or 35 paces. When Kalandar and his dog came up they told him what had occurred. Karam Khan then also came up and was told by Kalandar what had happend. Kalandar and Karam Khan on being urged promised not to divulge the matter, and Khoedad and the appellants then went away, Fatta carrying off the *khalka* (or *choga*) which had fallen from the deceased. Kalandar and Karam Khan give evidence to the effect that they came up to the spot after the murder had been committed. Kalandar says he learnt what had happened from Khoedad and the appellants. Karam Khan says that Kalandar told him what had happened in the presence of Khoedad and the appellants. The above is the only evidence against the appellants with the exception of certain evidence as to Fatta digging up the *khalka* belonging to the deceased, which was buried in a *kassi* near his *bahk*. The evidence as to the *khalka* the learned Sessions Judge discards regarding this evidence as not being credible. The Sessions Judge thinks that it is not likely that the deceased should have been carrying the *khalka* on his head as the approver says he was doing, and that one of the murderers should have thought it worth his while to carry away the garment, and he notes further that no mention of *khalka* is made in the initial report.

We are of opinion that the evidence is far too doubtful to support a conviction. The approver may, of course, be telling the truth, and it is quite probable that he himself had a hand in the murder, but his statement as to who his accomplices were must be corroborated by reliable evidence before it can form the basis of a conviction. The corroboration offered in this case is the statement of two men who apparently knew something about the matter from the very beginning but refused to make any statement until the third day of the Police investigation. The delay may, of course, be due to their reluctance to implicate the appellants and Khoedad after they had promised not to give information, but it is obvious that statements obtained after such a long delay must be regarded with suspicion; and these witnesses may possibly be screening themselves at the expense of innocent men. On behalf of the prosecution it is urged that these witnesses bear no enmity to the appellants and are related to them, but even so the long delay in making their statements makes their evidence liable to grave suspicion. As to the recovery of the *khalka* we regard this part of the case also with considerable doubt.

In our opinion there is no reliable corroboration of the approver's statement and we agree with the three assessors in holding the case not proved. We accordingly accept the appeal and reversing the conviction and

sentence we acquit the appellants and order them to be released.

R. N.

Appeal accepted.

PATNA HIGH COURT.
CRIMINAL REVISION No. 84 OF 1922.
April 12, 1922.
Present:—Mr. Justice Adami,
Thakur KRISHNA NARAIN SINGH
AND OTHERS—PETITIONERS
versus
EMPEROR—OPPOSITE PARTY.

*Criminal Procedure Code (Act V of 1898), s. 514, proceedings under—Civil proceedings—Forfeiture of bond—*Prima facie *proof of forfeiture, necessity of—Notice to show cause issued on Police report—Evidence on oath taken afterwards—Proceedings, whether vitiated—Prejudice, question of, whether material.*

Proceedings under section 514 of the Criminal Procedure Code are of the nature of Civil proceedings, in which the provisions laid down in that section must be most carefully observed. [p. 831, col. 1.]

Under section 514 of the Criminal Procedure Code, before issuing an order calling upon a person who is subject to a bond to show cause why he should not forfeit it, the Magistrate is bound to have before him sufficient proof that a good reason exists for making the order and the section requires that the grounds of such proof must be recorded. [p. 831, col. 1.]

Therefore, where a Magistrate calls upon a person subject to a bond to show cause under section 514, Criminal Procedure Code, merely on a Police report and takes evidence on oath after the order is issued, he acts without jurisdiction, and the proceedings must be set aside even though, as a matter of fact, the person is not prejudiced in any way by the procedure adopted. [p. 831, cols. 1 & 2]

Hariram Birbhan, In re, 11 Bom. H. C. R. 170, followed.

Application against an order of the Deputy Commissioner, Hazaribagh.

Messrs. *Hassan Imam* and *A. P. Upadhya*, for the Petitioners.

Mr. *H. L. Nandkeolyar*, Assistent Government Advocate, for the Crown.

JUDGMENT.—The petitioners in this case were bound down in proceedings under section 107, Criminal Prosedure Code, to keep the peace for one year in January 1920. Later on in that year a complaint was laid before the Magistrate by the opposite party to the effect that the petitioners were so acting as to cause a breach of the pease. The Magistrate did not treat this as an ordinary complaint but sent the matter to the Polise for enquiry. The Polise seem to have made an enquiry and to have submitted a report. On the 3rd of December 1920 the Deputy Commissioner on reading the report of the Police stated that he was of opinion that the facts disclosed justified the issue of an order on the petitioners to show cause why they and their sureties should not, under section 514 of the Criminal Procedure Code, forfeit their bonds of Rs. 200 each. The Deputy Commissioner ordered that the case should be transferred to a Deputy Magistrate for disposal after issue of notice. A notise accordingly was issued to the petitioners asking them merely to show cause why their bonds should not be forfeited.

The petitioners duly answered and the Police were directed to produce witnesses and these witnesses when produced were examined and cross-examined in the presence of the petitioners. During the course of the proceedings the Deputy Magistrate who was hearing the case considered whether he should frame charges against the petitioners under certain sections of the Penal Code. After the examination of the witnesses produced by the Polise the

KARURA v. MAM RAJ.

petitioners called no evidence and then the Deputy Magistrate drew up an order finding that the petitioners had committed breach of the peace and directing that their bonds should be forfeited. An appeal was made to the Deputy Commissioner who upheld the finding of the Deputy Magistrate.

The orders of the Deputy Commissioner and the Deputy Magistrate are assailed before me on the ground that they were passed without jurisdiction. Mr. Hasan Imam's contention is that the wording of section 514 shows that, before issuing an order calling upon a person who is subject to a bond to show cause why he should not forfeit it, the Magistrate is bound to have before him sufficient proof that a good reason exists for making the order and the section requires that the grounds of such proof must be recorded. In the present case the petitioners were merely called upon to show cause on the Police report which had been submitted to the Magistrate, and evidence was taken on oath after the order had issued. Section 514 lays down that it must be proved to the satisfaction of the Court that the bond has been forfeited and the Court shall record the grounds of such proof, and it is after such grounds have been recorded that the person bound by the bond may be called on to show cause why the amount should not be paid. The contention of Mr. Hasan Imam is supported by the case in *Hariram Birbhan, In re* (1). There it is clearly laid down that the Magistrate cannot have jurisdiction to issue an order to show cause under section 514 until it has been proved, and proof has been afforded by evidence recorded on oath, that there is justification for forfeiting the bond; there must be *prima facie* proof that the bond has been forfeited. It is quite clear, I think, that in the present case the Deputy Magistrate treated the case as a criminal case and this is shown by his doubt as to whether charges should be framed. Proceedings under section 514 are of the nature of Civil proceedings, and it has been more than once laid down that the provisions of section 514 must be most carefully observed. I do not think that, as a matter of fact, the petitioners were in any way prejudiced by the procedure adopted by the Deputy Commissioner, but there has been a failure to carry out the express provisions of the law, and the Deputy Magistrate acted without jurisdiction in failing to record proof before he issued notice to show cause; and on this ground I must hold that the petitioners are entitled to have the proceedings set aside and the amounts, that they paid as forfeited, refunded to them.

N. H.

Rule made absolute.

(1) 11 Bom. H. C. R. 170.

LAHORE HIGH COURT.

CRIMINAL REVISION No. 416 OF 1921.

August 13, 1921.

Present:—Mr. Justice Martineau.

KARURA—COMPLAINANT—PETITIONER

versus

MAM RAJ AND OTHERS—ACCUSED—RESPONDENTS.

Penal Code (Act XLV of 1860), s. 361—Minor brother—Complaint for kidnapping of sister.

A minor brother cannot be the guardian of his sister, and, consequently, cannot lodge a complaint for kidnapping under section 361 of the Penal Code.

Petition, under sections 435/439, Criminal Procedure Code, for revision of an order of the District Magistrate, Hissar, dated the 25th May 1920, affirming that of the Magistrate, First Class, Hissar, dated the 7th April 1920.

Messrs. *Raj Krishan* and *Nanak Chand*, Pandit, for the Appellant.

Lala *Hargopal*, for the Respondent.

JUDGMENT.—Allegation is that a girl, named Pato, was kidnapped by her stepmother, Nimbo, from the guardianship of the complainant, who is Pato's brother. The complaint has been dismissed, and the complainant has applied for revision.

The complainant is a minor, being about 15 years of age, and no authority has been cited before me to show that a minor can be the guardian of his sister,

The complaint was rightly dismissed, and I dismiss this application.

N. H.

Petition dismissed.

LAHORE HIGH COURT.

CRIMINAL REVISION PETITION No. 596 OF 1922.

June 26, 1922.

Present :—Mr. Justice Broadway.

BHAG SINGH—ACCUSED—PETITIONER

versus

EMPEROR, THROUGH CHANAN SINGH—COMPLAINANT—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 195—Sanction—Munsif exercising Small Cause Court powers, whether subordinate to District Judge.

A Subordinate Judge or a Munsif exercising the powers of a Small Cause Court is subordinate to a District Judge for the purposes of section 195 of the Criminal Procedure Code.

Lalji Tewari v. *Emperor*, 52 Ind. Cas. 193; 4 P. L. J. 609; (1919) Pat. 329; 20 Cr. L. J. 577 (F. B.), followed.

Petition, under section 195 (1) (6) of the Criminal Procedure Code, of revision of an order of the District Judge, Ludhiana, dated the 17th March 1922.

Mr. *G. S. Salariya*, for the Petitioner.

Mr. *Shamair Chand*, for the Respondent.

JUDGMENT.—It appears that in a certain Small Cause suit between Chanan Singh and Badru, the latter produced a certain receipt for Rs. 20 in his defence. To prove the receipt he gave evidence himself and put one Bhag Singh into the witness-box to support it.

Apparently this document was held to be a forgery by the learned Munsif, who tried the case as a Small Cause.

Chanan Singh applied to that officer's successor for sanction to prosecute Badru and Bhag Singh under sections 465, 471 and 193, Indian Penal Code.

This application was refused on the ground that the said successor had no power to entertain the same.

Chanan Singh then moved the learned District Judge who accorded sanction.

Bhag Singh has now come up to this Court in revision and for him Mr. Salariya has attacked the order of the learned District Judge on two main grounds.

Firstly, it was contended that the District Judge had no jurisdiction to accord sanction inasmuch as the Small Cause Court was not subordinate to the District Court. Reliance was placed on *Sukhdeo Singh* v. *District Magistrate of Muzaffarpur* (1). That authority, no doubt, supports this contention, but it was specifically overruled by a Full Bench of the same Court (Patna) in *Lalji Tewari* v. *Emperor* (2) where it was held that a Subordinate Judge or Munsif exercising the powers of a Small Cause Court is subordinate, for the purposes of section 195, Criminal Procedure Code, to the District Judge. That case is on all fours with the present and I hold, therefore, that the District Judge has not acted without jurisdiction.

I declined to go into the merits of the matter as I considered it inadvisable to express any opinion that might in any way influence the Trying Court.

Mr. Salariya's next contention was that the District Judge was wrong in sanctioning the prosecution of the petitioner for offences under sections 465 and 471, Indian Penal Code. Here, I consider, he is on firmer ground. Sub-clause 1 (c) of section 195, Criminal Procedure Code, relates to offences covered by these sections committed by a party to the proceeding or suit. Bhag Singh was not a party but a witness and, therefore, sub-clause 1 (c) did not apply to him.

I, therefore, accept this petition in so far as to eliminate from the sanction to prosecute the petitioner so much as relates to offences under sections 465 and 471, Indian Penal Code. In other respects, the order of the Court below will stand.

N. K.

Petition accepted.

(1) 38 Ind. Cas. 754; 2 P. L. J. 1; 18 Cr. L. J. 370.

(2) 52 Ind. Cas. 193; 4 P. L. J. 609; (1919) Pat. 329; 20 Cr. L. J. 577 (F. B.).

P. N. Das
Advocate High Court
Jammu & Kashmir

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 380 OF 1920.

January 31, 1922.

Present:—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Coyajee.

ISHRAPPA GANAP HEGDE—PLAINTIFF—APPELLANT

versus

KRISHNA PUTTA SHANKAR HEGDE AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Partition—Family property—Purchaser of one item, whether can sue for partition of that item—General partition.

It is not competent to a purchaser of a particular item of joint family property to sue for a partition of that particular item, without suing for partition in which the whole family property would be included and all the necessary parties joined. [p. 834, col. 2.]

Where the whole of the family property has been conveyed to strangers whether by joint action between the members of the family or by separate actions against which no dispute is raised, a suit may lie by one stranger against another stranger for the partition of a particular item of property in dispute. [p. 833, col. 2]

Second appeal from a decision of the District Judge, Kanara, in Appeal No. 82 of 1919, confirming the decree passed by the Subordinate Judge at Honavar, in Civil Suit No. 202 of 1918.

Mr. *G. P. Murdeshwar*, for the Appellant.

Mr. *Nilkanth Atmaram*, for the Respondent.

JUDGMENT.

MACLEOD, C. J.—The plaintiff sued for a partition of the plaint strip of land and separation of his two-thirds share, claiming title under a sale by defendants Nos. 3 and 4 of their two-thirds interest to the plaintiff in the suit property. Defendants Nos. 3 and 4 were members of a joint family consisting of themselves together with defendants Nos. 2 and 5, who were jointly interested to the extent of one-third. After the sale by defendants Nos. 3 and 4 to the plaintiff, the second defendant as manager of the family sold the plaint strip to the first defendant.

In the Trial Court the first defendant endeavoured to prove that there had been a sale to him of the plaint strip by defendant No. 2 prior to the date of the sale to the plaintiff of two-thirds of the property by defendants Nos. 3 and 4. This issue was found against him.

Then the first defendant claimed that defendants Nos. 3 and 4 were estopped from selling the plaint strip or an interest therein to the plaintiff, and that issue was found in the Trial Court in the affirmative, and the suit was dismissed, on the ground that the plaintiff's suit for partition of specific property could not lie without suing for a general partition.

In appeal the learned Appellate Judge considered that the suit could lie. The first defendant claimed to have purchased the interest of the whole undivided family:

"The plaintiff so far agreed with him to say that he had purchased all that remained of the joint family interest after the plaintiff's own purchase had taken effect. It was, therefore, common ground that the joint family had been altogether ousted. The contest was between two strangers. There was no reason why such strangers could not, without instituting a general suit for partition of the entire family property, maintain an action for the partition of the fraction which was in dispute between them."

Now, there may be cases in which one co-parcener purports to convey his interest in a particular item of family property to a stranger, while the other co-parcener (taking the simplest case of two co-parceners) sells his interest in the same property to another stranger. In such a case a suit might lie by one stranger against the other for partition for that item of the family property which had been wholly disposed of by the persons who were entitled to it. But such an action between strangers, in my opinion, should only be allowed in the very plainest of cases, when it has been proved that the whole of the family interest in the property has been disposed of either by joint action between the members of the family or by separate actions against which no dispute has been raised.

In this case the first defendant claims to be entitled to the entire strip of land in dispute under his sale from the second defendant who appears to have sold as manager; and assuming that this plaint strip had entirely gone out of the family, still the question might arise whether the first defendant was entitled to the whole or only to the share of his vendor. That question has never been raised in the suit. Accordingly, there is no evidence to show that the alienation by the second defendant

of the whole strip was competent. The learned Appellate Judge, however, although he considered that the suit would lie, dismissed it on the ground that the third and fourth defendants were estopped by their conduct in disputing the sale effected by the second defendant. I do not think the ground on which that estoppel was found to be effective will stand the light of analysis.

But, apart from that, it seems to me that the plaintiff's suit was not competent. It is true that all the members of the joint family are parties to the suit. But the question whether the suit could be converted into a general suit for partition has never been raised, and it is much better that the plaintiff, if he wishes to proceed further, should file a general partition action, rather than confuse the issues by changing the nature of the present suit. The dealings by members of a joint family with their undivided shares either in the whole of the family property, or in particular items, necessarily lead to a considerable amount of confusion. It cannot be said that any co-parsener has a particular share in any item of the family property. He has only an undivided share in the whole of it, and although it may be taken as settled law now that a co-parcener can sell his own interest in the joint family property, the relief given to the purchaser by the Courts can only be given by way of a suit for a general partition. See *Pandu Vithoji* v. *Goma Ramji* (1). Again in *Hanmandas Ramdayal* v. *Valabhdas Shankardas* (2), defendants Nos. 1 to 4 became purchasers at a Court-sale in execution of the decree against the fifth defendant of two of the properties belonging to the joint family. The plaintiff, a minor, thereupon brought a suit against his father (defendant No. 5) and the decree-holders as well as the auction-purchasers for a declaration that the plaintiff's half share in the two properties did not pass to the auction-purchasers, and for possession of his half share on equitable partition. It was held that the son's interest did not pass to the purchasers at the Court-sale, and it was also held that the auction-purchasers should be allowed to file a suit against the plaintiff for a general partition of the entire family properties.

The result must be that the plaintiff's suit as purchaser from defendants Nos. 3 and 4 for partition of this particular item of family property cannot lie, and we think that the order dismissing the plaintiff's suit should be confirmed, expressing our opinion that there is nothing to prevent the plaintiff from endeavouring to get advantage of his sale from defendants Nos. 3 and 4 by filing a suit for a general partition.

COYAJEE, J.—I agree in holding that the plaintiff in this case is not entitled to demand by partition his vendors' alleged two thirds share in this particular item of joint family property. It is clear on the facts that the plaintiffs vendors are only two out of four co-parceners owning considerable undivided property. As such co-parceners they are not entitled to say that they have a right to a specific share in any particular portion of the joint family estate. And a purchaser of their unascertained share cannot insist upon the possession of any definite piece of property. The remedy of the purchaser lies in a suit to have that share and interest ascertained by instituting a suit for general partition in which the whole of the joint family property should be included, and all necessary parties joined: *Pandu Vithoji* v. *Goma Ramji* (1). In a suit of that nature the Court, in making the partition, would endeavour to give effect to the alienation, and "so to marshal the family property amongst the co-parceners as to allot that portion of the family estate, or so much of it as may be just" to the purchaser: *Udaram Sitaram* v. *Ranu Panduji* (3).

W. C. A.

Decree confirmed.

(1) 50 Ind. Cas. 765; 43 B. 472; 21 Bom. L. R. 213.
(2) 46 Ind. Cas. 133; 43 B. 17; 20 Bom. L. R. 472.
(3) 11 B. H C. R. 76.

SECRETARY OF STATE FOR INDIA v. MAHARAJA OF BURDWAN.

PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT.

July 19, 1921.

Present:—Viscount Cave, Lord Shaw and Mr. Ameer Ali.

SECRETARY OF STATE FOR INDIA IN COUNCIL—APPELLANT

versus

MAHARAJA OF BURDWAN—RESPONDENT.

*Bengal Alluvion and Diluvion Act (IX of 1847), s. 6—Land revenue, assessment of—*Churs *and islands formed in rivers after Permanent Settlement—Bengal Land Revenue Assessment (Resumed Lands) Regulation (II of 1819), ss. 3, 31.*

All *churs* and islands in rivers flowing through, or opposite to, lands belonging to the *zemindaris* in Bengal which have been formed since the Decennial Settlements (made permanent by Regulation I of 1793) are liable to assessment under the Bengal Alluvion and Diluvion Act [p. 840, col. 1.]

The intention and effect of Act IX of 1847 was merely to alter the machinery by which lands gained from the sea or rivers by alluvion or dereliction were to be assessed, and not to subject to assessment any lands which would not have been liable thereto under the law in force at the time when the Act was passed; and, accordingly, a question raised as to the assessability of *churs* must be determined by reference to the pre-existing law and particularly to Regulation II of 819. [p. 837, col. 2.]

Secretary of State for India v. *Fuhamidannissa Begum*, 17 I A. 40; 17C. 590; 5 Sar. P. C. J. 391; 8 Ind. Dec. (N. S.) 933, followed.

The effect of Regulation II of 1819 is to declare that all *churs* newly formed since the Decennial Settlement, though upon a river-bed which is recognised as the property of the owner of an estate, are to be treated as land gained since the Settlement and consequently unsettled at the time. This express provision cannot be excluded merely by showing that the river-bed from which the *churs* have been thrown up was, at the date of Settlement, the property of the *zemindar* and that the Settlement was imposed upon the *zemindari* as a whole. The ownership of the bed may determine the proprietary rights in the *churs*; but property is one thing and assessability is another. The Regulation declares in terms that new *churs* are to be included in the category of unsettled lands, and contains no exception for *churs* formed upon a river-bed belonging to a settled estate. [p. 838, col. 2; p. 839, col. 1.]

The express provisions in section 31 of the same Regulation II of 1819 that waste land shall not be the subject of an additional assessment when brought into cultivation, when contrasted with the provisions of section 3 of the same Regulation as to newly formed *churs* and islands, affords further support to the view that the Legislature intended to put such *churs* upon a different footing from the waste lands and to make them liable to assessment. [p. 839, col 2.]

A river-bed cannot be treated as waste land so as to come within the protection of section 31 of Regulation II of 1819. [p. 839, col. 2.]

Lapez v. *Muddun Mohun Thakoor*, 13 M. I. A. 467; 14 W R. P. C. 11; 5 B. L. R 521; 2 Suth. P. C. J. 336; 2 Sar. P. C. J. 594; 20 E. R. 625, *Land Tax Commissioners* v. *Central London Railway Company*, (1913) A. C. 364; 82 L. J. Ch. 274; 108 L. T 690; 77 J. P. 289; 11 L. G. R 693; 57 S. J. 403; 29 T. L. R. 395 and *Attorney-General for British Columbia* v. *Attorney-General for Canada*, (1914) A. C. 153 at p. 158; 83 L. J. P. C. 169; 110 L. T. 484; 30 T. L. R. 144, distinguished.

Consolidated appeals from judgments and decrees of the High Court, Calcutta (Fletcher and Huda, JJ.), dated the 22nd May 1918, reported as 46 Ind. Cas. 305, modifying the decrees of the Subordinate Judge, Burdwan, and reversing those of the District Judge, Bankura.

Mr. *Dunne*, *K. C.* and Mr. *Kenworthy Brown*, for the Appellant.

Mr. *DeGruyther*, *K. C.* and Mr. *Dube*, for the Respondents.

JUDGMENT.

VISCOUNT CAVE.—These are consolidated appeals from decrees made by the High Court of Judicature at Fort William in Bengal in four suits. Of these suits three were brought by the Maharaja of Burdwan, with whose ancestor the Zemindari of Burdwan was permanently settled in the year 1793; and the fourth by the Zemindar of Maliara, with whose predecessor that Zemindari was similarly settled in the same year. The causes of action in all the four suits were similar in character. The lands comprised in the Zemindari of Burdwan are in part traversed and in part bounded by two rivers, the Damodar and the Darakeshwar; and the Maliara lands are similarly bounded by the first-mentioned river. Since the date of the Settlements a large number of Churs (or sandbanks) and islands have been thrown up in these rivers; and the Revenue Authorities, purporting to act under Act IX of 1847, recently caused a Deara Survey to be made of these Churs and islands (hereafter for the sake of brevity referred to as Churs) and assessed them with revenue, and on the refusal of the Zemindars to accept a Settlement, settled them with third parties. The Zemindars disputed the right of the Government to make such an assessment and claimed to be the owners of the Churs where they lay opposite to their settled lands and to be entitled to hold them as part of their settled property free from any

additional assessment; and it was to establish this claim that these suits were brought. The decision of the Subordinate Judge of Burdwan in suits brought by the Maharaja was partly for and partly against his claim, while the decree of the District Judge of Bankura in the Maliara suit was wholly against the Zemindar. On appeal the High Court decided all the suits in favour of the plaintiffs, and thereupon these appeals were brought by the defendant, the Secretary of State for India in Council.

The evidence in the suits is voluminous, but the material facts may be shortly stated; and for this purpose it will be sufficient to refer to the facts in the first two suits only, *viz.*, those brought by the Maharaja of Burdwan with reference to the Churs in the river Damodar; for it is common ground that the decision in these two suits must determine the result of the other two suits also.

The Damodar is a river of some width but little depth flowing into the Hooghly near Gurshumbook. For a distance of 53 miles, *viz.*, from Theraut to Basna, it forms the southern boundary of lands belonging to the Zemindari of Burdwan; and for the next 91 miles, *viz.*, from Basna to Gurshumbook, it runs through the lands of that Zemindari, which accordingly adjoins the river on both banks, except that a few of the riparian Mouzahs were some time since sold for arrears of revenue and no longer belong to the Zemindari. From Gurchumbook up to Ampta,—that is to say, for a distance of about 14 miles—the river is navigable at all seasons of the year; but beyond the last-mentioned point it is navigable at certain seasons only; and for present purposes may be treated as non-navigable. The Maharajas of Burdwan appear to have fishing rights in the river and to own certain private ferries upon it. They also at one time levied tolls on boats passing up and down the river; but these tolls were abolished by the Government in the year 1772, that is to say, before the date of the Decennial Settlement—and have not since been levied.

For some time before 1791 yearly Settlements were effected with the successive Maharajas, and it appears that on the occasion of one of these yearly Settlements, *viz.*, that for the year 1772, a deduction was made for *nadi sikasti*, or diluvion by river. The *kabuliyat* relating to the Settlement of 1788 is produced; and by this document Maharaja Tej Chandra, who is therein described as "Zemindar of Pergunnah Burdwan, etc., in the Province of Bengal," accepted the sum of Rs. 40,15,109-2. as the revenue for the settlement of "the said Chuckla," and agreed to cultivate the land and to raise no objection to paying the revenue on the score of inundation, of the lands being washed away by the river, etc. In 1790, when the Decennial Settlements were introduced, difficulty was experienced in effecting an agreement with the Maharaja, with the result that some Mouzahs were sold by Government to raise arrears of revenue; but ultimately in 1791 a settlement for nine years was agreed upon. No *sanad* or *kabuliyat* relating to this important Settlement has been produced, but its terms are evidenced by a statement headed "Dowl Bundbust or Particular Statement of the Jumma of Pergunnah Burdwan payable yearly by the Zemindar Maharaja Tej Chandra Bahadur for nine years from the beginning of the Bengal year 1198 to the end of 1206, or from the 10th April, 1791, to 11th April 1800." This statement contains the items making up the sum of Rs. 40,15,109-2, specified in the *kabuliyat* for the year 1788, and after certain deductions for sayer abolished, lands sold for arrears of revenue, and other matters, brings out the total revenue payable by the Zemindar during the nine years at Rs. 32,93,892 per-annum. No reference is made to the river-bed; and it was found by the Subordinate Judge that, while the income from the fishing and ferrying rights was included in the assessment, no part of the bed was included in any of the settled Pergunnahs and Mouzahs. Indeed, it is plain that in arriving at the revenue for the purposes of this Settlement the bed of the river was not taken into account. It is this Settlement which was made permanent by Regulation I of 1793.

Upon these and other like materials the Subordinate Judge came to the conclusion that the whole bed of the river where it ran through the Zemindari lands, and the bed *ad medium filum aquæ* where it bounded

those lands on one side only, was the property of the Zemindar, and accordingly that the Churs formed on these parts of the river-bed belonged to the Zemindari; but as to the effect of the Permanent Settlement he drew a distinction. He held that, the Zemindari having been settled as "the said Chuskla"—that is to say, as a compact estate—in the year 1788, and (as he assumed) also in the year 1791, the Settlement included and covered the river-bed where it was bounded on both sides by the Zemindari lands and that the Churs formed on this part of the bed could not be the subject of an additional assessment under the Act of 1847; but as to that part of the river which was bounded on one bank only by the Zemindari lands, he held that the bed of the river *ad medium filum*, being included in the adjoining lands by presumption of law only, was not covered by the Settlement, and that the Churs since formed on this part of the bed were liable to assessment as unsettled land. On appeal the High Court, while upholding the findings of the Subordinate Judge as to the proprietary rights of the Zemindar in the river-bed and Churs, rejected the distinction drawn by him as to the effect of the Permanent Settlement, and held that the Zemindar was entitled to hold all the Churs in dispute as part of his permanently settled lands and free from further assessment. The appeal is, therefore, brought as to all these Churs.

In dealing with this appeal their Lordships accept the concurrent findings of the Courts as to the ownership of the bed of the river and of the Churs formed upon it since the date of the Settlement, and the assumption of the Subordinate Judge that the Decennial Settlement of 1791 (which was made permanent in 1793) was similar to the settlement evidence by the *kabuliyat* of 1788 in assessing the Zemindari as a whole. They also put aside for the moment the subordinate arguments founded on the facts that some of the riparian Mouzahs had been alienated before the Settlement, and that the lower part of the river was navigable: and they proceed to consider the important question of law, whether on the facts as found the Revenue Authorities were entitled to assess the newly formed Churs to revenue as being "land added to the estate" within the meaning of section 6 of Act IX of 1847. It has already been decided by the Board in *Secretary of State for India* v. *Fahimidannissa Begum* (1), that the intention and effect of the Act of 1847 was merely to alter the machinery by which lands gained from the sea or rivers by alluvion or dereliction were to be assessed, and not to subject to assessment any lands which would not have been liable thereto under the law in force at the time when the Act was passed; and accordingly the question raised as to the assessability of the Churs in dispute must be determined by reference to the pre-existing law and particularly to Regulation II of 1819.

Regulation I of 1793, by which the Decennial Settlements were made permanent, declared (by Articles III) to the Zemindars and other proprietors of land with whom a Settlement had been concluded that "at the expiration of the term of Settlement no alteration will be made in the assessment which they have respectively engaged to pay but that they and their heirs and lawful successors will be allowed to hold their estates at such assessment for ever." The main purpose of this declaration appears from Article VI, which contains the following paragraph:—

"The Governor-General in Council trusts that the proprietors of land, sensible of the benefits conferred upon them by the public assessment being fixed for ever, will exert themselves in the cultivation of their lands, under the certainty that they will enjoy exclusively the fruits of their own good management and industry and that no demand will ever be made upon them, or their heirs or successors, by the present or any future Government, for an augmentation of the public assessment in consequence of the improvement of their respective estates."

Regulation XIX of 1793, which deals mainly with alienated lands, contains the following recital showing the origin of the Settlements for revenue:—

"By the ancient law of the country the ruling power is entitled to a certain

(1) 17 I. A. 40; 17 C. 590; 5 Sar. P. C. J. 391; 8 Ind. Dec. (N. S.) 933.

proportion of the produce of every *bigah* of land (demandable in money or kind, according to local custom), unless it transfers its right thereto for a term or in perpetuity, or limits the public demand upon the whole of the lands belonging to an individual, leaving him to appropriate to his own use the difference between the value of such proportion of the produce and the sum payable to the public, whilst he continues to discharge the latter."

Regulation II of 1819, which is expressed to be passed for (among other things) defining the right of Government to the revenue of lands not included within the limits of estates for which a Settlement has been made, contains (in section 3) the following provisions :—

"First.—It is hereby declared and enacted that all lands which, at the period of the Decennial Settlement, were not included within the limits of any Purgunnah, Mouzah or other division of estates for which a settlement was concluded with the owners, not being lands for which a distinct Settlement may have been made since the period above referred to, nor lands held free of assessment under a valid and legal title of the nature specified in Regulations XIX and XXXVII, 1793, and in the corresponding Regulations subsequently enacted, are and shall be considered liable to assessment in the same manner as other unsettled *mahals* and the revenue assessed on all such lands, whether exceeding one hundred *bighas* or, otherwise, shall belong to Government."

"Second.—The foregoing principles shall be deemed applicable not only to tracts of land such as are described to have been brought into cultivation in the Sunderbuns, but to all Churs and islands formed since the period of the Decennial Settlement, and generally to all lands gained by alluvion or dereliction since that period, whether from an introcession of the sea, an alteration in the course of rivers or the gradual accession of soil on their banks."

Section 31 of the same Regulation saves the rights of the proprietors of permanently settled estates to the full benefit of "all waste lands included within the ascertained boundaries of such estates respectively at the period of the Decennial Settlement, and which have since been or may hereafter be reduced to cultivation" and concludes with the following general declaration :—

"Second.—It is further hereby declared and enacted that all claims by the Revenue Authorities on behalf of Government to additional revenue from lands which were at the period of the Decennial Settlement included within the limits of estates for which a Permanent Settlement has been concluded, whether on the plea of error or fraud, or on any pretext whatever, saving, of course, the case of lands expressly excluded from the operation of the Settlement, such as Lakheraj and Thannadarry lands, shall be and be considered wholly illegal and invalid."

On an analysis of the terms of these Regulations, so far as they are material to the question now under consideration, it appears that, while lands included in a Permanent Settlement were carefully excluded from further assessment, this protection was extended only to lands actually in existence at the time of the settlement and specifically included in the estate as settled. The produce of "every *bigha*" of these lands was to be assessed to revenue once for all (Regulation XIX of 1791); and even waste land producing little or no revenue to the proprietor, if "included within the limits of any Pergunnah, Mouzah or other division of estates for which a Settlement was concluded," was to be free from further assessment on being brought into cultivation (Regulation II of 1819, section 31). But lands not included in the settled Pergunnahs and Mouzahs were to be considered liable to assessment as unsettled property; and "these principles," *i. e.*, that lands not included within the limits of the settled "Pergunnahs" and "Mouzah" were to be the subject of additional assessment—were to be deemed applicable to all Churs and islands formed since the Decennial Settlement, and generally to all lands gained by alluvion or dereliction since that period (Regulation II of 1819). It appears to their Lordships that the effect of the Regulation last referred to is to declare that Churs formed after the Decennial Settlement are to be treated as unsettled; and that this express provision cannot be excluded merely by showing that the river-bed from which the Churs have been thrown up was at the date of Settlement the property of the Zemindars,

and that the Settlement was imposed upon the Zemindari as a whole. The ownership of the bed may determine the proprietary rights in the Churs; but property is one thing and assessability is another. The Regulation declares in terms that new Churs are to be included in the category of unsettled lands, and contains no exception for Churs formed upon a river-bed belonging to a settled estate. Such Churs must, therefore, be treated as unsettled.

This conclusion is strongly supported by the terms of Regulation XI of 1825, which deals with the rules to be observed in determining claims to lands gained by alluvion or dereliction. The fourth rule laid down in that Regulation, while providing that "in small and shallow rivers, the beds of which, with the Julkur right of fishery, may have been heretofore recognised as the property of individuals, any sand-bank or Chur that may be thrown up shall, as hitherto, belong to the proprietors of the bed of the river," adds the words "subject to the provisions stated in the first clause of the present section." These last mentioned words refer to the proviso to the first clause, which prevents the owner of an increment of land gained from a river or the sea from being exempt from assessment to revenue under Regulation II of 1819; and they show conclusively that the intention of the Regulation was to provide that all Churs newly formed since the Decennial Settlement, though upon a river bed which is "recognised as the property" of the owner of the settled estate, are to be treated as land gained since the Settlement, and liable to be assessed accordingly.

There is nothing inequitable in such a construction. Section 5 of Act IX of 1847 provides that, when on inspection of the Deara Survey Map it appears that land has been washed away from or lost to any estate paying revenue to Government, a proportionate deduction shall be made from the *juma*, and if a deduction is to be made for land washed away, there is no reason why an addition should not be made in respect of land gained by alluvion or dereliction. In the latter case, while it may be that the area nominally belonging to the estate is unaltered, the cultivable area is increased and with it the potential revenue of the estate.

It was suggested in argument that a river-bed might be treated as "waste land" coming within the protection of section 31 of Regulation II of 1819; but their Lordships are not of that opinion. Indeed, the express provision in section 31 that waste land shall not be the subject of an additional assessment when brought into cultivation, when contrasted with the provisions of section 3 of the same Regulation as to newly formed Churs and islands affords further support to the view that the legislative authority intended to put such Churs upon a different footing from the waste lands and to make them liable to assessment.

The learned Judges of the High Court appear to have thought that such a construction of the Regulations as is here adopted would be opposed to the decision of this Board in the above cited case of *Secretary of State for India* v. *Fahamidannissa Bejum* (1); but on examination of that case it will appear clearly that the lands there held to be exempt from assessment were not Churs formed since the Settlement upon land which at the time of Settlement had been river bed, but were lands specifically comprised in the Settlement and which, having for a time been covered with water, had afterwards emerged again by reason of alluvion or dereliction. The estate there in question, containing at the date of the Decennial Settlement 10,042 *bighas* of land, had become wholly submerged by the action of the Ganges and the Brahmaputra; but an area amounting to 2,000 *bighas* had recently re-appeared above water, and it was this re formed land—which had been specifically included in the Decennial Settlement and in respect of which the assessed revenue had been paid even during the period of its submergence—which it was sought to assess to additional revenue. The Board, affirming the decision of the High Court in Bengal, decided against this claim, holding that "lands within the limits of settled estates which had become covered with water, and afterwards re-formed, were not lands 'gained from the river or sea by alluvion or dereliction' within the meaning of the legislation of 1847, which is confined

to lands so gained 'since the period of Settlement." It is obvious that such a conclusion has no application to a case like the present, where the land in question is new land formed since the Settlement was made. Lord Herschell, by whom the judgment of the Board was delivered, insisted more than once on the circumstance that the land in question was land which had been assessed to revenue at the date of the Settlement and had since been inundated and recovered, and that revenue had throughout been paid upon it; and the terms of the judgment indicate that, if the land in question had been formed for the first time since the date of the Settlement, the decision would have been the other way.

Lopez v. *Muddun Mohun Thakoor* (2) was referred to; but that case, which dealt with the proprietary right in land re-formed after submergence upon the original site and not with assessment to revenue, has no direct bearing on the present case. Reliance was also placed on certain rating cases: *Land Tax Commissioners* v. *Central London Railway Company* (3), *Attorney-General for British Columbia* v. *Attorney-General for Canada* (4), but those decisions turned on English or Canadian Law, and cannot affect the construction of the express provisions of the Bengal Regulations.

In the result, their Lordships are satisfied that the Churs and islands, which since the Decennial Settlement of the Zemindari of Burdwan has been formed in the river Damodar opposite to lands belonging to that Zemindari, were liable to assessment under the Act of 1847, and accordingly that the appeals in the first two suits should succeed. Having regard to this conclusion, it is unnecessary to consider the question of the ownership of any Churs which may have been formed opposite to lands alienated from the Zemindari or in the navigable part of the river.

(2) 13 M. I. A. 467; 14 W. R. P. C. 11; 5 B. L. R. 52'; 2 Suth. P. C. J. 336; 2 Sar. P. C. J. 59'; 20 E. R. 625.

(3) (1913) A. C. 364; 82 L. J. Ch. 274; 108 L. T. 690; 77 J. P. 289; 11 L. G. R. 693; 57 S. J. 403; 29 T. L. R. 395.

(4) (1914) A. C. 153 at p. 158; 83 L. J. P. C. 169; 110 L. T. 484; 30 T. L. R. 144.

As stated above, the Churs formed in the river Darakeshwar, which were in question in the third suit, and those formed in the Damodar river against lands of the Zemindar of Maliara, which were the subject of the fourth suit, are for present purposes in the same position as the Churs already discussed. The appeals in these suits also should, therefore, be allowed, and the decision of the District Judge of Bankura in the fourth suit should be restored.

Their Lordships will humbly advise His Majesty that these appeals should be allowed and the suits dismissed, and that the respondents should pay the costs in all Courts and the costs of these appeals.

R. N. & N. H. *Appeals allowed.*

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 581 OF 1921.

January 20, 1922.

Present :—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Coyajee.

DEVU JETIRAM GUJAR—DEFENDANT—APPELLANT

versus

REVAPPA SATAPPA SHINTRE—PLAINTIFF—RESPONDENT.

Dekkhan Agriculturists' Relief Act (XVII of 1879), ss. 3, 15B—Decree—Defendant becoming agriculturist after decree, effect of—"Suit," meaning of.

A defendant who is not an agriculturist at the time a decree is passed against him, but becomes one thereafter, is not entitled to the benefit of section 15B of the Dekkhan Agriculturists' Relief Act.

The description of suit in section 3 of the Dekkhan Agriculturists' Relief Act, is not confined to the relief claimed in the suit, but also includes the status of the parties.

Second appeal from the decision of the District Judge, Belgaum, in Appeal No. 57 of 1918, confirming the decree passed by the Subordinate Judge at Chikodi, in execution proceedings in Suit No. 240 of 1909.

Mr. *S. S. Patkar*, Government Pleader, for the Appellant.

Mr. *Nilkanth Atmaram*, for the Respondent.

JUDGMENT.—The plaintiffs applied for execution of their decree in Suit No. 240 of 1909 by sale of part of the mortgaged property. It was admitted that the defendant at the time the decree was passed was not an agriculturist, but on the allegation that he had since become an agriculturist, he claimed to be entitled to the benefit of section 15 B of the Dekkhan Agriculturists' Relief Act. Both the lower Courts have held that, assuming that the defendant had become an agriculturist since the decree was passed, he was not entitled to the benefit of section 15B.

In *Salchand Chaturchand* v. *Chunilal Jagjivandas* (1) the question arose whether a defendant who was not an agriculturist at the time when a money decree was passed against him, but who had become one later, could at the time of execution ask the Court under section 20 of the Dekkhan Agriculturists' Relief Act to grant instalments. Mr. Justice Heaton said :—

"In this case the First Class Subordinate Judge of Nasik has applied section 20 of the Dekkhan Agriculturists' Relief Act to the case of a judgment-debtor who was not an agriculturist when the decree was obtained but who by discarding trade and limiting himself more exclusively to profits in land had become an agriculturist at the time of the execution. We do not think that he was empowered to do this.....It seems to us to be quite clear that section 20 cannot apply to the case of a person who was not an agriculturist when the decree was obtained whatever his status may be thereafter when execution comes to be taken out against him."

It has been argued that section 20 of the Dekkhan Agriculturists' Relief Act expressly refers to a decree passed against an agriculturist, whether before or after the Act came into force, while section 15 B only refers to decrees for redemption, foreclosure or sale, in suits of the descriptions mentioned in section 3, clause (*v*) or clause (*s*), and, consequently, the fact that a defendant or any of the defendants, who was not an agriculturist at the time the decree was passed, but became one thereafter, does not prevent his being a party to a suit of that description. But we think that, considering the nature of the Act, the description of "suit" in section 3 is not confined to the relief claimed in the suit, but also includes the status of the parties. Otherwise, the result would be that in all suits for redemption, foreclosure or sale, if subsequently the defendant brought himself within the definition of an agriculturist, he would be entitled to the benefit of section 15 B, and we do not think that was the intention of the Legislature, or that is what the law enacts. We think, therefore, that the decision of the Court below was correct and the appeal ought to be dismissed with costs.

W. C. A.

Appeal dismissed.

(1) 19 Ind. Cas. 901; 37 B. 486 at p. 487; 15 Bom. L. R. 357.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2699 OF 1920.

March 9, 1921.

Present:—Mr. Justice Abdul Raoof.

GANGA RAM—PLAINTIFF—APPELLANT

versus

MAYA DAS AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 102—Suit based on agreement to share the income of a tenancy—Suit, whether, of the nature cognizable by Small Cause Court—Appeal, second.

A suit based on an agreement between the plaintiff and the defendant that the latter would pay the former half of what he realised from a tenancy granted to him by the Government is cognizable by a Court of Small Causes as all that is transferred under the agreement is a moveable property and not a right in the tenancy and, under section 102, Civil Procedure Code, no second appeal lies from a decision in such a suit where the value of the subject-matter is less than 500 rupees. [p. 842, col. 1.]

Second appeal from a decree of the Senior Subordinate Judge, Jhang, dated the 19th October 1920, affirming that of the Munsif, Second Class, Jhang, dated the 17th July 1920.

Lala *Rama Nand*, for the Appellant.

Mehta *Amin Chand*, for the Respondents.

JUDGMENT.—The following relief was claimed by the plaintiff:—That a decree for Rs. 67-8 0 be passed in favour of the plaintiff. This claim the plaintiff based

upon an alleged agreement between him and the defendant that the latter would pay him half of what he realised from the tenancy granted to him by Government. In order to make the case clear it was argued on behalf of the plaintiff before the lower Appellate Court that all that was transferred to him under the agreement was a moveable property and not a right in the tenancy. Looking at the relief in the light of this explanation the suit, on the face of it, appears to be of the nature of suits cognizable by a Court of Small Causes. Mr. Rama Nand for the plaintiff appellant has argued that the suit comes within clause 31 of the 2nd Schedule of the Provincial Small Cause Courts Act and is thus excepted from the jurisdiction of a Court of Small Causes. The suit is not one for an account to recover surplus collections received by the mortgagee, nor is it a suit for the profits of immoveable property belonging to the plaintiff which have been wrongly received by the defendant. It was simply and purely a suit based on an alleged agreement, and, therefore, within jurisdiction of a Court of Small Causes. Under section 102 of the Code of Civil Procedure, therefore, no appeal lies, and this appeal must be dismissed with costs, and I order accordingly.

W. C. A.

Appeal dismissed.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 191 OF 1919.

December 23, 1921.

Present :—Sir Norman Macleod, Kt, Chief Justice, and Mr. Justice Shah.

NATHURAM HIRARAM THAKOR AND OTHERS—PLAINTIFFS—APPELLANTS

versus

THE SECRETARY OF STATE FOR INDIA AND ANOTHERS—DEFENDANTS—RESPONDENTS.

Bombay Land Revenue Code (Act V of 1879), ss. 203, 204—Notice of demand issued by Mamlatdar, whether order within sections—Suit for declaration that land held rent-free, maintainability of—Bombay Revenue Jurisdiction Act (X of 1876), s. 11, application of.

A notice of demand issued by a Mamlatdar that a certain sum of money was due for payment of land revenue, and that, if it was not paid, steps would be taken, according to law, to enforce payment, is not an order within the meaning of sections 203, 204 of the Bombay Land Revenue Code, and, consequently, a suit instituted after the issue of such a notice, by the assessee for a declaration that he is entitled to hold the land rent-free would not be governed by section 11 of the Bombay Revenue Jurisdiction Act. [p. 843, col. 2.]

First appeal from the decision of the District Judge, Ahmedabad, in Suit No. 34 of 1915.

Mr. *G. N. Thakor*, for the Appellants.

Mr. *S. S. Patkar*, Government Pleader, for Respondent No. 1.

Mr. *N. K. Mehta*, for Respondent No. 2.

JUDGMENT.—The plaintiffs filed this suit praying for a declaration that Survey No. 656 in the limits of the Talukdari village of Kanj was of their absolute ownership, and that the Talukdar defendants had no right of any kind whatever over it, and that the first defendant, the Secretary of State, had no right of any kind whatever to sanction the relinquishment of the said Survey Number by the said Talukdars, and had no right to assess any kind of claim or tax on it, and for further and other relief.

A preliminary issue was raised whether the suit was barred under section 11 of the Bombay Revenue Jurisdiction Act. The learned Judge held that the suit was barred on the ground that an order had been passed within the meaning of sections 203 and 204 of the Bombay Land Revenue Code, and that as the plaintiffs had not appealed against that order their suit could not lie.

Now it appears that in the previous litigation between the Talukdars and the plaintiffs, the plaintiffs were able to establish their right to hold this particular land rent-free. Thereafter the Talukdars relinquished this particular Survey Number in favour of Government, although it does not appear that the plaintiffs were heard on the question whether the relinquishment was or was not subject to their rights.

The next step taken by the Revenue Authorities was a notice of demand issued by the Mamlatdar that a certain amount was due for the payment of the land revenue, and that if it was not paid within ten days

from the receipt of the notice, steps would be taken according to law to forcibly recover the whole amount for the current year's land revenue which had not been paid.

One would presume that the notice of demand of the Mamlatdar was based on an order by the Collector directing that this particular Survey Number was liable to pay assessment, and that evidently was the view taken by the first defendant when the written statement was filed, because in the first paragraph thereof it is said:

"The jurisdiction of the Court to entertain the suit is barred by section 11 of the Bombay Revenue Jurisdiction Act, 1876, since the plaint does not state that the plaintiffs have preferred any appeals against the orders of the Collector imposing and levying assessment on the land in suit as provided by sections 203 and 204 of the Bombay Land Revenue Code."

Now it is admitted that no such order of the Collector can be produced. Consequently, there could be no order from which an appeal lay. It seems that the first defendant urged that in the absence of the order of the Collector assessing the land, the notice of demand by the Mamlatdar was an order within the meaning of sections 203 and 204. Now the plaintiffs could have appealed to a higher authority objecting to the notice of demand issued by the Mamlatdar, but it does not follow that because they could have endeavoured by a resort to higher authority to get that notice of demand revoked, therefore, it was an order within the meaning of sections 203 and 204 of the Bombay Land Revenue Code. The learned Judge on this question says:

"Then it was contended that the notice of demand issued by the Mamlatdar was not an 'order.' Considering the number of years for which the dispute about these lands has been continuing one would suppose that before the Mamlatdar issued this notice there must have been a formal order by some Revenue Officer directing this to be done. But if there was such an order it has not been brought to the notice of the Court, and the learned Pleader for the defendants, in arguing the issue, treats the demand notice as if it was the order and nothing else. In my opinion, it is an order within the meaning of sections 203 and 204 of the Land Revenue Code. I see no reason to hold that the word "order" used in those sections was meant to be understood in a narrow or technical sense, as a formal order passed after judicial inquiry or anything of that kind. A notice of demand is in effect an order to pay."

Now it may be said that a notice of demand which, if not complied with, can be made effective by execution proceedings, may be considered as akin to an order, but that could only be because of the results following from it. But it is not strictly logical to find that because the same results follow from two particular kinds of documents, therefore, the documents are of the same kind also. One has to look to the wording of the document; and it appears to us that it would be going too far to say that this notice of demand, which admittedly is the natural consequence of an order imposing assessment upon land, can be treated as an order or decision within the meaning of sections 203 and 204 of the Bombay Land Revenue Code. The whole question regarding this demand of land revenue is somewhat involved in mystery, as the plaintiffs were allowed to continue to hold the land rent-free, and yet apparently no opportunity was given to them, after the demand to pay land assessment was issued, to state their case for their being allowed to continue to hold rent-free, whether the land was relinquished or not. It seems to us this is a case to which section 11 of the Bombay Revenue Jurisdiction Act does not apply, and that the suit would lie. The decree dismissing the suit must be set aside, and the suit must be remanded to the lower Court to be heard on its merits. The plaintiffs to get their costs of the appeal. Costs in the lower Court to be costs in the cause.

W. C. A.

Decree set aside.

MUHAMMAD KHAN v. GHULAM QADIR.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1681 OF 1921.
January 11, 1922.

Present :—Mr. Justice Martineau.

MUHAMMAD KHAN AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

GHULAM QADIR—DEFENDANT—RESPONDENT.

Pre-emption—Non-compliance with decree—Appeal.

Non-compliance with a decree for pre-emption is not fatal to the further prosecution by the pre-emptor of an appeal against the decree.

Thakur Das v. *Tulsi Das*, 70 P. R. 1890 (F. B.) and *Malik Akbar Ali* v. *Hassan Ali*, 67 P. R. 1895, followed.

Second appeal from a decree of the District Judge, Sialkot, dated the 28th April 1921, affirming that of the Munsif, First Class, Daska, District Sialkot, dated the 3rd February 1921.

Mr. *Badr-ud Din, Kureshi*, and Babu *Joti Sarup*, for the Appellants.

JUDGMENT.—The plaintiffs were given a decree for pre emption of the land in suit subject to the payment of Rs. 200 by the 5th March 1921. They appealed contending that the real price was only Rs. 92, and the District Judge on the 4th March remanded the case under O. XLI, r. 25, Civil Procedure Code, for a finding as to the market value of the land but when the case came before him again on the 28th April he dismissed the appeal on the ground that as the plaintiffs had not paid the money as required by the decree their suit stood dismissed. They have filed a second appeal in this Court, and it is clear that the appeal must be accepted.

It was held by a Full Bench in *Thakur Das* v. *Tulsi Das* (1) that non-compliance with a pre-emption decree was not fatal to the further prosecution by the pre-emptor of his appeal, as section 214 of the Civil Procedure Code of 1882 was to be read subject to the provisions of the law of appeal, and that ruling was followed in *Malik Akbar Ali* v. *Hassan Ali* (2).

I accordingly accept this appeal, set aside the decree of the lower Appellate Court, and remand the case to that Court under O. XLI, r. 23, Civil Procedure Code, for fresh decision of the appeal before it on the merits. Court-fee on the appeal in this Court to be refunded. Other costs will be costs in the case.

Z. K. & R. N.

Appeal accepted.

(1) 70 P. R. 1890 (F. B.).
(2) 67 P. R. 1895.

HALLAPPA KALLAPPA v. IRAPPA GIRIMALLAPPA.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 741 OF 1920.
January 16, 1922.

Present :—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Coyajee.

HALLAPPA KALLAPPA—DEFENDANT—APPELLANT

versus

IRAPPA GIRIMALLAPPA AND ANOTHER PLAINTIFFS—RESPONDENTS.

Dekkhan Agriculturists' Relief Act (XVII of 1879) s. 10 A, scope of.

The provisions of section 10A of the Dekkhan Agriculturists' Relief Act are not limited in their scope to suits of the description mentioned in section 3, clauses (*w*), (*y*), (*z*); those provisions are applicable to every suit to which an agriculturist is a party, and in which there is some transaction in issue entered into by such agriculturist, or the person, if any, through whom he claims, which is of such a nature that the rights and liabilities of the parties thereunder are triable wholly or in part under Chapter III of the Act. [p. 845, cols. 1 & 2.]

Second appeal from a decision of the Assistant Judge, Belgaum, in Appeal No. 122 of 1918, confirming a decree passed by the Second Class, Subordinate Judge at Athni, in Civil Suit No. 190 of 1915.

Mr. *A. G. Desai*, for the Appellant.

Mr. *H. B. Gumaste*, for Respondents Nos. 1 and 2.

JUDGMENT.

MACLEOD, C. J.—The plaintiff filed this suit for partition of certain lands and houses and moveables at Shirhatti in Athni Taluka. Defendants Nos. 1 to 3 were his *bhaubands*. The other defendants were alleged to be alienees of some of the lands. Defendant No. 4 did not appear at the trial. The suit was decreed. Thereafter, defendant No. 4 got the decree

set aside to the extent of the Land Survey Number 156, which is said to have been transferred to him by the sale-deed Exhibit 115 in 1913. The plaintiff alleged that the transfer was really a mortgage, and that, therefore, the land was still owned by his family and was partible.

In the Trial Court the issue was whether the sale relied on by the defendant No. 4 was really a mortgage. It does not seem to have been suggested there that that issue could not be tried, or that section 10A of the Dekkhan Agriculturists' Relief Act was not applicable to the case. But in first appeal that point was taken. The learned Judge said :

"The only question is, whether the words 'whenever it is urged at any stage of any suit or proceeding' in section 10A are to be so construed as to confine the meaning of the words 'any suit or proceeding' specifically to a suit of the description mentioned in section 3, clauses (*w*), (*y*), and (*z*). Section 12 and section 13 are in terms restricted to those suits, but section 10A, enacted in the same Chapter, provides for 'any suit or proceeding.' All that is necessary is that the transaction in issue should be of such a nature as to make it amenable to the operation of sections 12 and 13. I see no reason for cutting down the scope of the words 'any suit or proceeding' in section 10A, and limiting it to the four corners of the suits provided for in section 12. Section 10A was, it would appear, deliberately given a wider scope. The words 'any suit' have, therefore, to be read in their ordinary sense."

It seems to me that when the provisions of section 12 were specifically limited to any suit of the description mentioned in section 3, clauses (*w*), (*y*) or (*z*), if it had been intended to limit the provisions of section 10A to suits of that description, similar words would have been used instead of the words "in any suit or proceeding." But for the section to be applicable it is only necessary that an agriculturist must be a party to the suit and that some transaction shall be in issue entered into by such agriculturist or the person, if any, through whom he claims, which shall be of such a nature that the rights and liabilities of the parties thereunder are triable wholly or in part under Chapter III of the Act. The illustration (*a*) makes this clear:—If a landlord sues for possession of land leased by him to an agriculturist, such suit is not one of the suits referred to in section 3, clauses (*w*), (*y*), and (*z*). In a suit on a lease, if the defendant alleges that he mortgaged the land with possession to the lessor, who is entitled to its possession only as such mortgagee and not as owner, and asks that he may be allowed to redeem the mortgage without being ejected, then, there is a transaction in issue such as is referred to in section 10A, and the Court may admit evidence on this allegation, and if satisfied that it is correct, may decline to eject the defendant as tenant, and allow the suit to be converted into one for redemption of the mortgaged property. Therefore, the fact that there is some such transaction in issue in a suit to which an agriculturist is a party renders section 10A applicable whatever the nature of the suit may be. Now it seems to me to be clear that this was a suit for partition which was resisted by the fourth defendant on the ground that a part of the property had been sold to him, so the Court was entitled to take evidence with regard to the real nature of the transaction, and decide whether or not, the transaction was a sale as contended for by the fourth defendant, or a mortgage as alleged by the plaintiff, and having found that it was not a sale but a mortgage, then the Court was entitled to treat the case as against the fourth defendant as a suit for redemption. The Court apparently did not take that course but left the mortgagee-appellant to his remedy by another suit. As the parties are agreeable now that we should pass orders as if the plaintiff was asking for a redemption of the mortgage from the fourth defendant, while dismissing the appeal by the fourth defendant against the decree for partition, we direct that the suit should be remanded to the Trial Court for taking an account under section 15B of the Dekkhan Agriculturists' Relief Act of the mortgage Exhibit 115 of the year 1913. We dismiss the appeal with costs and remand the suit to the Trial Court

PARTAB SINGH v. ACHHAR SINGH.

to pass a redemption decree. Costs in remand to be costs in the cause.

COYAJEE, J.—I agree. In this second appeal it is urged on behalf of the appellant that the lower Courts erred in law in inquiring into the nature and character of the transaction in question. The contention is that the operation of section 10A of the Dekkhan Agriculturists' Relief Act should be confined to that limited class of suits which is described in section 3 of the Act whereas the present suit being a suit for partition of certain properties does not fall within that class. In my opinion that contention is not well-founded. The material words of the section are: "at any stage of any suit or proceeding to which an agriculturist is a party." These words must be given their ordinary and natural meaning, and the Legislature must be intended to mean what it plainly expresses. The illustrations attached to that section show that it was intended to give full effect to the plain words of the enactment. Neither of the suits referred to in illustrations (*a*) and (*c*) falls within the the restricted class of suits described in section 3. The illustrations given in the Statute "are of relevance and value in the construction of the text." In *Mahomed Syedol Ariffin* v. *Yeoh Ooi Gark* (1) the Privy Council observes: "It would require a very special case to warrant their rejection on the ground of their assumed repugnancy to the sections themselves. It would be the very last resort of construction to make any such assumption. The great usefulness of the illustrations, which have, although not part of the sections, been expressly furnished by the Legislature as helpful in the working and application of the Statute, should not be thus impaired." Moreover, a comparison of the language used in sections 10A, 11 and 12, which all occur in the Third Chapter of the Act, yields the same result. For, whereas the words used in section 10A are "any suit or proceeding to which an agriculturist is a party," those used in sections 11 and 12 are "suit of the description mentioned in section 3." That this variation of language is not attributable to a desire of improving the style or of avoiding repeated use of the same words, becomes obvious on a mere reading of sections 11 and 12 themselves. In my opinion, therefore, section 10A has a wider operation than what is contended for on behalf of the appellants; and this construction best harmonizes with the object which the Legislature had in view in passing the enactment.

W. C. A. *Appeal dismissed: Case remanded.*

(1) 39 Ind. Cas. 401; 43 I. A. 256 at p. 263; 19 Bom. L. R. 157; 21 C. W. N. 257; (1917) M. W. N. 162; (1916) 2 A. C. 575; 86 L. J. P. C. 15; 115 L. T. 564; 32 T. L. R. 678 (P. C.).

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1254 OF 1916.

January 12, 1921.

Present:—Mr. Justice Scott-Smith and Mr. Justice Leslie-Jones.

PARTAB SINGH—DEFENDANT—APPELLANT

versus

ACHHAR SINGH—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XLI, r. 26—Remand, objection to finding on, not filed—Court, discretion of, to allow objection to be taken at hearing.

Where a party to an appeal fails to file objections to a return to an order of remand under O. XLI, r. 26 of the Civil Procedure Code, it is discretionary with the Court to permit such objections to be taken at the hearing of the appeal.

Second appeal from a decree of the Additional District Judge, Hoshiarpur at Gurdaspur, dated the 21st February 1916, reversing that of the Subordinate Judge, First Class, Hoshiarpur, dated the 27th April 1914.

Mr. *O. L. Anand*, for Bakhshi *Tek Chand*, for the Appellant.

Mr. *D. R. Sawhney*, for Dr. *Nand Lal*, for the Respondent.

JUDGMENT.—The findings of the lower Appellate Court upon the issues sent down to it are against the appellant and no objections have been filed under O. XLI, r. 26 of the Civil Procedure Code. We, therefore, in our discretion, decline to hear objections now, no sufficient cause being shown why we should do so.

The findings are of fact and we accept them, and in accordance therewith dismiss the appeal with costs.

W. C. A. *Appeal dismissed.*

HANMANT TIMAJI DESAI v. RAGHAVENDRARAO GURURAO DESAI.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 157 OF 1921.

January 17, 1922.

Present:—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Coyajee.

HANMANT TIMAJI DESAI AND OTHERS—DEFENDANTS—APPELLANTS

versus

RAGHAVENDRARAO GURURAO DESAI—PLAINTIFF—RESPONDENT.

Instalment decree—Failure to pay one instalment—Subsequent instalments paid—Payment, appropriation of—Court, duty of.

Where a decree directs payment of a certain sum of money by instalments, it is the duty of the Court, when instalments are paid, to appropriate them to the earliest instalment unpaid. The debtor cannot allow such earlier instalment to remain unpaid, unless at the time he makes the payment, the instalment was already barred by limitation. [p. 848, col. 1.]

First appeal from a decision of the First Class Subordinate Judge at Dharwar, in Dharkhast No. 399 of 1920.

Mr. *N. V. Gokhle*, for the Appellants.

Mr. *A. G. Desai*, for the Respondent.

JUDGMENT.—The plaintiff obtained a decree on an award on the 8th October 1915, whereby it was directed that the defendants should pay to the plaintiff Rs. 14,000 by eleven instalments that the first ten instalments were to be paid by annual instalments of Rs. 1,300 each, and the last instalment was to be one of Rs. 1,000; that the defendants should pay the instalment every year on 1st August to the plaintiff; that the first instalment was to be paid on 1st August 1916; that if the defendants failed to pay any two instalments out of the said instalments, the said two instalments should be paid within six months from the date of default to pay the second instalment; and that in case of failure to pay the said two instalments within six months accordingly, the plaintiff should recover the whole amount of the said two instalments and the future instalments that remained unpaid on that day and costs, by sale of the property mentioned in the deed of mortgage without possession.

The date of the mortgage on which the decree was passed was 8th September 1904. It is quite clear that any personal remedy against the mortgagor would be barred by limitation. The first instalment was paid on the 1st August 1916, but the second one not having been paid, the plaintiff applied in July 1918 for execution of the decree by selling a portion of the mortgaged property to realize the amount of the second instalment. The defendant contended that the property could not be sold unless two instalments were in arrears, and the matter came up to the High Court on appeal from the decision of the Subordinate Judge allowing execution to proceed: *Hanmant Timaji Desai v. Raghavendra Gururao Desai* (1). It was held that the application for execution was premature. But from the judgment of Mr. Justice Shah it might be inferred that the Court was of opinion that a suit might have been filed to recover Rs. 1,300, the instalment due, and in that suit a decree might be obtained for sale of the mortgaged property or sufficient to satisfy the payment of the instalment in arrear. With due respect, we doubt very much if that was a correct reading of O. XXXIV, r. 14, Civil Procedure Code.

But at present we are concerned with a later Darkhast taken out by the plaintiff by which he sought to recover the instalment which fell due on the 1st August 1917 by attaching other property of the defendant, namely, the decree which he had obtained against one Shrinivas Murhar in the Court of Haveri. The Judge said "the most important question which I have to decide is, therefore, whether plaintiff can proceed now against the persons of the defendants, or their property other than that mortgaged to him in Exhibit 4," and he found that the plaintiff was entitled to recover the amount claimed either from the persons of the defendants or from any of the property of their excepting the mortgaged property in Exhibit 4.

It was eventually found that the decree which was attached had been fully satisfied. Therefore, in the ordinary course, the Darkhast would fall to the ground. But the point decided against the defendants was that in the case of any one instalment remaining unpaid after the due date, the plaintiff could execute against the persons of the defendants or against any property belonging to them other than the mortgaged property. This is an important question, and it appears to us that it was wrongly decided by the Court below.

(1) 58 Ind. Cas. 221; 22 Bom. L. R. 650; 44 B. 981.

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It seems clear that where the decree only gives the mortgagee a remedy against the mortgaged property, the personal remedy on the money claim against the mortgagor being barred, the only way in which the mortgagee can recover his money is by sale of the mortgaged property. The decree directs that execution should only issue against the mortgaged property in the event of two instalments being in arrears for six months, and it may be that if one instalment remains in arrear, and the plaintiff may be running the risk of losing that instalment, he would be entitled to file a suit for the payment of that instalment, which could be recovered by sale of the mortgaged property; and it seems if the decree is construed strictly that would be the only way in which he could recover the last instalment, the others having been duly paid, since it could not be said that two instalments were in arrears, as was the sole condition under the decree on which the sale could be directed.

However, it is not necessary to decide that point at present. But it seems that although four instalments had been paid under the decree, the last three instalments had been credited to the instalments for 1918, 1919 and 1920, leaving the instalment for 1917 still unpaid. The result might be that recovery of that instalment, if the remaining instalments were paid according to due dates, would become barred entirely, and we do not think that that was the intention of the Court when the decree was drawn up. It would be the duty of the Court, when instalments are paid, to appropriate them to the earliest instalment unpaid. The debtor cannot allow such earlier instalment to remain unpaid, unless at the time he makes the payment the instalment was already barred by limitation. It seems to us, therefore, that this decree should be considered as if instalments up to 1919 had been paid, and the instalment for 1920 remained due. Any instalment paid hereafter will be appropriated according to date, so that as soon as two consecutive instalments are in arrears, then the plaintiff will be entitled to execute by sale of the mortgaged property. The appeal will be allowed and the Darkhast will be amended according to this judgment so as to show that the instalment for 1920 is in arrear, and not the instalment for 1917. The fresh Darkhast now filed should also be amended according to this judgment. The appellant to get costs of the appeal.

W. C. A.

Appeal allowed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2378 OF 1918.

December 6, 1921.

Present :—Mr. Justice Abdul Raoof and Mr. Justice Martineau.

BHAGAT RAM AND OTHERS—DEFENDANTS—APPELLANTS

versus

Musammat SAHIB DEVI—PLAINTIFF AND *Musammat* PARMESHRI—DEFENDANT—RESPONDENTS.

Hindu Law—Widow—Maintenance—Liability of purchaser of deceased husband's property.

Where a Hindu widow is entitled to receive maintenance out of the estate of her deceased husband, the person who has succeeded to the estate cannot, if he seeks to defraud the widow, by any device in the way of parting with the estate or changing its form, get rid of the liability which has come to him along with the advantage derived from his survivorship, and a transferee taking from him with reason to suppose that the transaction is one originating not in an honest desire to pay off debts, or satisfy claims for which the estate is justly liable, and which it cannot otherwise well meet but in a design to shuffle off a moral and legal liability would, as sharing in the proposed fraud, be prevented from gaining by it, but if, though he knows of the widow's existence and her claim, he buys upon a rational and honest opinion that the sale is one that can be effected without any furtherance of wrong, he has, as against the widow, acquired a title free from the claim which still subsists in full force as against the recipient of the purchase-money [p. 850, col. 1.]

Lakshman Ramchandra Joshia v. *Satyabhama Bai*, 2 B. 494; 1 Ind. Dec. (N. S.) 752, relied upon.

Ram Kunwar v. *Ram Dai*, 22 A. 326; A. W. N. (1900) 97; 9 Ind. Dec. (N. S.) 1248, *Bharatpur State* v. *Gopal Dei*, 24 A. 160; A. W. N. (1901) 207, *Manilal* v. *Bai Tara*, 17 B. 396; 9 Ind. Dec. (N. S.) 259, *Daulat Ram* v. *Champa*, 55 Ind. Cas. 28; 2 U. P L. R. (L.) 50; 32 P. W. R. 1920, *Parvati Devanna Jagadal* v. *Shrinivas Ramchandra Patil*, 55 Ind. Cas. 531; 22 Bom. L. R. 110, referred to.

Second appeal from a decree of the District Judge, Ambala, dated the 3rd May 1918, affirming that of the Subordinate Judge, Second Class, Ambala, dated the 11th February 1918.

BHAGAT RAM v. SAHIB DEVI.

Pandit *Sheo Narain*, R. B., for the Appellants.

Lala *Mehr Chand Mahajan*, for the Plaintiff-Respondent.

JUDGMENT.—This was a suit for recovery of maintenance and declaration of a charge on two shops. The property in question along with some other properties belonged to one Lok Nath. He died leaving *Musammat* Sahib Devi, the plaintiff a widow, and Jiwan Kishore, a son. The latter is the defendant No. 1 in the case. Jiwan Kishore was a boy of twelve years when his father died. He came into the possession of these two shops and the other property on his father's death. He alienated almost all the properties. The two shops were purchased by the defendants. A house which is already mortgaged, is the only property which remains in the possession of *Musammat* Sahib Devi, the widow. The family admittedly followed the Hindu Law, and the property is found to have been the self-acquired property of Lok Nath. The deceased was the vendee's *pandah* and the vendee knew the family well. The plaintiff, *Musammat* Sahib Devi, instituted the suit to claim maintenance as a charge on the two shops in question. The plea set up was that there existed no charge on the property under the Hindu Law and that the vendee was the *bona fide* purchaser for value. Both the Courts below have decreed the suit and the defendants have come up in second appeal to this Court.

The question to be determined is whether the maintenance can be made a charge on the property in the hands of the vendee, who claims to be the *bona fide* purchaser.

Pandit Sheo Narain has contended on behalf of the appellants that the maintenance of a Hindu widow is not a charge upon the estate of the deceased husband until it is fixed and charged upon the estate by a decree or by agreement, and the widow's right is liable to be defeated by a transfer of the husband's property to a *bona fide* purchaser for value even with knowledge of the widow's claim for maintenance, unless the transfer has been made with the intention of defeating the widow's claim. In support of this argument he has relied upon a large number of cases out of which the following may be mentioned:—

Ram Kunwar v. *Ram Dai* (1), *Bharatpur State* v. *Gopal Dei* (2), *Manilal* v. *Bai Tara* (3), *Parvati Devanna Jagadal* v. *Shrinivas Ramchandra Patil* (4) and *Daulat Ram* v. *Champa* (5).

On these authorities the crucial question to be determined is whether the vendee in this case was a *bona fide* purchaser. This was decided by the Trial Court in the negative. It found that the vendee was well-acquainted with the circumstances of the family; that the property inherited by Jiwan Kishore was only limited; that Jiwan Kishore incurred debts for immoral purposes; and that while purchasing the shops the vendee was warned that the widow had set up a claim for maintenance. The vendee admitted that he was so warned by Lala Munna Lal, Secretary, District Board, of the plaintiff's rights, but that he purchased the shops as they were situated adjacent to his house. From the above circumstances the Court of first instance concluded that the vendee was well-acquainted with the character of Jiwan Kishore also. Having taken the above circumstances into consideration the Court held that the vendee was not a *bona fide* purchaser. This finding of the Trial Court was challenged in appeal and the argument put forward was, firstly, that the vendee was a *bona fide* purchaser and, secondly, that Jiwan Kishore, defendant No. 1, had other property out of which he should support his mother. The lower Appellate Court agreed with the finding of the First Court and repelled the plea that the vendee was a *bona fide* purchaser.

It was strongly contended by Pandit Sheo Narain that there was only a general charge for maintenance on the property, and that there being no specific charge on the shops in question and the vendee being a *bona fide* purchaser was not affected by the notice of the fact that the widow had a claim for maintenance. The leading case on the point is admittedly the case of *Lakshman Ramchandra Joshi* v. *Satyabhama Bai* (6). The summary of the question decided in that case is given in

(1) 22 A. 326; A. W. N. (1900) 97; 9 Ind. Dec. (N. S.) 1248.
(2) 24 A. 160; A. W. N. (1901) 207.
(3) 17 B. 398; 9 Ind. Dec. (N. S.) 259.
(4) 55 Ind. Cas. 531; 22 Bom. L. R. 110.
(5) 55 Ind. Cas. 28; 2 U.P. R. L. (L.) 50; 32 P. W. R. 1920.
(6) 2 B. 494; 1 Ind. Dec. (N. S.) 752.

NARAYAN LAXMAN CHANDAVADKAR v. GOPALRAO TRIMBAK CHANDAVADKAR.

Gour's Hindu Law at page 447, section 87. Two of the rules, namely, (4) and (5) are thus stated there :—

"(4) That the right may, however, be lost by a transfer made for legal necessity or for a purpose binding upon the family in which case the question of notice is immaterial. Even a transferee who takes with a notice of the claim would hold it free from it."

"(5) That where the property is limited, the transferee is bound to enquire whether there is any claim for maintenance or residence, and his failure to do so would be tantamount to notice within the meaning of section 3 of the Transfer of Property Act and of the Trusts Act."

In the Bombay case referred to above Mr. Justice West, after discussing the case-law and the text, arrived at the following conclusion :—

"If he (vendor) sought to defraud her, he could not indeed by any devise in the way of parting with the estate, or changing its form, get rid of the liability which had come to him along with the advantage derived from his survivorship ; and Lakshman (vendee)—taking from him with reason to suppose that the transaction was one originating not in an honest desire to pay off debts, or satisfy claims for which the estate was justly liable, and which it could not otherwise well meet, but in a design to shuffle off a moral and legal liability—would, as sharing in the proposed fraud, be prevented from gaining by it; but if, though he knew of the widow's existence and her claim, he bought upon a rational and honest opinion that the sale was one that could be effected without any furtherance of wrong, he has, as against the plaintiff, acquired a title free from the claim which still subsists in full force as against the recipient of the purchase-money."

The Judges in that case remanded the case for a re-trial, as they thought that having regard to the observations made in their judgment the following questions required determination before the final decision of the case, namely, (1) was the sale justifiable under the circumstances? (2) Was it unfairly prejudicial to the widow's rights or remedies, and (3) Was the vendee's purchase made under such circumstances that the property passed to him exonerated from the liability to support the widow.

In the present case the findings recorded by the lower Appellate Court make it clear that the sale was not justifiable and that it had unfairly prejudiced the plaintiff's rights and that the vendee was not a *bona fide* purchaser. It is not necessary for us to consider in any detail the authorities relied upon by the respective parties, as the law is fully crystalised in the judgment of Mr. Justice West.

We accordingly uphold the decrees of the Courts below and dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 374 OF 1921.

January 26, 1922.

Present :—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Coyajee.

NARAYAN LAXMAN CHANDVADKAR —PLAINTIFF—APPELLANT

versus

GOPALRAO TRIMBAK CHANDAVADKAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Agreement to give in adoption—Consideration—Annuity, promise of—Agreement, validity of.

Where the consideration for an agreement to give a boy in adoption, is a promise to pay to the parent of the boy an annunity, such promise is sufficient to invalidate the agreement.

Second appeal from the decision of the District Judge, Nasik, in Appeal No. 198 of 1920, confirming the decree passed by the Subordinate Judge at Nasik, in Civil Suit No. 200 of 1919.

Mr. *G. S. Rao*, for the Appellants.

Mr. *Nadkarni* (with him Mr. *S. B. Shingne*), for the Respondents.

JUDGMENT.—Both the Courts have found in this case that the promise to pay annuity was the consideration for the agreement to give the boy in adoption. That would be sufficient to invalidate the agreement; and we need not consider the question

whether the payment of the annuity, if there had been good consideration for it, could be enforced against the heirs of Ganpatrao, although we may point out that the two decisions in *Balkrishna* v. *Janardan* (1) and *Babubhai* v. *Beharilal* (2) appear to be in conflict, and may require to be considered hereafter. The appeal, therefore, will be dismissed with costs.

W. C. A.

Appeal dismissed.

(1) 6 Bom. L. R. 642.
(2) 7 Bom. L. R. 686.

CALCUTTA HIGH COURT.
CIVIL REVISION CASES NOS. 512 AND 476 OF 1921.
December 20, 1921.
Present:—Mr. Justice Suhrawardy and Mr. Justice Cuming.
BAUL CHANDRA ADDYA—DEFENDANT—PETITIONER
versus
Sheikh ABDUL MATLEB—PLAINTIFF—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. XX, r. 4 (1)—Small Cause Court, judgment of—Judgment specifying points for decision and entering findings seriatim, whether proper—Suit to recover amount on basis of acknowledgment, whether cognizable by Small Cause Court—Provincial Small Cause Courts Act (IX of 1887), s. 25—Jurisdiction—No error of law—Interference by High Court, if competent.

Where a Small Cause Court Judge has in his judgment specified the points for decision and has entered his findings *seriatim* under each of the issues mentioned by him, he has complied with the provisions of O. XX, r. 4 (1), Civil Procedure Code. [p. 851, col. 1.]

A Small Cause Court is competent to try a suit to recover a certain sum of money on the basis of an acknowledgment. [p. 852, col. 1.]

A High Court will not interfere with a decree, if no error of law has been committed by the Small Cause Court within the meaning of section 25 of the Provincial Small Cause Courts Act. [p. 852, col. 1.]

Rules against an order of the Judge of the Court of Small Causes at Sealdah in Suit No. 4435 of 1920.

FACTS appear from the judgment.

Babu *Baranasibasi Mookerji* (with him Babu *Krishna Chandra Banerji*), for the Petitioner.—I attack the judgment of the learned Small Cause Court Judge as not being in accordance with law. The judgment does not satisfy the requirements laid down in O. XX, r. 4, clause (1). There must be indication in the judgment that the learned Judge has understood and considered all the points. Refers to *Malik Rahmat* v. *Shiva Prasad* (1). Will a simple 'yes' or 'no' amount to a decision? A decision is a judicial determination of a case.

[CUMING, J.—There is difference between a decision and reasons for a decision.]

Apart from that, I submit that in this case there has been a gross failure of justice. Is there any indication that the Judge looked into the account-books of the petitioner? Simple *ipse dixits* will not do. Moreover, I was not given an opportunity to examine the expert? The scope of section 25 of the Provincial Small Cause Courts Act is much wider than section 115 of the Civil Procedure Code. 'Defective procedure' also comes under section 25 of the Provincial Small Causes Courts Act. On plaintiff's own case it was not one for settled accounts, but for settlement of accounts, so the Small Causes Court has no jurisdiction to try this suit. See Article 31 of the Second Schedule to the Provincial Small Cause Courts Act. It is a suit for an account and not on account.

Babu *Fatitpaban Chatterji*, for the Opposite Party, did not appear.

JUDGMENT.

RULE NO. 476 OF 1921.

This Rule is directed against a decree of the Court of Small Causes at Sealdah. It is urged that the judgment passed by the learned Small Cause Court Judge is not in accordance with law.

The learned Judge has specified the points for decision and has entered his findings *seriatim* under each of the issues mentioned by him. We think he has complied with the provisions of O. XX, r. 4, clause 1.

The next point urged is with regard to the defendant not having been given a sufficient opportunity of calling a handwriting expert. There was an application for review before the learned Judge and the reason he has given in his judgment on that application affords a complete answer to this objection.

It is also argued that the present suit being one for account is not cognizable by the Small Cause Court. It appears from the judgment of the learned Judge that the

(1) 13 A. 533; A. W. N. (1891) 172; 7 Ind. Dec. (N. S.) 337.

plaintiff's case was that the defendant acknowledged the plaintiff's dues to be Rs. 522-1-6 for which the suit was brought. An issue was framed by the learned Judge that "did the defendant acknowledge the plaintiff's dues to be Rs. 522-1-6," and his decision on that issue is that the defendant acknowledged the plaintiff's dues to be Rs. 522-1-6. Such being the case, the Small Cause Court was quite competent to try this suit.

We are of opinion that the Court below has not committed any error of law within the meaning of section 25 of the Provincial Small Cause Courts Act so as to invite our intervention with the decree.

The Rule is discharged.

RULE No. 512 OF 1921.

The main Rule (No. 476 of 1921) being discharged this Rule is also discharged.

N. K.

Rules discharged.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 329 OF 1921.

March 23, 1922.

Present :—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Shah.

THE EAST INDIAN RAILWAY COMPANY—DEFENDANT—APPELLANT

versus

DAYABHAI VANMALIDAS—PLAINTIFF—RESPONDENT.

Railways Act (IX of 1890), Sch. II, cl. (m)—"Shawls," meaning of—Question as to meaning of word, whether question of law—Appeal, second.

The term "Shawls" in clause (*m*) of Schedule II to the Railways Act, refers to Indian Shawls of special value, and cannot be taken to apply to articles of inferior value. [p. 855, col. 2.]

The question whether the term "Shawl" in clause (*m*) of Schedule II to the Railways Act is not used in a restricted sense, is a question of law, and the High Court can, in second appeal, consider what is the proper meaning of the word. [p. 853, col. 1.]

Second appeal from a decision of the Assistant Judge at Ahmedabad, in Appeal No. 184 of 1918, confirming a decree passed by the First Class Subordinate Judge at Ahmedabad, in Civil Suit No. 342 of 1916.

Mr. *Campbell* (with him Messrs. *Crawford, Bayley & Co.*), for the Appellant.

Mr. *G. N. Thakor*, for the Respondent.

JUDGMENT.

MACLEOD, C. J.—This is an appeal from the decree of the Assistant Judge of Ahmedabad confirming the decree passed against the original first defendant by the First Class Subordinate Judge.

The plaintiff sued the East Indian Railway Company and the Bombay Baroda and Central India Railway Company to recover Rs. 877-11-7, the value of a bale of goods known as Malidas of German make, which was consigned in October 1915 by the plaintiff's agent from Howrah to Ahmedabad, and lost in transit. The first defendant Company, relying on the fact that the plaintiff in his letter of the 23rd December 1915 described the goods in the bale as 170 pieces Shawls, contended that they came within the excepted articles referred to in section 75 of Act IX of 1890 and as the consignor had failed to describe the nature of the goods and pay the proper rate for them, the Company was not liable.

The evidence shows that the goods were described as Malidas in the plaintiff's account-books, and that each piece was worth Rs. 5-5-0. The Subordinate Judge, relying on the decision in *Sarat Chandra Bose* v. *Secretary of State for India* (1), held that the term 'Shawls' in the Second Schedule to the Indian Railways Act did not apply to these cheap goods which were not even manufactured when the Act of 1854 was passed, and so section 75 did not apply. The term "Shawls" in the Schedule was meant to apply to valuable Shawls from Kashmir and other places. Accordingly the suit was decreed against the first defendant Company and dismissed as against the second defendant Company but without costs. In appeal the Assistant Judge said :

"The accounts of plaintiff and his agent show that the goods consigned were Malidas and not Shawls. The goods do not fall under section 75, Schedule II. There is ample other evidence to support the same

(1) 14 Ind. Cas. 726; 39 C. 1029

conclusion. The construction of the law is not favourable to defendant according to decided cases considering the price and the quality of goods."

We have had before us a specimen of the goods contained in the missing bale. It is obviously a Shawl within the ordinary meaning of the word as used in the English language.

It was argued that both Courts had found as a question of fact that the goods were not Shawls and that being so no second appeal lay.

Exactly the same question arose in *Sarat Chandra Bose* v. *Secretary of State for India* (1) which was a second appeal and the Court considered that the real question at issue was whether the word "Shawls" in the Second Schedule of the Indian Railways Act was meant to apply to all Shawls, or only Shawls of a particular material and value, and not whether 'Alwans' were or were not Shawls. The term 'Shawls' would appear at first sight to be used generally as applicable to all Shawls, but it is a question of law whether in its particular context it was not used in a restricted sense.

Now the object of section 75 was to protect the Railway Companies from claims made in respect of loss or damage to articles of a special value, unless the nature of such articles had been previously declared and a special rate paid for the carriage thereof. The words "special value" are misleading as many of the articles detailed in the Second Schedule have no special value and protection was really necessary on account of their special nature, so that the Railway Companies might be put on notice to take precautions to ensure their safe transit. Some of the articles enumerated can be of great value within a small compass, others though large can be easily damaged. There is no general principle applicable to all except that they require special care by the Railway Company when performing the contract of carriage. An half anna postage stamp, a double bass, a diamond, a watch must all be declared provided the value of the package is over 100 rupees, so that the intrinsic value is no test. The plaintiff, therefore, must rest his case on the contention that the word 'Shawls' in the Second Schedule must mean Shawls of a particular kind. It was suggested that when the word was used in the first Indian Railways Act of 1854, only Indian Shawls could have been referred to, and that the only Indian Shawls known in those days were valuable Kashmir or Persian Shawls. That is no doubt correct as Shawls are not mentioned among the articles of special value in the corresponding section of the Carriers Act of 1830.

It was unfortunate when the Indian Railways Act of 1890 was passed that it was not recognised, that all kinds of imported Shawls, whether valuable or of a cheaper quality, might be given to the Railway Companies for carriage, so that the retainer of the general term "Shawls" in the Second Schedule might lead to a demand by the Railway Companies that such Shawls should be declared. Though at one time I was of opinion that a great deal could be said to justify that demand, and that the obvious way to remove the difficulties which arise in cases like the present one was to amend the Second Schedule so as to make it clear that only valuable Indian Shawls were intended to be included therein, I am not prepared to differ from the view taken by my brother Shah which is in accordance with the decision in *Sarat Chandra Bose's case* (1), and opposed to the view of Stuart, J. in *Shudarshan* v. *East Indian Railway Company* (2). It cannot be denied that this case of cheap imported Shawls is much like any other case of woollen goods, and it would not naturally occur to the consignor that it would have to be declared, in order that, if lost, its value might be recovered. It would be certainly desirable that the term "Shawls" in the Second Schedule should now be amended so as to make it clear that only Shawls of special value are intended to require to be declared. I should think it would then be difficult for the Railway Companies to make out any good grounds for including Malidas in the Schedule.

I think both appeals should be dismissed with costs.

SHAH, J.—The only question in this second appeal is whether the piece goods contained in the missing parcel were

(2) 52 Ind. Cas. 644; 42 A. 76; 17 A. L. J. 1031.

'Shawls' within the meaning of Schedule II of the Indian Railways Act IX of 1890.

The importance of the question is that if the parcel contained 'Shawls' the Railway Company would not be liable for the loss, as the declaration required by section 75 of the Indian Railways Act was not made by the consignor. On the other hand if the goods were not Shawls, the Company would be liable for the loss of the goods delivered for carriage under section 72 of the Indian Railways Act.

The lower Courts have held that the articles contained in the parcel, of which a sample has been produced in the case, were not 'Shawls.'

It has been urged on behalf of the appellant Company that the word 'Shawls' is used in a general and wide sense, and that it includes oblong pieces of any material which can be used as 'Shawls' though cheap and not satisfying the requirement of the word 'Shawl' in a restricted sense as used and understood in India. The dictionary meaning of the word as understood in the English language is relied upon as indicating the sense in which the word is used in the Schedule. The appellant relies upon the observations in *Shudarshan* v. *East Indian Railway Company* (2) and contends that the view taken in *Sarat Chandra Bose* v. *Secretary of State for India* (1), of the meaning of the word 'Shawls' is erroneous.

On behalf of the respondent it is urged that it is really a question of fact and that the finding of the lower Appellate Court based on the evidence in the case that the sample before the Court is not a 'Shawl' within the meaning of the Schedule ought to be accepted in second appeal. It is further urged that in view of the scope and object of section 75, the restricted meaning of the word 'Shawl' should be accepted. The respondent relies upon the decision in *Sarat Chandra Bose's case* (1).

After a careful consideration of the arguments on both sides, I have come to the conclusion that the question set forth at the outset should be answered in the negative.

It is in a sense a question of fact whether the particular sample before the Court is a 'Shawl' or not. But in the present case the answer depends upon the meaning of the word 'Shawl.' If the word is interpreted in a restricted sense the article in question would not be a 'Shawl.' If it be interpreted in the wider and more comprehensive sense, it would be a 'Shawl.' Under the circumstances it seems to me that it cannot be treated as a pure question of fact, and that it is necessary for us to consider in second appeal as to what is the proper meaning of the word 'Shawl' as used in Schedule II.

The sample in question is an oblong piece worth Rs. 5-5-0, probably made of rough wool or of mixed material of wool and cotton. It appears to be an imitation of a real Shawl with the marked difference in the price as well as the material of which it is made. The word 'Shawl' is the same as the Persian word 'Shal' and it is commonly used in the same sense in almost all the Indian languages. It is used by the Indian Legislature in an Act applicable to British India. The language of the Act is English. The meaning of the word in Johnson's Persian Dictionary is given as follows :—

"A Shawl or mantle, made of very fine wool of a species of goat common in Tibet. A coarse mantle of wool and goats' hair, worn by *dervishes*."

The meaning of the word in English is thus stated in Webster's Dictionary :—

"A square or oblong cloth of wool, cotton, silk or other textile or netted fabric used especially by women as a loose covering for the neck and shoulders: Indian Shawl is described as a kind of rich Shawl made in India from the wool of the Cashmere goat. It is woven in pieces, which are sewed together."

The word is more fully dealt with in Murray's Dictionary and I shall quote only two meanings of the word as given there which are material for the present purpose :—

(1) "An article of dress worn by Orientals (commonly as a scarf, turban, or girdle), consisting of an oblong piece of a material manufactured in Kashmir from the hair of the Tibetan 'Shawl-goat.'"

(2) "As the name of an article of clothing worn in Europe and the West, chiefly by women as a covering for the

shoulders or, sometimes for the head, originally applied to the imported 'Cashmere Shawl' but in later use extended to denote an oblong or square piece of any textile or netted fabric, whether of wool, silk, cotton or mixture of these."

It would appear that in Persian as well as in the Indian languages the word has a limited and specific meaning which would exclude the sample such as we have in the present case from its scope. The Indian Legislature, however, has used the word in an Act in the English language. Though it is not improbable that it may have been used by the Legislature as an Indian word in the sense given to it in the Indian language, we have to see what its meaning is in the English language. The first meaning as given in Murray's Dictionary in substance is the same as that in the Indian languages. The second meaning as given above is much wider and would include in its scope any oblong piece of cloth made of silk, wool, cotton or mixture thereof. When the word has two meanings, one of a restrictive nature and the other of a comprehensive character, and when we have to decide which of the two meanings would be appropriate, it seems to me that it is necessary to turn not only to the context in relation to which the word is used but also to the scope and object of section 75 and to the reason of the rule contained therein. I think it is open to the Court to consider these elements in deciding which of the two meanings is to be accepted as representing the true meaning of the word used in the Schedule. The section is enacted to lay down certain conditions as to articles of special value which must be fulfilled before any liability can be attached to a Railway Administration for the loss thereof. The general responsibility of the Railway Administration in respect of the goods delivered for carriage is defined by section 72: and section 75 contains an exceptional rule applicable to certain articles of special value mentioned in the Second Schedule. It is clear to my mind that 'Shawls' in the comprehensive sense given thereto in the English language would not necessarily be an article of special value. A Shawl in restricted sense is clearly an article of special value. It makes no difference to my mind as to how or where the article is manufactured. But what does matter to my mind is the stuff of which it is made. The price of the article would not directly matter: but it would be relevant as indicating the real nature of the material used. The reason of the rule contained in section 75 can apply to 'Shawls' in the restricted sense and not to Shawls in the comprehensive sense of the term. I, therefore, draw the inference, and I think it is an inference open to the Court to draw in view of the origin and use of the word as also its apparent ambiguity in relation to the context, that the word 'Shawls' is used there in the restricted sense as indicated in Murray's Dictionary.

It is clear that the article in question does not satisfy that description, and that the conclusion reached by the lower Courts that the missing parcel did not contain 'Shawls' is right.

It is not necessary to express any opinion as to whether 'Alwans' and 'Malidas' can be 'Shawls' in this restricted sense. In order to be able to decide this question, I should like to know more about the meanings attached to these words by the dealers in different markets than it is possible to know on the present record. Taking the dictionary meanings of these terms in Urdu 'Alwans' and 'Malidas' may be Shawls in the proper sense of the word. I do not think, and it is not contended, that the use of the word 'Malidas' by the plaintiff in his accounts and of the word 'Shawls' in the correspondence can affect the conclusion that the article in question is not a 'Shawl.'

I have considered the observations of Stuart, J., in *Shudarshan* v. *East Indian Railway Company* (2). The actual decision in that case has no bearing upon the point arising in this case. It may not matter whether a particular Shawl is a machine-made or hand-made article. The learned Judge in that case had to decide whether the word 'lace' as used in the Schedule included machine-made lace also. The observations of the learned Judge on the decision of the Calcutta High Court in *Sarat Chandra Bose* v. *Secretary of State for India* (1), as to the meaning of the word 'Shawls' were not, strictly speaking, necessary for the decision in that case and while I agree that the

Court has to consider the meaning of the word used by the Legislature and not to look to the discussions and views of the legislative authorities, I do not think that the Court is absolved from the duty of determining which of the two meanings, which the word may bear, is to be accepted. The origin of the word 'lace' is different. In my opinion different considerations arise in determining the true meaning of 'Shawls' as used in the Schedule. There may or may not be any ambiguity about the meaning of the word 'lace': but it does not follow that there is no ambiguity about the meaning of the word 'Shawls.' Where the question is whether the word 'Shawl'—a word of Indian origin and of extensive use in India as an Indian word—has one meaning or the other, the considerations to which I have referred naturally arise. On the whole I am satisfied that the conclusion reached in *Satat Chandra Bose's case* (1) as to the meaning of the word 'Shawls' is right.

I would, therefore, confirm the decree of the lower Appellate Court and dismiss the appeal with costs.

In the view I take of Second Appeal No. 321 I think that the Second Appeal No. 363 should also be dismissed with costs. It relates only to the order of costs in the Trial Court: and I see no good reason to disturb that order.

W. C. A.

Appeals dismissed.

LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 341 OF 1921.

January 24, 1922.

Present:—Mr. Justice Martineau.

SUNDAR DAS AND OTHERS—PLAINTIFFS—PETITIONERS

versus

PURAN SINGH—DEFENDANT—RESPONDENT.

Contract Act (IX of 1872), s. 62—Novation—Insufficiently stamped hundi *given in renewal of prior* hundi—*Creditor, whether can fall back upon prior* hundi.

Where an insufficiently stamped *hundi* is given in renewal of a prior *hundi* and a suit on the basis of the subsequent *hundi* is not maintainable, the creditor can fall back upon the prior *hundi*. Section 62 of the Contract Act is no bar to his doing so. [p. 857, col. 1.]

Bhagat Ram-Ganpat Rai v. *Chhajju Ram*, 44 Ind. Cas. 886; 15 P. W. R. 1918, distinguished.

Jagan Prasad v. *Indermal*, 23 Ind. Cas. 589; 36 A. 259; 12 A. L. J. 361, *Kuttayan Chetty* v. *Palaniappa Chetty*, 27 M. 540, relied upon.

The test in a case of this kind is whether the original cause of action exists independently of the *hundi* subsequently executed, if it does the creditor can ordinarily sue on it, otherwise not. [p. 857, col. 1.]

Sheikh Akbar v. *Sheikh Khan*, 7 C. 256; 8 C. L. R. 528; 3 Ind. Dec. (N. S.) 573, relied upon

Petition, under section 25 of Act IX of 1887, for revision of a decree of the Judge, Small Cause Court, Amritsar, dated the 19th February 1921.

Lala *Mehr Chand Mahajan*, for the Petitioners.

Lala *Hukam Chand*, for the Respondent.

JUDGMENT.—The plaintiffs sued the defendants on a *hundi* for Rs. 300. The *hundi* was found to be insufficiently stamped, and the plaintiffs asked to be allowed to amend their plaint so that they might sue on the original consideration. Leave was refused by the Trial Court, but was granted by this Court in revision, and the plaintiffs accordingly amended their plaint and sued on a former *hundi*, which was for Rs. 600 and bears an endorsement to the effect that Rs. 300 had been paid in cash and a new *hundi* executed for Rs. 300.

The Judge of the Small Cause Court has dismissed the suit, holding, on the authority of *Bhagat Ram Ganpat Rai* v. *Chhaju Ram* (1), that the plaintiffs cannot fall back on the prior *hundi*. They have applied to this Court for revision.

In the case relied on by the learned Judge, where an insufficiently stamped *hundi* had been executed in lieu of the balance due on a mortgage-deed, which was cancelled by an endorsement to the effect that the whole of the mortgage money had been received in full, it was held that the plaintiff could not recover the sum due to him on the basis of the mortgage-deed.

In *Jagan Prasad* v. *Indermal* (2), however, which is a case exactly in point, it was held,

(1) 44 Ind. Cas. 886; 15 P. W. R. 1918.
(2) 23 Ind. Cas. 589; 36 A. 259; 12 A. L. J. 361.

that where an insufficiently stamped *hundi* was given in renewal of a prior *hundi* the plaintiff could fall back on the prior *hundi*.

The general principle to be followed is enunciated in *Sheikh Akbar* v. *Sheikh Khan* (3). The test in a case of this kind is whether the original cause of action exists independently of the *hundi* subsequently executed; if it does the creditor can ordinarily sue on it, otherwise not. In the present case the *hundi* for Rs. 600 gave the plaintiff a cause of action which is quite independent of the subsequent *hundi*, and I do not see why the suit on the former *hundi* should not be maintainable.

Counsel for the respondent contends that section 62 of the Contract Act, which provides that if the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed, debars the plaintiff from maintaining the claim on the prior *hundi*. I cannot agree with this contention. In *Kuttayan Chetty* v. *Palaniappa Chetty* (4), it was held that the giving of a *hundi* in payment of the price of goods sold operates as a payment, only if the *hundi* is honoured, and that if the *hundi* is dishonoured the right to sue on the original cause of action is revived. So in the present case the giving of the second *hundi* would have operated as a discharge of the first one only if the new contract could have been legally enforced. As the plaintiff cannot sue on the second *hundi* owing to its not being properly stamped he can fall back on the first one, and section 62 of the Contract Act is not a bar to his doing so.

I accept this application, set aside the decree of the lower Court, and remand the case to that Court under O. XLI, r. 23, Civil Procedure Code, for fresh disposal according to law. The Court-fee on the application will be refunded. Other costs will be costs in the case.

R. N.

Application accepted.

(3) 7 C. 256; 8 C. L. R. 528; 3 Ind. Dec. (N. S.) 713.

(4) 27 M. 540.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 538 OF 1921.

January 31, 1922.

Present:—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Coyajee.

NAGABHATTA TIMMANBHATTA BOPPANHALLI—PLAINTIFF—APPELLANT

versus

NAGAPPA SUBBAYA HAVIK AND ANOTHER—DEFENDANTS—RESPONDENTS.

Sale in execution—Suit against purchaser to recover property—Sale not set aside—Suit, whether maintainable.

A suit to recover from a purchaser at a Court-sale the property purchased by him is not maintainable until the Court-sale is set aside, unless it is a nullity, even though the suit relates to property included in the sale which is outside the suit and which by mistake was included in the decree. [p. 858, col. 1.]

Appeal from the decision of the District Judge, Kanara, in Appeal No. 116 of 1919, reversing the decree passed by the Subordinate Judge at Sirsi, in Civil Suit No. 282 of 1918.

Mr. *R. A. Jahagirdar*, for the Appellant.

Mr. *Nilkant Atmaram*, for Respondent No. 1.

Mr. *G. P. Murdeshwar*, for Respondent No 2.

JUDGMENT.—The plaintiff sued to recover from the second defendant the price of the materials of the house mentioned in the plaint, and also to recover possession of the house site and Hittal, etc., appertaining thereto, the said properties having been purchased by defendant No. 2 at a Court sale held at the instance of defendant No. 1 in Darkhast No. 295 of 1914. The suit was decreed in the Trial Court, but was dismissed in appeal. The facts, as set out by the learned District Judge, show that one Ramayya, the husband of the plaintiff, owned eight properties. He mortgaged seven of them to one Venkata Bhatta and four years later he mortgaged all the eight properties to one Tammanna Bhatta. In 1910, the plaintiff filed a suit to redeem this latter mortgage, and in her plaint she recited the fact of the former mortgage, but by mistake in describing the property mortgaged to Venkata Bhatta, she included the eighth property, which was only subject to the second mortgage. In the redemption suit a decree was passed

that the plaintiff should pay to Rudrappa, the transferee from Venkata Bhatta, who had been made a party, the amount due under the first mortgage and costs by annual instalments, with liberty to bring the mortgaged property to sale in default. In the decree was included the eighth property, which, as a matter of fact, was not mortgaged originally to Venkata Bhatta. As the plaintiff did not pay her instalments, the first defendant (her husband Rudrappa having died) took out execution and brought all the property to sale. At the Court-sale the second defendant was the purchaser.

This is not a suit to set aside that sale, but a suit to recover from the purchaser what he had purchased at the Court-sale, and it is difficult to see how such a suit could lie until the Court sale is set aside, unless it could be considered as a nullity. Now it was entirely the fault of the plaintiff that she allowed the decree to be passed, because she must have been aware that the eighth property was entered in the decree for redemption which she obtained with regard to the first mortgage, and she has allowed the Court to sell the eighth property in execution of that decree. So that on the question of mistake, it is perfectly clear that the plaintiff was alone responsible for the eighth property having been sold. It is difficult then to see how she could say that the sale was a nullity. If necessary it would have to be held that the plaintiff was not even entitled to take such a plea.

What is the proper view in such a case when objections are raised to a Court sale, was clearly laid down in *Malkarjun* v. *Narhari* (1). In that case the Court issued a notice to the wrong party, and not to the party against whom execution was applied for. It was then argued that the Court had no jurisdiction to sell the property, but the Privy Council at page 347 held that—

"[Although the Court made a mistake], a Court has jurisdiction to decide wrong as well as right. If it decides wrong, the wronged party can only take the course prescribed by law for setting matters right and if that course is not taken the decision, however wrong, cannot be disturbed. The real complaint here is that the Execution Court construed the Code erroneously. Acting in its duty to make the estate of Nagappa available for payment of his debt, it served with notice a person who did not legally represent the estate, and on objection decided that he did represent it. But to treat such an error as destroying the jurisdiction of the Court is calculated to introduce great confusion into the administration of the law. Their Lordships agree with the view of the learned Chief Justice that a purchaser cannot possibly judge of such matters, even if he knows the fact; and that if he is to be held bound to inquire into the accuracy of the Court's conduct of its own business no purchaser at a Court-sale would be safe. Strangers to a suit are justified in believing that the Court has done that which by the directions of the Code it ought to do."

Then at page 352 their Lordships say:

"The Limitation Act protects *bona fide* purchasers at judicial sales by providing a short limit of time within which suits may be brought to set them aside. If the protection is to be confined to suits which seek no other relief than a declaration that the sale ought to be set aside, and is to vanish directly some other relief consequential on the annulment of the sale is sought, the protection is exceedingly small."

Obviously, then, the plaintiff being perfectly well aware of the facts, being aware that the Court had sold the property which was not contained in Venkata Bhatta's mortgage, had thirty days from the date of the sale to apply to have the sale set aside.

There is no question of fraud in this case, and, therefore, Art. 95 of the Indian Limitation Act cannot possibly apply. It has been argued that the case comes under Art. 96 on the ground that the plaintiff is seeking for relief on the ground of mistake. But although that Article might apply to the plaintiff's suit as originally framed it cannot apply to this suit as it ought to have been framed seeing that the Court-sale has to be set aside, and cannot be considered as a nullity. Therefore, the case is governed by Art. 12 of the the First

(1) 25 B. 337; 2 Bom. L. R. 927; 5 C. W. N. 10; 27 I. A. 216; 10 M. L. J. 368; 7 Sar. P. C. J. 739 (P. C.).

Schedule of the Indian Limitation Act. The appeal, therefore, must be dismissed with costs.

W. C. A. *Appeal dismissed.*

PATNA HIGH COURT.

FIRST CIVIL APPEALS NOS. 89 AND 116 OF 1919.

July 6, 1922.

Present:—Sir Dawson Miller, KT., Chief Justice and Justice Sir B. K. Mullick, KT.

IN F. A. No. 89 OF 1919.

Rani CHATTER KUMARI DEBI—APPELLANT

versus

Babu PRATAPDHUJ SINGH *alias* JUNG BAHADUR SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

IN F. A. No. 116 OF 1919.

Babu HAR SHANKER SINGH AND OTHERS—DEFENDANTS NOS. 2 TO 4—APPELLANTS

versus

Rani CHATTER KUMARI DEBI—PLAINTIFF

AND

Babu PRATAPDHUJ SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Grant of waste land—Non-payment of rent until land is cultivated not illegal—Immediate payment of rent not necessary to create tenancy—Bengal Tenancy Act (VIII of 1885).

There is nothing in the Bengal Tenancy Act which prevents the granting of waste land to a tenant with a stipulation that no rent shall be payable until the land is brought under cultivation. [p. 864, col. 1.]

Immediate payment of rent is not an essential factor in the creation of a tenancy. [p. 864, col. 1.]

Lyons v. *Betts*, 13 W. R 94 and *Deo Nandan Pershad* v. *Meghu Mahton*, 34 C. 57; 5 C. L. J. 181; 11 C. W. N. 225, distinguished.

First appeal from a decison of the Subordinate Judge, Mozufferpore.

Messrs. *P. N. Singh* and *A. P. Upadhya* and *K. Sahay*, for the Plaintiff-Appellant.

Messrs. *S. M. Mullick*, *B. N. Mitter* and *H. N. Prasad*, for the Defendants-Respondents.

JUDGMENT.

MILLER, C. J.—In this case both the plaintiff and some of the defendants have preferred appeals from the decision of the Subordinate Judge of Muzaffarpur dated the 24th January 1919. The question for decision is whether the defendants Nos 2 to 6 have acquired a *raiyati* interest in the lands in suit or whether the plaintiff is entitled to possession of them as her *bakasht* lands.

The plaintiff is the widow of the late Raja Mohan Bikram Sah, proprietor of the Ramnagger Raj, who died without male issue in 1912. On her husband's death the plaintiff succeeded to his estate, included in which are the two villages of Manchangwa and Ghoraghat. From the year 1889 these villages together with others with which we are not concerned were leased under three successive registered *ticca patta* granted by the late Raja. The *ticcadar* under the first lease was one Dowlat Singh who held for a period of five years which expired in September 1894. The second lease which was for a period of 10 years from September 1894 to September 1904 was granted to Babu Pratapdhuj Singh also known as Jung Bahadur Singh, the defendant No. 1 in the suit. The third was for a term of 11 years in continuation of the previous one in favour of the defendant No. 1 and expired on the 23rd September 1915. The leases provided that the lessee should not, without the permission of the Raja Sahib, dismiss the Patwari of the villages already holding appointment who, it appears, was employed and paid by the Raja, and if the lessee should employ his own Matsuddi in writing collection papers, etc., he was to furnish a copy of them to the lessor, obtaining a receipt for the same from the registered Patwari, and to file six monthly *jamabandi* papers in the office of the Raja. Without permission of the Raja Sahib the lessee was not to settle lands at a low rate of rent with his dependents or any *raiyat*. Otherwise there were no special features in the lease calling for attention.

It is not contended that the *ticcadar* could himself acquire any *raiyati* interest in any of the demised property during the term of the lease. It is also not disputed that apart from the restriction as to not settling the lands at a low rate the *ticcadar* could settle tenants upon any part of the land other than the landlord's *serait*.

When the last lease expired in 1915 the plaintiff took over possession from the *ticcadar* Pratapdhuj Singh and claimed that the lands in dispute, amounting to about 110 *bighas* altogether in the two Mauzas, which were then occupied by the defendants No. 2 to 6, were really the *bakasht* of the *ticcadar*, and, as such returned into her direct possession as *malik* on the termination of the lease.

It is the plaintiff's case that the lands were never in fact settled with the defendants Nos. 2 to 6, or, if they were, that the settlement was merely colourable and made by the *ticcadar* for his own benefit in the *farzi* names of the defendants Nos. 2 to 6, so that he might retain a *raiyati* interest in the disputed lands at a low rate of rent after his lease terminated.

The defendant No. 1 disclaims all interest in the disputed lands and denies that the other defendants were his *farzidars*. It is the defendants' case that about 32 *bighas* odd in Manehangwa and 15 *bighas* odd in Ghoraghat were the ancestral *kaimi* holding of the defendants Nos. 2, 3 and 4 who form a joint family and that these lands were recorded in the names of their respective fathers in the Record of Rights prepared at the Cadastral Survey and Settlement operations in 1893, having been in their family before the defendant No. 1 acquired any interest in the land. These three defendants further acquired by settlement from Pratapdhuj Singh, the *ticcadar*, a further plot of 3 *bighas* and some odd *cottahs* in Manehangwa in 1905. In July of the same year Munder Singh, now deceased, the father of the defendants Nos. 3 and 4, endeavoured to obtain some Parti lands in the Mauzas from the *ticcadar* for the purpose of grazing his bullocks but without success. He thereupon applied to the Raja, with whom he was on friendly terms, to intercede with the *ticcadar*. The Raja thereupon issued a Parwana dated the 25th July 1905 addressed to Pratapdhuj Singh requesting him to arrange that Munder Singh should get about 20 to 25 *bighas* of Parti land for grazing his plough bullocks and storing straw, adding that: "If, at any time, the said Babu bring the said Parti land under his cultivation contrary to these terms, then you can realise from the said Babu a fair and proper rent for the said Parti land." On receipt of this document Pratapdhuj Singh told the Patwari Amar Lall, who, as already stated, was a Raj servant, to settle some lands with Munder Singh on the terms mentioned in the Parwana which accordingly was done. In fact the land settled with Munder Singh in this manner was altogether between 38 and 39 *bighas* in the two villages. No rent was to be paid for it, but if it should be brought under cultivation then a fair rent was to be assessed. The defendants Nos. 2, 3 and 4 thus came to have altogether a holding of about 93 *bighas* in the two Mauzas and this land has been recorded in their names in the Record of Rights prepared at the Revisional Settlement and finally published in 1916. The remainder of the disputed land, amounting to about 17 *bighas*, was settled with the defendants Nos. 5 and 6 by the *ticcadar* in small plots at different times between the years 1899 and 1913. For all this land, except that which was settled in accordance with the terms of the Parwana, rent was payable by the tenants to the *ticcadar* and the sum is in each case recorded in the Record of Rights.

During the Revisional Settlement operations which began before the last *ticca* lease terminated, the plaintiff objected to the lands being recorded in the names of the defendants as *raiyots* and claimed them as *ticcadars bakasht*, contending that the defendants were merely the *farzidars* of the *ticcadar*. The objection was heard in February 1914 by the Khanapuri Officer who, after taking evidence on behalf of both parties, dismissed the objection. His order was subsequently confirmed by the attestation officer. An objection by the plaintiff under section 103A of the Bengal Tenancy Act was subsequently filed and was heard before the Assistant Settlement Officer in May 1915. That officer, after hearing the evidence, dismissed the petition and the names of the defendants were entered as *raiyats* in the Record of Rights finally published in January 1916.

At the trial the plaintiff did not seriously dispute the fact that the lands had been settled with the defendants Nos. 2 to 6 and no serious attempt appears to have been made to rebut the presumption arising from the earlier Record of Rights pub-

lished in 1898, after the Cadastral Survey, which recorded the 50 *bighas* as the *kaimi kasht* of the ancestors of the defendants Nos. 2 to 4. She contended, however, that the settlement was a *farei* transaction for the benefit of the *ticcadar* and that the lands, and especially those more recently settled, were cultivated by the servants of the *ticcadar* and not by the other defendants. She also questioned the authenticity of the Parwana issued by the Raja in 1905 and disputed the *bona fides* of the settlement alleged to have been made in consequence thereof. She also contended that as no rent had been settled for what may be called the Parwana lands the relationship of landlord and tenant had not been created between the parties with respect to these lands. As the lands recorded in the Cadastral Survey as the *kasht* of the defendants' ancestors were not settled with them by the defendant No. 1, it was suggested that Dowlat Singh, the *ticcadar* under the first lease, granted by the Raja for the years 1889 to 1894, was merely the servant and *benamidar* of Pratapdhuj Singh and that the settlement was made by Dowlat Singh in the interests of Pratapdhuj.

The learned Subordinate Judge dismissed the suit as to all the lands except the 30 *bighas* of Parti land settled with the defendants Nos. 2, 3 and 4 in pursuance of the Parwana of 1905 for which he gave a decree in favour of the plaintiff.

From this decison the defendants Nos. 2, 3 and 4 have appealed and contend that the learned Subordinate Judge has gone wrong both in law and fact in holding that no proper settlement of these lands was made with them. The plaintiff has also appealed and contends that the defendants Nos. 2 to 6 were the *farzidars* of the defendant No. 1 and further that the settlement by the latter was contrary to the terms of the *ticca patta* executed in his favour and is not binding on the plaintiff.

It will be convenient to deal first with the plaintiff's appeal which is numbered 89 of 1919.

Apart from the Parwana lands which were settled in 1905, and for which the plaintiff has got a decree in her favour, it will be convenient to remember that the lands, the subject of the plaintiff's appeal, consist of (1) 50 *bighas* or thereabouts claimed as the ancestral *kasht* of the defendants Nos. 2, 3 and 4, which may be referred to as the ancestral lands, and, (2) 3 *bighas* and some odd *cottahs* settled with the defendants Nos. 2, 3 and 4 by the defendant No. 1 in 1905 and about 18 *bighas* settled with the defendants Nos. 6 and 7 at different times between 1889 and 1913.

In support of her contention that the lands were in fact cultivated by, or on behalf of, the *ticcadar* the plaintiff called seven witnesses whose evidence-in-chief was of the briefest description and was to the effect that the defendants Nos. 2 to 4 and their fathers before them were on friendly terms with the *ticcadar* and that the land was in possession of the *ticcadar* and not of the other defendants. Some of them further stated that the defendants Nos. 5 and 6 were servants of the defendant No. 1. None of these witnesses resided in the villages in question and most of them were servants of the plaintiff. It is manifest from their cross-examination that they were deposing to facts of which they had no real knowledge. Most of them had never been near the disputed land and had to admit that they knew nothing about the affairs either of the defendant No. 1 or the other defendants. One of them Raghubir Missir had been on the disputed land once only. At that time he said the land was vacant and he had never seen the defendant No. 1 there. Another of them, Radha Mohan Lal, says he had been in these villages on three occasions for a short time, that he first came to know of the dispute in 1916, that he cannot say who was working as *kashtkar* on the disputed land, and he did not know on whose behalf the lands were being worked. Another of them, Dip Narain Lal, says he made no enquiries as to who was in possession of the disputed lands but that another man named Elahi Khan had made enquiries and from that it transpired that the defendant No. 1 was in possession. This witness had never been on the disputed land himself nor had he seen the defendant No. 1 there and it is obvious that he had no first-hand knowledge

of the matters in dispute. The evidence of the other witnesses was even of less value. This evidence was rejected by the learned Subordinate Judge and, in my opinion, he could not possibly have done otherwise. There was a volume of evidence both documentary and oral to show that the defendants Nos. 2 to 6 and not the defendant No. 1 were the real occupiers. The Record of Rights is also in their favour and it is sufficient to say that the plaintiff has entirely failed to make out a case that the defendants Nos. 2 to 6 were the *farzidars* of the defendant No. 1. Further there is no evidence to show that the rent assessed for the ancestral lands and the subsequently settled lands was at a low rate. There is likewise no evidence from which it can be inferred that Dowlat Singh, even if he settled the ancestral lands with the defendants' father, held the lease merely as a *benamidar* for Pratapdhuj Singh. Nor is there anything to show that the ancestral lands were in fact settled by Dowlat. In so far as the plaintiff's appeal is concerned it must, in my opinion, be dismissed with costs to the defendants who have appeared.

The appeal by the defendants Nos. 2 to 4 is numbered 116 of 1919. The question for determination in this appeal is whether there was in fact a settlement of the Parwana lands with the defendants Nos. 2 to 4 and, if so, whether it is binding upon the plaintiff. I have already held that there is nothing in the evidence to show that these defendants were *farzidars* of Pratapdhuj Singh, and this is in accordance with the learned Subordinate Judges' finding.

He found, however, that the defendants had not made out their title to the Parwana lands partly on the ground that the circumstances under which they were settled were suspicious and partly on the ground that as no rent was immediately payable the relationship of landlord and tenant was not created. He was of opinion that there could be no tenancy unless there was a contract to pay rent. I shall consider these questions separately.

The reasons which led the learned Subordinate Judge to regard the Parwana with suspicion were two. The first was that the Raja would not condescend to write to the *ticcadar* to settle lands with tenants The second was that the Raja in 1911 lost his seals and some one must have used them for an improper purpose. From this he concludes that the Parwana of 1905 which bears the impression of the Raja's seals of that date was a forgery. This is the merest surmise and there is no other evidence upon which the theory of forgery rests. Regrettable though it be it is by no means uncommon to find a charge of forgery introduced into the pleadings in this country when the proof is either altogether absent or totally inadequate to support it. The facts proved in the present case are shortly as follows. The Parwana, the material part of which has already been referred to, bears at the top the seal of the Raja which was in use in 1905 and a smaller seal at the end. There can be no doubt as to the genuineness of the seals. The large seal is exactly the same as that appearing in the *ticca pattas* granted to the defendant No. 1 and on other documents produced which are admittedly genuine and it is proved that the smaller seal was, usually impressed at the end of the Raja's letters. Mr. Jagannath Prasad Pandey, a Professor of Sanscrit in Patna College and a gold medallist of his year, who owns considerable property near Ghoraghat, and whose father and grandfather held the office of Dewan of the Ramnagar Raj, was called as a witness. He had seen papers with the seals of the late Raja and swears to the genuineness of that on the Parwana. He further states that it was the Raja's practice to seal his letters and write the word "Patrashi" in his own hand at the beginning. Both these features appear in the Parwana. It purports to be written by Dineshwar Sahay, as scribe, and bears his signature. He was Peshkar to the late Raja until 1911 when he resigned on account of failing eye-sight. He was called as a witness by the defendants and proved the circumstances under which the Parwana came to be written. He confirms the story as to Munder Singh approaching the Raja, with whom he was on friendly terms, and asking about the land and says that the Raja directed him to write out the Parwana. When it was written the Raja affixed both seals in his presence and wrote the word "Patrashi" at the beginning as was his

custom. This witness further deposes that the Parwanas issued by the Raja used to be copied into a register and numbered and that the register was kept in the Raja's record-room. It is nowhere denied that such a register was kept and the practise is one in general use. This witness's evidence, if untrue, could easily have been refuted by the plaintiff by producing the register of that date and showing that no such document was copied therein. The register was not produced. The only suggestion against this witness is that he did not resign but was dismissed. This, however, was denied by him in cross-examination and there is no evidence to support the suggestion. I accept his evidence as that of a witness of truth. Moreover, it is difficult to see why a document executed and sealed in 1905 should be presumed to be spurious because the Raja lost his seals in 1911. Further, on an examination of the story about the seals, the evidence of which is contained in a petition of the Raja addressed to the District Judge of Muzaffarpur, it does not appear that the seals were actually stolen, but merely that the box containing them had been tampered with and a number of currency notes and some gold and jewellery were found missing. The box was discovered to have been opened in September 1910 and in May 1911 the petition, to which I have referred, was sent by the Raja to the District Judge of Muzaffarpur mentioning the loss of the notes, gold and jewellery and stating that as the box, which also contained his seals, had been tampered with, he thought it proper to discontinue using the former seal and to have a new one prepared. He, therefore, asked that information of the above facts should be circulated amongst subordinate officers including Sub-Registrars and, for purposes of identification, he affixed the new seal to his petition. It is obvious from this that the seal itself was not stolen but merely that its further use was discontinued as the box containing it had been broken open and the valuables taken. The object of those who broke open the box was apparently to steal the valuables and the seal being of no intrinsic value was left behind. Had the seal been stolen the Raja would not have said in his petition that he thought it proper to discontinue the use of the former seal and to substitute a new one in its place. The suggestion now made, however, is that whoever broke open the box used the seals to stamp a number of blank papers at the beginning and the end for future use, to be filled in as opportunity offered, and that the Parwana now produced is the first fruits of a fraud begun in 1910. More unlikely things may, no doubt, occasionally happen but it is our plain duty to decide the issues upon the evidence before us and not to reject the evidence on a mere possibility that the truth may not have been disclosed. In face of the clear evidence of Dineshwar Sahay, to say nothing of that of the defendant No. 1 himself, who says that the Parwana was delivered to him and he acted upon it, I am quite unable to give any weight to the bare suggestion, unsupported by any direct evidence, that the Parwana was a spurious document.

The story that the Raja "stooped down to write to the *ticcadar* to settle lands with the defendant at no rent," to use the language of the learned Subordinate Judge was, in his opinion, a story which could not be believed by a Court of Justice and one which does not appeal to common sense on the face of it. The learned Subordinate Judge's experience of Rajas may have been unfortunate but from what little has been disclosed in the evidence of the Raja's mode of living—he was certainly of a convivial habit I can see no inherent improbability in his writing a letter to his lessee in order to oblige a friend with whose family both he and the Rani were, according to the defendants' evidence which stands uncontradicted, on visiting terms. It must be remembered that both the *tissadar* and the defendants Nos. 2, 3 and 4 are Zemindars and men of substance and some position in the neighbourhood. Moreover, the Parwana is, in my opinion, amply proved by the evidence to have been issued and acted on and with due respect to the learned Subordinate Judge I am not able to accept his reasons, based as they are on mere suspicion, for rejecting it.

The second point on which the learned Subordinate Judge found against the defendants on this part of the case was that as they paid no rent for the Parwana lands they were not tenants of the landlord. From

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the Parwana it would appear that the lands were originally Parti and were to be settled with the tenant for grazing cattle and storing straw, and that no rent was to be payable as long as the land was used for that purpose but that, if it should be brought under cultivation, a fair rent was to be assessed. The defendant No. 1 in his evidence says he directed the Patwari Amar Lall to settle about 25 *bighas* of Parti land with Munder Singh and that when the latter sometime later began to cultivate the lands he demanded rent at the rate of Rs. 4 per *bigha*. The tenant offered a lower rate, *viz.*, that which he paid for the others lands occupied by him. About that time the Settlement operations began and no agreement as to rent was come to before the defendant No. 1's *ticca* lease expired in 1915. In 1915 the Record of Rights was finally published recording the names of the defendants Nos. 2, 3 and 4 as *raiyats* after the objection by the plaintiff, already referred to, her husband having in the meantime died. After the Record of Rights it was open to the landlord to have a fair and equitable rent settled for the lands which by that time appear to have been brought under cultivation but this apparently was not done. Instead, the plaintiff instituted the present suit in September 1916. Munder Singh, with whom the settlement was made, died some years ago and cannot be called as a witness. Amar Lall, Patwari, the plaintiff's servant, through whom the settlement was made, was not called to dispute the settlement. On this evidence there can be no room for doubt that the settlement was made as alleged by the defendants. Moreover, the Record of Rights is in their favour and raises a presumption which, in my opinion, so far from being rebutted, is supported by the evidence. The immediate payment of rent is not an essential factor in the creation of a tenancy. It is by no means unusual for waste lands to be granted to a tenant by his landlord with a stipulation that no rent shall be payable until they are brought under cultivation. There is nothing in the Bengal Tenancy Act which prevents such an arrangement. The definition of tenant in section 3 (3) of the Act is "a person who holds land under another person and is, or but for a special contract would be, liable to pay rent for that land to that person." There is no reason why the landlord should not forego the payment of rent in the case of waste lands until they are made fit for cultivation by the labour of the tenant. Such an arrangement is for their mutual benefit. The tenant gets the use of the land for a limited purpose free of rent and gives his labour to render the land more productive to his landlord. The landlord gets the benefit of the tenant's labour which improves the nature of the land and increases its letting value.

References to four cases were given in the judgment of the learned Subordinate Judge in support of his view that there can be no tenancy unless there is a contract to pay rent. Two of the cases appear to be wrong references and as their names were not given I have been unable to trace them. Of the other two that of *Lyons* v. *Betts*(1), merely lays down that willingness to pay rent does not make a trespasser a tenant. The other *Deo Nandan Pershad* v. *Meghu Mahton* (2), is an authority for the proposition that a mere request by the plaintiff to the defendant to give up possession of land and to pay the produce or the value thereof during occupation cannot be regarded as a demand for rent and is not sufficient to create the relationship of landlord and tenant which is a matter of contract. Neither of these cases supports the broad proposition that there can be no tenancy where no rent is payable.

It was finally contended that the settlement of this land was against the terms of the *ticca patta* which does not permit the *ticcadar* to grant lands at a low rate without the consent of the landlord. There appear to me to be two answers to this argument; first, the settlement was made on the landlord's instructions and, secondly, the land was not settled at a low rate. The *ticcadar*, during the term of his lease, could no doubt forego the right to receive any rent at all, provided he made no contract which would bind the landlord afterwards. In the present case he has not impinged on the landlord's right to demand a fair and equitable rent when the lands are brought, as they now are, under cultivation. For the above reasons

(1) 13 W. R. 94.
(2) 34 C. 57; 5 C. L. J. 181; 11 C. W. N. 225.

I am of opinion that the appeal of the defendants Nos. 2, 3 and 4 should be allowed with costs against the plaintiff. The decree of the Subordinate Judge will be set aside in so far as it finds in favour of the plaintiff's right to possession of 38 *bighas* 17 *cottahs* 5 *dhurs* of the land in suit together with proportionate costs, and in lieu thereof a decree will be entered in favour of those defendants dismissing the plaintiff's suit with costs.

MULLICK, J.—I agree.

P. D. & N. K.

Appeal allowed.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 210 OF 1920.

February 9, 1922.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Coyajee.

TRIBHOVANDAS VARJIVANDAS AND OTHERS—DEFENDANTS—APPELLANTS

versus

BALMUKUNDAS KISHOREDAS—PLAINTIFF—RESPONDENT.

Vendor and purchaser—Agreement to re-convey property—Specific performance—Tender.

A suit based on an agreement to re-convey on re-payment of consideration the property, which the defendant had purchased from the plaintiff, is really a suit for specific performance. To such a case the strict law of tender is not applicable, and, therefore, an unconditional tender of consideration is not necessary to support the claim.

First appeal from the decision of the First Class, Subordinate Judge, Ahmedabad, in Suit No. 373 of 1919.

Mr. *B. J. Desai*, (with him Mr. *G. N. Thakor*), for the Appellants.

Messrs. *G. S. Rao* and *Ratanlal Ranchhoddas*, for the Respondent.

JUDGMENT.—The plaintiff sued to recover by partition the eastern moiety of the plaint village site and agricultural land of the village of Lahna from the defendants on payment to them of the sum of Rs. 9,500, and to have a deed of conveyance relating to the said eastern moiety from the defendants. There is no dispute with regard to certain facts. On the 29th March 1916 Mahant Devpuri Sukhdevpuri, who was the owner of the village, sold 1,110 *bighas* of the agricultural land on the western side of the village with a moiety of the village site to the defendants for Rs. 20,000 by a sale-deed, Exhibit 44. On the same date Devpuri conveyed to the defendants the remaining portion of the village on the eastern side with the remaining moiety of the village site for Rs. 10,000 by a deed, Exhibit 45. But by this sale-deed it was agreed that the vendor Devpuri was at liberty to purchase that portion back within three years on payment of Rs. 10,000.

On the 7th June 1918 the plaintiff purchased from Devpuri his right to have the property comprised in the sale-deed, Exhibit 45, re-conveyed to him.

On the 24th July 1918, the plaintiff gave notice to the defendants that he had purchased the rights of Devpuri and asked the defendants to hand over to him all the land including the village site, excepting the 1,100 *bighas* to the west of the said village, on receipt of Rs 10,000.

Correspondence ensued from which it appears that disputes arose between the parties with regard to what passed by the sale-deed, Exhibit 44, to the defendants, and what remained to be re conveyed to the plaintiff on payment of Rs. 10,000, and, eventually, before the three years had expired, the plaintiff filed this suit. The only defence to the suit that could possibly avail the defendants was the contention that the plaintiff was not entitled to sue unless he had paid Rs. 10,000, and that an unconditional tender of the money was necessary to support the claim. As the Judge decreed the plaintiff's claim he directed him to pay Rs. 9,800 into Court, Rs. 200 being deducted for the value of trees cut down by the defendant. The plaintiff says that, previous to the institution of the suit, he called upon the

defendants to re-convey to him the property comprised in the deed, Exhibit 45. The defendants replied to the plaintiff's notices with notices of a general character, and hence the plaintiff filed this suit. It would have been better if the plaintiff had brought the money into Court. But in a suit of this nature, which is really a suit for specific performance, we do not think that the strict law as to tenders is applicable and considering the negotiations which went on for several months, and the fact that the suit was filed before the three years had expired, and also the fact that the defendants had been in possession of a portion of the village when they undertook to re-convey to the plaintiff, we see no reason why justice should not be done by directing the defendants to re-convey on payment of the consideration money. The decree does not limit any time within which the consideration should be paid. But the plaintiff must tender Rs. 9,800 within a month after the proceedings are returned to the lower Court. This direction should be entered in the decree. Otherwise the appeal is dismissed with costs.

S. D.

Appeal dismissed.

LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 333 OF 1921.

January 17, 1922.

Present :—Mr. Justice LeRossignol.

BUDH RAM—PLAINTIFF—PETITIONER

versus

CHANDU—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), Sch. II, cl. 15 (1) a —Private inquiry held in presence of parties —Private inquiry—Award based on hearsay and conjecture—Award.

An award based on an inquiry made by arbitrators from the neighbours of the parties in the presence of the latter, cannot be said to be based on a private inquiry and must be upheld though it is clearly based on hearsay and conjecture.

Petition, under section 44 of Act VI of 1918, for revision of a decree of the Junior Subordinate Judge, Hissar, dated the 22nd January 1921.

Mr. *N. C. Pandit*, for the Petitioner.

Mr. *Sagar Chand*, for the Respondent.

JUDGMENT.—The only question in this revision is whether the arbitrators based their award on a private inquiry. Petitioner contends that this is patent on the face of the award, but I do not read the award in this way. I interpret it to mean that the parties produced no evidence, whereupon the arbitrators made inquiry from the neighbours of the parties. There is nothing to indicate that that inquiry was not made in the presence of parties and the award, though no doubt based on hearsay and conjecture, must be upheld.

I dismiss the petition with costs.

S. D.

Petition dismissed.

CALCUTTA HIGH COURT.

CIVIL RULE No. 649 OF 1921.

February 27, 1922.

Present:—Mr. Justice Greaves and Mr. Justice Ghose.

RAMA NATH MISRA—DEFENDANT—PETITIONER

versus

RAMRANJAN MISRA—PLAINTIFF—OPPOSITE PARTY.

Arbitration—Private award—Absence of one of several arbitrators, if makes award invalid—Waiver—Civil Procedure Code (Act V of 1908), Sch. II, para. 20.

Arbitrators must be present during the whole of the proceedings and deliberations but it is open to the parties to waive the absence of one of the several arbitrators. Therefore an award signed by an arbitrator, who was present one day only for a short time and did not hear the evidence or take part in the deliberations of the remaining arbitrators, is not invalid, if the irregularity is waived.

Rule against an order of the Court of the Sub-Judge, Asansol.

FACTS appear from the judgment.

Babu *Bankim Chandra Mukerjee*, for the Petitioner.—The present application arises out of an application under paragraph 20 of Schedule II of the Code of Civil Procedure for filing award made without the

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intervention of Court. One of the arbitrators after hearing a portion of the evidence disappeared on subsequent days. There were five arbitrators. He was present for one day for sometime only. He signed the award. The First Court refused to file the award on that ground. On appeal it was held that evidence should be taken as to whether I waived objection as to the irregular procedure. The evidence is against me and it has been found that I waived objection as to the irregular procedure. I submit all the arbitrators must be present in all the meetings and also at the final meeting when the deliberations are made. Even if there had been my waiver that would not cure the irregularity. Refers to *Amir Begam* v. *Badr-ud-din* (1), *Co operative Hindustan Bank Limited* v. *Bhola Nath Borooah* (2), *Abu Hamid Zahir Ala* v. *Golam Sarwar* (3). No such point was raised in the lower Court and it had no jurisdiction to raise the point and remand the case for evidence. I could not waive my objection in law.

Dr. *D. N. Mitter*, (with him Babu *Manindranath Banerjee*), for the Opposite Party was not called upon to reply.

JUDGMENT.—On the 9th February 1920 an application was made under Schedule II, paragraph 20, of the Code of Civil Procedure to the Munsif at Asansol to file a private award dated 22nd Aswin 1325. The Munsif held that there was no arbitration in the case by all the arbitrators jointly and he refused the application. It appears that there were five arbitrators and that they were to act jointly under the submission. One Rakhal Upadhya, the Munsif says, was present one day for a short time, but did not hear the evidence or take part in the deliberations of the arbitrators and the Munsif states that there was no evidence to show that Rakhal Upadhya signed the award after actually going through the papers and considering them. Against the Munsif's decision an appeal was preferred to the Subordinate Judge and the Subordinate Judge framed this issue "whether the defendant waived his right to have his case tried by the continuous presence of Rakhal Upadhya during the judicial portion of the arbitration case." The Munsif held on this issue that the defendant did not object on the ground of the absence of Rakhal Upadhya from the judicial portion of the arbitration proceedings and that from that his waiver of the objection might be inferred. The matter came back to the Subordinate Judge with the Munsif's finding and he decreed the appeal and ordered the award to be filed. This Rule was obtained at the instance of the present applicant but we cannot say that the decision of the Subordinate Judge was wrong having regard to the Munsif's finding, and we do not think that this is a matter in which we ought to interfere. No doubt, the arbitrators must be present during the whole of the deliberation but it is open to the parties to waive the absence of one of them. This is, it appears, what the defendant has done in the present case. But, then, it is said that whatever the defendant has done with regard to Rakhal's absence from the evidence he did not waive his absence from the final deliberation and that, consequently, his waiver does not extend to this. But we think, on the whole, that we must find with the learned Subordinate Judge that the defendant has waived the whole of the irregularity caused by Rakhal Upadhya's absence from any part of the proceeding having regard to the form in which the issue was framed and the finding of the Munsif thereon.

This being so, the Rule must be discharged with costs. Hearing-fee two gold *mohurs*.

S. D.

Rule discharged.

(1) 23 Ind. Cas. 625; 36 A. 336 at p. 343; 18 C. W. N. 755; 1 O. L. J. 249; 12 A. L. J. 537; 17 O. C. 120; 16 Bom. L. R. 413; (1914) M. W. N. 472; 16 M. L. T. 35; 27 M. L. J. 181; 19 C. L. J. 494 (P. C.).

(2) 31 Ind. Cas. 597; 19 C. W. N. 165.

(3) 40 Ind. Cas. 422; 22 C. W. N. 301; 25 C. L. J. 396.

LAHORE HIGH COURT.
FIRST CIVIL APPEAL NO. 1217 OF 1920.
November 22, 1921.
Present:—Mr. Justice LeRossignol and Mr. Justice Campbell.
THE ALLAHABAD BANK, LIMITED, DELHI—DEFENDANT—APPELLANT
versus
MRS. LENA MACDONALD OF DELHI—PLAINTIFF AND
MRS. FLORENCE DAVIS—DEFENDANT—RESPONDENTS.
Appeal—Party not aggrieved, whether can appeal.

Plaintiff's father deposited a certain sum with a Bank in the joint names of himself and one *D.* payable to 'either or survivor'. He subsequently made a Will devising his property of every description to the plaintiff and died before the period of the deposit had expired. Plaintiff obtained Probate of the Will and sued the Bank and *D.* for a declaration that the deposit belonged exclusively to the deceased and that the plaintiff was entitled to receive it on maturity as the executor of the deceased. *D.* did not appear, but the Bank resisted the suit. The suit was eventually decreed. The Bank appealed impleading *D.* also as a respondent to the appeal.

Held, that the Bank had no *locus standi* to prefer the appeal, inasmuch as its position was merely that of a stake-holder and it was not in any way prejudiced by the decree passed in favour of the plaintiff.

Seshayyar v. *Pappuvaradayyangar*, 6 M. 185; 17 Ind. Jur. 188; 2 Ind. Dec. (N. S.) 407, followed.

First appeal from a decree of the Senior Subordinate Judge, Delhi, dated the 27th Februbry 1920.

Lala *Moti Sagar*, R. S, for the Appellant.

Lala *Raj Narain*, R. S., and Kanwar *Dalip Singh*, for Mrs. Macdonald, Mr. *Cardon Noad*, for Mrs. Davis, Respondents.

JUDGMENT.—Mr. Isaac Jackson, residing in Delhi, made a deposit of Rs. 52,000 with the Allahabad Bank, Limited, Delhi, on the 26th March 1917, in the joint names of himself and Mrs. Florence Davis, "payable to either or survivor." The period of deposit was from 1st January 1917 to 31st December 1919.

On the 11th February 1918 Mr. Jackson made a Will devising the whole of his property of every description to his daughter Mrs. Macdonald. He died on 5th November 1918 and Probate of the Will was granted to Mrs. Macdonald on 21st February 1919.

On the 24th February 1919 Mrs. Macdonald sued Mrs. Davis and the Bank for a declaration that the amount of the deposit, Rs. 52,000, belonged exclusively to Mr. Jackson and that Mrs. Macdonald, his executrix, was entitled to receive it on maturity.

Mrs. Davis did not appear and the suit was heard against her *ex parte*. The Bank resisted the claim on the grounds that the deposit was not and could not be disposed of by the Will, that the money was gifted to Mrs. Davis, and that she alone was entitled to it either as donee or as co-depositor.

The lower Court granted the plaintiff the declaration sought, the decree being *ex parte* against Mrs. Davis. The Bank has appealed joining Mrs. Davis as the second respondent and she has appeared and is represented.

Counsel for Mrs. Macdonald has taken the preliminary objection, which we find must be sustained, that the Bank is not entitled to appeal since it is not a party adversely affected by the decree, but is merely in the position of a stake-holder between the rival claimants Mrs. Macdonald and Mrs. Davis. *Seshayyar* v. *Pappuvaradayyangar* (1), is cited in support of the objection and is in point. The finding there was that one *P.* had no *locus standi* to appeal in the following circumstances. *S.* sued to redeem land mortgaged to *N.* joining *P.*, the brother of *N.* as a defendant because he was in possession of the land in suit. *P.* disclaimed all personal interest, said that he was in possession on behalf of *N.* and asserted the mortgage to be a forgery. *N.* did not appear, *P.* was not authorized to defend the suit on behalf of *N.* nor did he claim to do so. The plaintiff's suit was decreed and *P.* appealed in his own name and on his own account.

In the present case the Bank's memorandum of appeal is worded entirely as though the Bank held power of-attorney from Mrs. Davis, which is not the case. Not a word is said about any prejudice to the Bank arising out of the decree, Mrs. Davis has not appealed, and there is now

(1) 6 M. 185; 17 Ind. Jur. 188; 2 Ind. Dec. (N. S) 407.

a final decree that Mrs. Macdonald is entitled to the money in suit against her. Counsel for the Bank has attempted to argue that the Bank is entitled to resist Mrs. Macdonald after the elimination of Mrs. Davis because the Will could not affect the deposit and because the Bank is entitled to retain the money until some one with a better claim appears. Not only is this contention not mentioned in the memorandum of appeal, but it can have no force in the face of the admitted fact that Mrs. Macdonald is Mr. Jackson's daughter, and would have a good claim to the money even if her father had died intestate.

We are not impressed by the suggestion (which has been put forward but is not founded upon anything in the grounds of appeal) that the Bank is an aggrieved defendant because the decree is likely to influence prospective depositors on the "either or survivor" system. We cannot consider remote possibilities. The decree binds no one but the parties to it, and adjudicates on nothing but the rights of Mrs. Macdonald and Mrs. Davis in the Rs. 52,000 deposit made by Mr. Jackson. The Allahabad Bank would have had to pay the money to one or other of these persons, and it cannot matter to it directly which of the two receives the Rs. 52,000 by order of a competent Court.

We think it unfortunate in the circumstances, that the suit was not defended by Mrs. Davis, and record our decision that the appeal does not lie with some reluctance, but we have no doubt that it is correct.

The appeal must be dismissed with costs.

Z. K. *Appeal dismissed.*

PATNA HIGH COURT.

APPEAL FROM APPELLATE ORDER No. 66 OF 1922.

July 6, 1922.

Present:—Mr. Justice Coutts and Mr. Justice Das.

DARGAHI MIAN AND ANOTHER—OBJECTORS—APPELLANTS

versus

Musammat MANGO KUER—DECREE-HOLDERS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), Sch. III, Art. 6—Suit for declaration and rent—Rent-decree—Execution.

A suit for a declaration that the landlord is entitled to a *nakdi* rent and for a decree for rent is a suit for rent in the strictest meaning of the term; and Art 6 of Schedule III of the Bengal Tenancy Act is not inapplicable to the execution of a rent-decree obtained in such a suit simply because the landlord had asked for a wholly unnecessary declaration.

Appeal from a decision of the District Judge, Gaya.

Messrs. *S. S. Bose* and *N. C. Ghosh*, for the Appellants.

Mr. *Nawal Kishore Prasad, II*, for the Respondents.

JUDGMENT.

DAS, J.—This appeal arises out of an order passed by the learned District Judge of Gaya in an execution matter. The point taken by the judgment-debtor before us is that the execution of the rent decree is barred by the provision of Schedule III, Art. 6 of the Bengal Tenancy Act. The decree holder is the landlord and at the time of the rent-suit was undoubtedly the landlord and the defendant was and is his tenant. The suit was for a declaration that the landlord was entitled to a *nakdi* rent and for a decree for rent. The learned Judge in the Court below has come to the conclusion that, as the plaintiff sued not only for arrears of rent but also for a declaration regarding the share of the *bhoali* rent, the suit was a title suit and the decree was not a rent-decree, and, consequently, Art. 6 of Schedule III of the Bengal Tenancy Act was inapplicable I am unable to take the same view. The suit was between landlord and tenant and undoubtedly the provisions of the Act are applicable to them. Further, the suit was a rent-suit in the strictest meaning of the term, and I do not understand why Art. 6 of the

Third Schedule, should not apply to the execution of a decree obtained in such a suit just because the landlord asked for a wholly unnecessary declaration in the suit. In my opinion Art. 6 of the Third Schedule of the Bengal Tenancy Act did apply to the application for execution of the decree and the learned District Judge should have dismissed the application for execution.

I would allow the appeal, set aside the orders passed by the Courts below and dismiss the execution petition of the respondents with costs.

COUTTS, J.—I agree.

S. D.

Appeal allowed.

LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 284 OF 1921.

January 14, 1922.

Present :—Mr. Justice Martineau.

THE FIRM ISHAR DAS-DHARM CHAND OF AMRITSAR, THROUGH SRI GOPAL—DEFENDANT—PETITIONER

versus

THE FIRM BUTA MAL-DURGA DAS OF AMRITSAR, THROUGH DURGA DAS—PLAINTIFF,

THE FIRM SHIV NATH-RAI CHAINI RAM OF AMRITSAR, THROUGH BADRI DAS OF THE FIRM ISHAR DAS-GORAKH RAM OF BOMBAY AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 10, 115—Application for stay of suit—Order refusing stay—Revision.

An order refusing to stay a suit under section 10 of the Civil Procedure Code does not amount to the decision of a "case" within the meaning of section 115 of the Civil Procedure Code, and, therefore, is not open to revision.

Sultanat Jahan Begam v. *Sundar Lal*, 58 Ind. Cas. 90; 42 A. 409; 18 A. L. J. 431 and *Pandit Rama Kant* v. *Pandit Ragdeo*, 60 P. R. 1897 (F. B.), referred to.

Petition, under section 44 of Act III of 1914, for revision of an order of the Subordinate Judge, First Class, Amritsar, dated the 8th February 1921.

Lala *Fakir Chand* and Mr. *Devi Dyal* for Mr. *Anant Ram*, for the Petitioner.

Lala *Kahan Chand*, for the Respondents.

JUDGMENT.—The plaintiffs have brought a suit for Rs. 18,943-12-0 in the Court of the Subordinate Judge of Amritsar. The defendants contended that a suit between the same parties in which the same issue was involved was pending in the High Court of Bombay, and that, therefore, the suit at Amritsar, which was instituted afterwards, should be stayed in accordance with section 10 of the Civil Procedure Code. The Subordinate Judge has refused to stay the suit, on the ground that the parties are not exactly the same in the two cases and that the suit in the Court at Bombay deals also with other items and is more comprehensive. The defendants have applied for revision of the order of the Subordinate Judge.

For the plaintiffs it is objected that there has been no decision of a case by the lower Court, and that, therefore, no revision lies. This objection is supported by a decision of Banerji, J., in *Sultanat Jahan Begam* v. *Sundar Lal* (1), that an application under section 10 of the Civil Procedure Code for the stay of a suit is not a "case," and that an order for stay passed on that application is not a decision of a case within the meaning of that word in section 115 of the Civil Procedure Code.

It was held by this Court in *Pandit Rama Kant* v. *Pandit Ragdeo* (2), that the word "case" in section 622 of the Code of 1882 may mean a particular branch of a case for which an independent remedy or a different procedure is provided in the Code. I am, however, unable to see how an application for stay of proceedings in a case can be regarded as a branch of that case.

In my opinion, therefore, the preliminary objection must prevail, and it must be held that the Subordinate Judge's order does not amount to a decision of a "case."

I accordingly dismiss the application for revision with costs.

Z. K.

Application dismissed.

(1) 58 Ind. Cas. 90; 42 A. 409; 18 A. L. J. 431.
(2) 60 P. R. 1897 (F. B.).

ALTAP ALI CHOUDHURY *v.* JARINA BIBI.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1417 OF 1920.

February 9, 1922.

Present:—Mr. Justice Greaves and Mr. Justice Panton.

ALTAP ALI CHOUDHURY AND OTHERS—PRINCIPAL DEFENDANTS—APPELLANTS

versus

Srimati JARINA BIBI AND OTHERS—PLAINTIFFS AND OTHERS *Pro forma* DEFENDANTS—RESPONDENTS.

Procedure—Evidence—Court, if can refer to documents other than those on record without hearing parties—Bengal Tenancy Act (VIII of 1885), s. 103A, inference under, if can be drawn from khasra *papers.*

No Court has a right to look at any document or any papers other than those on the record without giving the parties to the suit an opportunity of being heard and of making their submission with regard to what is contained in documents outside the record to which the Judge desires to refer. [p. 871, col. 2.]

If it becomes necessary to refer to matters other than those on the record in accordance with the provisions in that behalf contained in the Code of Civil Procedure, reference to such evidence must only be made in the presence of the parties and after hearing them upon the evidence. [p. 872, col. 1.]

An inference under section 103A of the Bengal Tenancy Act can only be drawn from the finally published Record of Rights, and not from the material (*khasra* papers) upon which the finally published Record of Rights is founded. [p. 871, col. 2.]

Appeal against a decree of the Additional District Judge, Tipperah, dated the 24th February 1920, reversing that of the Munsif, Third Court at Comilla, dated the 21st December 1918.

Babu *Upendra Kumar Roy*, for the Appellants.

Babu *Krishna Kamal Moitra* for Babu *Sasadhar Roy*, for the Respondents.

JUDGMENT.—This is an appeal by the defendants. The First Court dismissed the suit and the lower Appellate Court has decreed it in the plaintiff's favour. Now, the judgment of the lower Appellate Court is attacked on two grounds:—First, with regard to the procedure adopted by the learned Judge and, secondly, with regard to his findings as to title which are said to be defective. It is not necessary for us to deal with the second point because we think that the procedure adopted by the learned Judge was clearly incorrect and that the case must go back in order that the appeal should be re-heard by the lower Appellate Court.

Now, apparently what happened is this: the hearing of the case was concluded on the 3rd February 1920 and judgment was reserved. When the learned Judge came to consider his judgment he found some difficulty apparently in arriving at a conclusion upon the materials on the record and, accordingly, he sent for, in the absence of the parties, the *khasra* papers, and looking at the papers he came to certain conclusions which were contrary to the entries as appearing in the Record of Rights. Thus apparently he has drawn an inference in favour of the plaintiffs and adverse to the defendants from what he has found in these *khasra* papers. Now, it seems to us that he was clearly wrong in the procedure which he adopted. Assuming, as is suggested, that recourse might be had to the *khasra* papers the learned Judge certainly, before arriving at the conclusion at which he arrived, should have allowed the defendants an opportunity of being heard with regard to the conclusions which the Judge was prepared to draw from *khasra* papers. No Court has a right to look at any document or any papers other than those on the record unless he gives to the parties to the suit an opportunity of being heard and making their submissions with regard to what is contained in documents outside the record to which the Judge desires to refer. We think there is no doubt that the whole judgment has been coloured by what the learned Judge has found in the *khasra* papers.

Then, again, it seems to us that he was certainly wrong in drawing the inference which he did from these papers. The inference under section 103A of the Tenancy Act can only be drawn from the finally published Record of Rights, and not from the material upon which the finally settled Record of Rights is founded.

On behalf of the respondents we were urged to say that, even apart from the irregularity above-mentioned, there was evidence on the record from which the learned Judge could arrive at the decision at which he arrived. But, speaking for myself, I cannot but think that he approached the evidence of both the parties with his mind influenced by what he had found, or what he thought he had found, in the *khasra* paper.

Accordingly, this appeal succeeds and the case will go back to the lower Appellate Court in order that the appeal may be re-heard upon the materials upon the record and if it becomes necessary to refer to other matters in accordance with the provisions in that behalf contained in the Code of Civil Procedure, reference to such evidence must only be made in the presence of the parties and after hearing them upon the evidence. The question as to the admissibility of the *khasra* papers will be a matter for argument before the lower Appellate Court.

Costs of this appeal will abide the result of the re-hearing of the appeal by the lower Appellate Court.

B. N.

Appeal allowed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1331 OF 1921.
November 29, 1921.
Present:—Mr. Justice Chevis.

ALLAH RAKHIA KHAN AND OTHERS PLAINTIFFS—APPELLANTS
versus
KALA RAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Pre-emption—Omission to claim whole land sold—Accidental mistake—Amendment of plaint.

If in a suit for pre-emption the plaintiff intentionally sues for less land than is covered by the sale he loses his right of pre-emption; but in cases where the error is merely accidental and relates only to the description of the property the pre-emptor is always allowed to amend his claim. If, of course, he refuses to correct his error when it is pointed out to him he will be held to have forfeited his claim. [p. 873, col. 2.]

Where, however, the vendee himself takes no objection to the error or raises an objection too late, the right of pre-emption is not forfeited. [p. 873, col. 2.]

Shankar Lal v. *Dallu*, 25 Ind. Cas. 68; 132 P. W. R. 1914; 230 P. L. R. 1914; 13 P. R. 1915, followed.

Paras Ram v. *Nathu Mal*, 19 Ind. Cas. 222; 212 P. L. R. 1913; 19 P. R. 1913; 314 P. W. R 1912, distinguished.

Jasmir Singh v. *Rahmatulla*, 7 P. R. 1896, referred to.

Second appeal from a decree of the Additional Judge, Muzaffargarh, at Dera Ghazi Khan, dated the 21st February 1921, reversing that of the Munsif, First Class, Leiah, District Muzaffargarh, dated the 3rd January 1921.

Lala *Har Gopal*, for the Appellants.

Lala *Jagan Nath*, for the Respondents.

JUDGMENT.—The land in suit was sold for Rs. 800 to Thao Ram by a sale-deed registered on the 11th of February 1918. On the 3rd of February 1919 Kala Ram sued to pre-empt claiming to take over the land on payment of Rs. 800. His claim was not resisted and on the 17th of February 1919 Kala Ram got a decree on condition of payment of Rs. 800 by a certain date. Kala Ram paid the money in due time and took possession. The land sold is certain *khewat* land, with a corresponding share of *shamilat*. Kala Ram could not, of course, take physical possession of a share of the undivided *shamilat* land. A mutation was, however, made in his favour without objection by the vendee, and the mutation order includes the corresponding share of *shamilat*. The mutation was attested on the 27th of July 1920. Meanwhile, on 5th February 1919, the present appellants had brought a suit claiming to pre-empt the land sold on payment of Rs. 117.8. This suit was brought in the Court of the Civil Judge at Leiah, whereas Kala Ram's suit had been lodged in the Munsif's Court. The present appellants had not been made parties in the suit brought by Kala Ram, but Kala Ram was afterwards impleaded in the suit brought by the appellants. It is admitted that Kala Ram's right of pre-emption is superior to that of the appellants, but the appellants pleaded that, as Kala Ram had omitted in the suit brought by him to include the share in *shamilat* he had forfeited his right to pre-empt and his decree should have no effect against them. This contention was accepted by the First Court who gave the present appellants a decree for pre-emption on payment of Rs. 800. Kala Ram appealed to the Additional Judge, who held that Kala Ram had only by mere accident omitted to claim a share in *shamilat* and that the decree should be read as covering the whole of the land sold. So the Additional Judge accepted Kala Ram's appeal and dismissed the suit of the present appellants, hence appeal to this Court.

ALLAH BAKHIA KHAN v. KALA RAM.

In the heading of his plaint Kala Ram described the property quite correctly except that he omitted the words "*mai hissa shamilat.*" The omission was never objected to in the suit brought by Kala Ram and the decree is simply one for *arazi mutadawia.* Construing literally, I am unable to hold that the decree covers more than the land mentioned in the plaint or that the land mentioned in the plaint includes a share in *shamilat*, but it is obvious that Kala Ram meant to sue for the whole or whatever land was covered by the sale-deed; otherwise he would never have been willing to pay the full price mentioned in the sale-deed. So it is obviously a case of mere accidental misdescription of the property sold. Had the vendee raised any objection Kala Ram would most certainly have made it clear that he was suing for the whole of the property. In *Jasmir Singh* v. *Rahmatulla* (1) a Division Bench of this Court expressed the opinion that in such a case no amendment was really necessary. In other cases cited in Ellis' Law of Pre-emption, 3rd Edition, pages 166 and 167, amendments have been allowed in such cases. But on behalf of the appellants it is objected that it is now too late to allow any amendments in Kala Ram's suit, that suit being no longer pending. It is urged that Kala Ram is bound by the decree, and reliance is placed on the ruling reported as *Paras Ram* v. *Nathu Mal* (2). In that case the sons of a man, who had alienated land, sued to recover the land alienated on the ground that the alienation was without consideration and necessity. They obtained a decree but, as they had omitted in their plaint to include the corresponding share of *shamilat*, and as the decree was simply one for the land claimed in the plaint, it was held that they had no right to take possession of the *shamilat* land and they were made to restore the *shamilat* land which they had taken possession of in execution of decree. They were, of course, not made to give up possession of the *khewat* land, which was covered by the decree. Now if I were to apply this ruling to the present case I do not think that I should be justified in depriving Kala Ram of more than his right to a corresponding share in the *shamilat.* But what the appellants want me to do is to deprive Kala Ram even of that land for which he has got a decree. Their claim is based simply on the ground that Kala Ram having sued for less than the whole of the land covered by the sale-deed should be held to have forfeited his right of pre emption. Now, it is perfectly clear that if a man intentionally sues for less land than is covered by the sale he loses his right of pre-emption, but in cases where the error is merely accidental and relates only to the description of the property the pre-emptor is always allowed to amend his claim. If, of course, he refused to correct his error, when it was pointed out to him, he would be held to have forfeited his claim. If the vendee himself takes no objection to the error or if he raises objection too late, right of pre-emption is not forfeited: see *Shankar Lal* v. *Dallu* (3). In the present case the vendee raised no objection. The error was not noticed and so Kala Ram had no opportunity of correcting his error. I fail to see how it can be said that Kala Ram has forfeited his right of pre-emption. The error was obviously purely accidental and Kala Ram has never refused to amend it. I hold, therefore, that Kala Ram has not forfeited his right of pre-emption.

But, on behalf of the appellants, it is also urged that, even supposing that Kala Ram has not forfeited his right of pre-emption, his decree only covers the *khewat* land, and the share in *shamilat* has not been pre-empted, and so it is urged that I should at least give the appellants a decree for pre-emption of the share in the *shamilat.* Turning to the grounds of appeal to this Court I cannot say that any of these grounds covers the point now raised and, therefore, I decline to entertain it. I uphold the decree of the learned Additional Judge, dismissing the suit and I dismiss this appeal with costs.

Z. K.

Appeal dismissed.

(1) 7 P. R. 1896.
(2) 19 Ind. Cas. 222; 212 P. L. R. 1913; 19 P. R. 1913; 314 P. W. R. 1912.
(3) 25 Ind. Cas. 68; 132 P. W. R. 1914; 230 P. L. R. 1914; 13 P. R. 1915.

BECHARAM LIHIRY v. SUDEBI DASI.

CALCUTTA HIGH COURT.
CIVIL RULE No. 615 OF 1921.
January 27, 1922.
Present :—Mr. Justice Greaves.
BECHARAM LIHIRY—PLAINTIFF—PETITIONER
versus
SUDEBI DASI—DEFENDANT—OPPOSITE PARTY.

Legal Practitioners Act (XVIII of 1879), s. 28, application of—Suit by Pleader for fee based upon agreement—Fee, amount of, not fixed.

Where a suit by a Pleader for fees against his client is based on an agreement he cannot succeed unless the agreement is both in writing signed by the party to be charged and filed as provided in section 28 of the Legal Practitioners Act. Consequently, no suit upon an oral agreement can succeed byvirtue of the provisions of section 28. [p. 875, col. 2.]

Sib Kishore Ghosh v. *Manik Chandra Nath*, 29 Ind. Cas. 453; 21 C. L. J. 618, *Sarat Chandra Roy* v. *Chandi Charan Mitra*, 7 C. W. N. 300, distinguished.

Raghunath Saran Singh v. *Sri Ram*, 28 A. 764; A. W. N. (1906) 235; 3 A. L. J. 579; 1 M. L. T. 242 (F. B.), approved.

Ishan Chandra Kar v. *Ram Charan Pal*, 26 Ind. Cas. 960; 20 C. L. J. 445, referred to.

Rule against an order of the Court of the Sub-Judge, Nadia, in Small Cause Court Suit No. 48 of 1921.

FACTS appear from the judgment.

Babu *Brajalal Chakravarty*, for the Petitioner.—The agreement here is only to pay reasonable and proper fees. Such an agreement does not come within the purview of section 28 of the Legal Practitioners Act, as no 'amount' has been fixed. Section 28 applies to agreements respecting the 'amount' of payment. An agreement to pay reasonable and proper fees is not an agreement respecting the amount of payment.

Moreover, the agreement in this case is not an agreement at all, because the plaintiff is only suing for reasonable and proper fees for work done, whatever the amount may be. He is clearly entitled to reasonable and proper remuneration for work done. This case comes within the ruling in the cases of *Sarat Chandra Roy* v. *Chandi Charan Mitra* (1) and *Sib Kishore Ghosh* v. *Manik Chandra Nath* (2), where the plaintiffs' suit for reasonable remuneration for work done was held not to come within the bar of section 28.

Babu *Mritunjoy Chatterjee*, for the Opposite Party.—The suit is based on an agreement. Refers to the plaint. The agreement alleged does not satisfy the requirements of section 28 and is, therefore, invalid under that section. A suit based upon such an agreement cannot succeed. Refers to *Ishan Chandra Kar* v. *Ram Charan Pal* (3), *Kamini Moni Debi* v. *Khettra Mohan Ganguli* (4) and *Raghunath Saran Singh* v. *Sri Ram* (5).

The cases of *Sib Kishore Ghosh* v. *Manik Chandra Nath* (2) and *Sarat Chandra Roy* v. *Chandi Charan Mitra* (1) are distinguishable. There no agreement was alleged; the suit was based simply on a claim for reasonable remuneration for services rendered.

[GREAVES, J.—The Pleader was entitled to a *quantum meruit*.]

Yes. The case of *Sarat Chunder Roy Chowdhury* v. *Chundra Kanta Roy* (6), goes further than this, but I am not making that extreme contention.

In the case of *Raghunath Saran Singh* v. *Sri Ram* (5), the suit was based on an agreement to pay "full legal fees," yet the agreement was held to be invalid under section 28. The present case is on all fours with that case.

Babu *Brajalal Chakravarty*, in reply.—There was no concluded contract. The amount was not determined, it has to be determined by the Court. No doubt the agreement for the whole case was bad.

[GREAVES, J.—You cannot approbate and reprobate.]

No. But there was no stipulation as to amount. In *Raghunath Saran Singh's case* (5) "full legal fees" imported a definite amount, such as would be payable under section 27 by the unsuccessful party to his successful adversary.

ORDER.—This Rule was granted at the instance of the plaintiff under the provisions of section 25 of the Provincial Small Cause Courts Act. The plaintiff's suit was based

(1) 7 C. W. N. 300.
(2) 29 Ind. Cas. 453; 21 C. L. J. 618.
(3) 26 Ind. Cas. 960; 20 C. L. J. 445.
(4) 18 Ind. Cas. 43; 15 C. L. J. 660; 17 C. W. N. 45.
(5) 28 A. 764; A. W. N. (1906) 235; 3 A. L. J. 579; 1 M. L. T. 242 (F. B.).
(6) 28 C. 805; 13 Ind. Dec. (N. S.) 524.

BECHARAM LAHIRY v. SUDEBI DASI.

upon an oral agreement whereby he says the defendant engaged him as Pleader and agreed to pay reasonable and proper fees for the work done. The claim of the plaintiff extends to a claim for compensation for the termination of his services, and it would, therefore, appear, although it is not actually stated, that the agreement relied on was one for employment of the plaintiff during the entire course of the work for which he was employed. The Subordinate Judge has rejected the claim on the ground that the suit cannot succeed by virtue of the provisions of section 28 of the Legal Practitioners Act. Section 28 provides that no agreement entered into by a Pleader respecting the amount and manner of payment for services is to be valid unless it is made in writing signed by the persons to be charged and filed in the District Court or in some other Court within fifteen days from the date on which it is executed. But it is urged before me on behalf of the plaintiff that the agreement in question does not fall within the provisions of section 28 because it is said that as the agreement was only to pay reasonable and proper fees no amount was fixed within the meaning of the word "amount" in section 28, and the learned Vakil for the plaintiff further contends that the agreement was not an agreement at all because the plaintiff is only suing for fees that he was entitled to, I suppose he means under section 27, although it would not appear that these fees or, at any rate, all of them fall within the purview of section 27.

So far as the second point is concerned, I do not think it is now open to the plaintiff to say that the agreement was not, in fact, an agreement. He has pleaded it in paragraph 4 of his plaint as an agreement and the case has been argued and decided on that footing.

So far as the other point is concerned, the plaintiff has relied upon the case of *Sib Kishore Ghosh* v. *Manik Chandra Nath* (2), as an authority for the argument that where there is no fixed and definite amount the agreement is not within the provisions of section 28. But it seems to me that that case is not an authority for the proposition for which the plaintiff contends because, as is pointed out in the judgment, there was, in fact, no agreement alleged and consequently if no agreement was alleged there was nothing to attract the provisions of section 28. I think, therefore, that *Sib Kishore Ghosh* v. *Manik Chandra Nath* (2) does not support the plaintiff's contention. Then on behalf of the defendant, I was referred to the case of *Raghunath Saran Singh* v. *Sri Ram* (5). That was a Full Bench case and the suit was based on an oral promise to pay full legal fees and to engage the plaintiff as Pleader on behalf of the defendant. The Allahabad Court held that this agreement was barred by the provisions of section 28 and Mr. Justice Richards, as he then was, states at page 767 that in his view section 28 was intended to provide that all special agreements between a Pleader and his client should be in writing signed and filed according to the provisions of the section. It seems to me that if that case was rightly decided it covers the plaintiff's contention in the present application. There was no stated amount fixed in the agreement alleged and if the plaintiff's contention is right that would take him out of the provisions of section 28, but in spite of that it was held that section 28 was a bar. In *Sarat Chandra Roy* v. *Chandi Charan Mitra* (1), to which I was referred, as also in the case in *Sib Kishore Ghosh* v. *Manik Chandra Nath* (2), already referred to, there was no agreement. Consequently, clearly the cases there did not fall within the provisions of section 28. I was also referred to the case of *Ishan Chandra Kar* v. *Ram Charan Pal* (3). It seems to me that that case decides that a suit by a Pleader for fees based upon an alleged oral agreement, as here, cannot succeed because it is not a valid agreement as it is a special agreement and any special agreement is to be in writing under the provisions of section 28. I think that the true rule is that where a suit by a Pleader for fees against his client is based on an agreement he cannot succeed unless the agreement is both in writing signed by the party to be charged and filed as provided in the section. Consequently, no suit upon an oral agreement can succeed by virtue of the provisions of section 28.

That being so, I think the Rule must be

discharged with costs. I assess the hearing fee at one gold *mohur*.

B. N. & N. K.

Rule discharged.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 2009 OF 1916.

December 14, 1920.

Present:—Mr. Justice Abdul Rsoof.

Musammat AI BAI—APPELLANT

versus

Bhai KAHAN SINGH—RESPONDENT

Civil Procedure Code (Act V of 1908), O. XXI, r. 63—Suit by unsuccessful claimant to establish right to attached property—Burden of proof—Transfer of Property Act (IV of 1882), s. 53—Transfer to defeat and delay creditors—Presumption.

In a suit by an unsuccessful claimant, brought on the disallowance of his objections to attached property by a Court of Execution, the burden of proof to establish the ownership of the property lies necessarily on the plaintiff. [p. 877, col. 2.]

Where a member of a firm knowing that the firm had failed, executed deeds transferring his property to his wife and his son, the Court would be justified in applying the principles of section 53 of the Transfer of Property Act, and presuming that the alienations were fraudulent, and were executed with the object of delaying and defeating his creditors. [p. 878, col. 2.]

First appeal from a decree of the Subordinate Judge, First Class, Multan, dated the 29th June 1916.

Shaikh *Abdul Qadir*, K. B., and Mr. *Muhammad Rafi*, for the Appellant.

Messrs. *Petman*, *Obbard*, *Dhanraj Shah*, *Mukand Lal*, *D. R. Sawhney* and *B. N. Kapur*, for the Respondents.

JUDGMENT.—The facts giving rise to the suit which has led to this appeal may be summarised as below.

A firm of partnership under the name "Harnam Singh and Company" was started with eight partners holding different shares. Seth Kasam was one of these partners holding a one-anna share in the rupee. For a time the partnership business flourished but it failed some time about the 7th February 1906. The firm was indebted to various creditors, among them being one Bhai Kahan Singh who had advanced Rs. 25,000 to Har Charan Singh, the managing member of the firm under five *hundis* dated 1st April 1904. Bhai Kahan Singh had to sue the partners of the firm. Eventually he succeeded in obtaining a decree for Rs. 16,615-13 0 with future interest on the amount decreed on the 6th May 1910 from the Court of the Subordinate Judge of Lahore. This decree was passed jointly against Seth Kasam and four of his partners. In the execution of his decree Bhai Kahan Singh attached certain house property and shops, and sought to realize the decretal money by their sale. *Musammat* Ai Bai, the wife of Seth Kasam and her son, Muhammad Sadiq, put forward objections that the houses and shops attached did not belong to the judgment-debtor, that they belonged to them and were in their possession, and that they were not liable to be sold in execution of the decree against Seth Kasam. *Musammat* Ai Bai relied upon a registered document dated the 19th February 1906, under which certain house property had been transferred to her by Seth Kasam in lieu of Rs. 5,000 alleged to be due to her as her dower-debt. She also relied upon another document dated the 21st September 1908 by which Seth Kasam had purported to transfer in her favour a house and seven shops of the value of Rs. 3,000 with the alleged object of providing for her maintenance and residence.

Muhammad Sadiq put forward a sale-deed, dated the 20th February 1906, executed in his favovr by Seth Kasam transferring a number of houses in consideration of Rs. 10,000. For the purposes of this appeal it is not necessary to describe specifically the properties alienated in favour of *Musammat* Ai Bai and Muhammad Sadiq. These objections were disallowed by the District Judge of Multan to whose Court the decree had been transferred for execution on the ground that all the three transfers were fictitious and without consideration. The objections were accordingly dismissed on the 4th August 1913. This led to the institution of two suits, namely, one by *Musammat* Ai Bai and the other by Muhammad Sadiq. In both these suits six defendants were impleaded. Bhai Kahan Singh, the decree-holder, being the de-

fendant No. 1, and we are concerned with this defendant alone as the others did not interest themselves in the suits and did not file any written statement. The suits were resisted by Bhai Kahan Singh principally on the ground that Seth Kasam had executed the sale-deeds fictitiously and without consideration in order to defeat his creditors, and that they were unlawful and null and void. In the suit of *Musammat* Ai Bai the amount of dower alleged by her was denied. Her possession over the property transferred in her favour was also denied. In the written statement filed in the suit of Muhammad Sadiq the allegation made by the defendant No. 1 was that the plaintiff was living jointly with Seth Kasam, and that the plaintiff was not in possession of the property in dispute. The two suits were tried together by the learned Subordinate Judge of Multan and were disposed of by one judgment. He framed three issues, namely:—

(*i*) Did Seth Kasam execute both the *tamliknamas* validly in favour of his wife?

(*ii*) Is the sale-deed in favour of Muhammad Sadiq with consideration and valid?

(*iii*) Was the *onus probandi* rightly put on the plaintiffs?

The decision of these issues was given against the plaintiffs and the suits were dismissed on the 29th of June 1916.

Two appeals were preferred against the decree passed by the learned Subordinate Judge, namely, First Appeal No. 2008 of 1916 preferred by Muhammad Sadiq and the First Appeal No. 2009 of 1916 by *Musammat* Ai Bai. Both these appeals have been argued together before us and, like the Court of first instance, we considered it convenient to dispose of both of them by one judgment.

In order to understand the true nature of the dispute it is necessary to give previous history of the firm "Harnam Singh and Company," the failure of which is said to have led to the execution of the deeds, which are now challenged as being fictitious and fraudulent. From the evidence of Mr. Ganpat Rai, Barrister-at-Law, who was one of the partners, it appears that the failure of the firm was communicated to him on the 7th of February 1906. On the 17th of February a meeting was held at the house of Pandit Sheo Narain in Lahore. Seth Kasam was present in the meeting. Seth Kasam then knew thoroughly well that the firm had failed, and he talked to creditors of a remission. The meeting started at about mid-day and in the evening Seth Kasam left saying that he felt pain in his stomach. He professedly left for Faqir Iftikhar-ud-Din's house, and the meeting continued for about an hour after his departure. The meeting was adjourned till the next day, *i. e.*, the 18th February 1906 and it was again held on that date; but Seth Kasam did not attend this meeting. On the 19th and 20th February 1906 he executed the sale-deed in favour of his son, Muhammad Sadiq and the deed of transfer in lieu of dower in favour of his wife *Mussammat* Ai Bai. Sardar Udham Singh, Lala Harkishen Lal, were also examined on the point and they corroborated the evidence given by Mr. Ganpat Rai. The evidence further shows that Seth Kasam made other transfers also in favour of his friends and relations about the same time. In a case like this, where the objections as to the attached properties have been disallowed by the Execution Court, the burden of proof to establish the ownership of the property would lie necessarily on the plaintiff. In this case particularly the circumstances are so strong that the burden of proving the allegations in the plaint lies even more heavily upon the plaintiffs.

The learned Subordinate Judge unnecessarily framed an issue on the question of the execution of the documents relied upon by the two plaintiffs, because their execution was admitted in paragraph 3 of the *jawab-i-dawa* filed by the defendant No. 1 in the two cases. Their execution being admitted they were challenged only on the ground of their being fraudulent, fictitious and without consideration.

As regards the deed dated the 19th February 1906 in favour of *Musammat* Ai Bai it was necessary for her to establish that there was consideration for it and the property alienated had been transferred to her *bona fide*. The evidence on the point is not only meagre, but valueless in the eye of the law. The evidence as to the amount of dower given by Mir Hassan is clearly hearsay. *Musammat* Ai Bai is stated to have gone to him and to have requested him to get Seth Kasam to pay her dower, the amount of which was stated to be Rs. 5,000 by her. This was the only information which this witness

had on the point of *Musammat* Ai Bai's dower. This was a statement made by the plaintiff, *Musammat* Ai Bai, herself, in her own favour. She is not entitled to rely on an admission made by herself. The evidence of Muhammad does not possess any greater value. According to him Muhammad Sadiq, son of *Musammat* Ai Bai, had gone to him and had requested him to persuade Seth Kasam to pay to *Musammat* Ai Bai Rs. 5,000, the dower-debt due to her. This is hearsay evidence and inadmissible.

Nur Muhammad was examined by commission, and as to the amount of dower of *Musammat* Ai Bai he stated that he had learnt from his father and grandmother and other relations that the *mehr* (dower) of *Musammat* Ai Bai in her marriage with Seth Kasam was fixed at Rs. 5,000. This is also hearsay evidence and possesses no value. Therefore, practically, there was no evidence before the Court below on the question of the alleged dower of *Musammat* Ai Bai. The Court below was right in holding that the document, dated 19th February 1906, in favour of *Musammat* Ai Bai was without consideration. Seth Kasam was so situated at the time that the conclusion as to the sale-deed being fraudulent and executed with the object of defeating his creditor is irresistible. The liability of the partners of the firm "Harnam Singh and Company," according to the evidence, was almost Rs. 4,00,000. The creditors were clamouring for their claims. The affairs of the Company were clearly disclosed in the meeting of the 19th February 1906. The conduct of Seth Kasam in leaving the meeting abruptly on the pretext of pain in the stomach and then only two days after executing the two deeds in favour of his wife and son, leaves no possible doubt as to his intention.

As regards possession over the property conveyed, numerous receipts have been put in showing that Municipal taxes were paid by *Musammat* Ai Bai. On the other hand, evidence has been called on behalf of the defendant to show that Seth Kasam all along remained in possession of the transferred property and let out the houses to tenants himself though purporting to act on behalf of his wife. If the transfer was fraudulent, as we find it to be, it was only to be expected from a fraudulent transferor to adopt means to show the reality of the transaction. We do not believe that *Musammat* Ai Bai was never placed in exclusive possession of the property transferred under the deed dated the 19th February 1906.

As regards *tamliknama*, dated the 21st September 1908, it is enough to say that there was no reason why Seth Kasam should have made up his mind suddenly to provide for the maintenance and residence of *Musammat* Ai Bai with whom, according to his own admission, he had not been on good terms ever since the year 1905. The circumstances disclosed by the evidence on the record lead us to the conclusion that this document also must have been executed with the fraudulent object of defeating and delaying his creditors. Applying the principles of section 53 of the Transfer of Property Act the Court may presume that the alienation was fraudulent. The circumstances are so strong in this case that it is not possible to come to any other conclusion. The issue No. 2 related to the sale-deed in favour of Muhammad Sadiq and raised the question whether it was for consideration and valid. The execution of this deed was also admitted by the defendant No. 1, but it was challenged on the ground of want of consideration, and that it had been fraudulently executed to defeat the creditors. The learned Subordinate Judge was not right in holding that the execution had not been proved. The real question was whether the payment of Rs. 10,000, the consideration for the sale-deed, had been established by the evidence on the record. The amount was not paid before the Sub-Registrar, but its receipt was admitted before him. Muhammad Sadiq in his deposition tried to make out that his grandmother had given him Rs. 14,000 some years before and that out of this amount he had paid Rs. 10,000 to his father as the price of house and shop transferred to him by Seth Kasam.

Maula Bakhsh, witness for the plaintiff, stated that 9 or 9½ years ago, Seth Abdulla, uncle of the plaintiff, sent for him one evening, and he went to his shop where he saw Seth Kasam, Munshi Khair-ud-Din, Seth Gul Muhammad, Seth Muhammad Usman, Seth Muhammad Sadiq and Seth Ali Muhammad sitting. Some money bags were lying, which were counted by Seth

Kasam. Seth Abdulla said that some dealings with regard to the property had taken place between Seth Kasam and Muhammad Sadiq in connection with which the amount of Rs. 10,000 was paid by Muhammad Sadiq to Seth Kasam, and some of his property in Multan Cantonment was purchased. The plaintiff tried to make out that a few days before the actual date on which the sale-deed was registered the amount of Rs. 10,000, the consideration of the sale-deed, had been privately paid to the father by son. It is difficult to believe this evidence. Seth Kasam himself has stated in his deposition that the father and son had not been on good terms for a long time. One would have expected, under the circumstance, that the son would have taken a receipt for the amount when he paid it at the shop of his uncle, Seth Abdulla. Ali Muhammad, witness, has also tried to support the statement of Maula Bakhsh, and has made a similar statement.

Chandu Ram had identified Seth Kasam before the Sub-Registrar. He has been called to prove the admission made by Seth Kasam as to the receipt of Rs. 10,000, the consideration of the sale deed. The evidence is of not much help to the plaintiff. Seth Kasam also has made a statement stating the alleged circumstances under which Rs. 10,000 were received by him beforehand. For him it was simply natural to make the statement, because he himself was the author of the fraudulent deed. The rest of the evidence called on behalf of the plaintiff, Muhammad Sadiq, was with regard to the payment of Municipal taxes and apparent possession enjoyed by him. Our remark relating to the evidence given in *Musammat* Ai Bai's case applies equally to the evidence given on behalf of Muhammad Sadiq under this head.

In our opinion the Court below took the right view of the evidence in this case, and came to this right conclusion. We accordingly dismiss both the appeals with costs in all Courts.

W. C. A.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 257 OF 1921.

April 7, 1922.

Present :—Mr. Justice Cuming and Mr. Justice Panton.

SITANATH DAS—DECREE-HOLDER—APPELLANT

versus

Rani KANAK PROBHA DEBI AND OTHERS—JUDGMENT-DEBTORS—RESPONDENTS.

Execution of decree—Limitation—Judgment-debtors who were described as parties but against whom execution was not asked for, if precluded from showing subsequently that the application was barred by limitation.

A judgment-debtor who was not a party to a previous application for execution of a decree or to any order made upon it is not precluded from showing that the said application was barred by limitation and that, therefore, it was not in accordance with law. [p. 880, col. 2.]

Harendra Lal Roy Chowdhry v. *Sham Lal Sen*, 27 C. 210; 14 Ind. Dec. (N. S.) 139, followed.

Mungul Pershad Dichit v. *Grija Kant Lahiri*, 8 C. 51; 11 C. L. R. 113; 8 I. A. 123; 4 Sar. P. C. J. 249; 4 Ind. Dec. (N. S.) 32 (P. C.), referred to.

Appeal against an order of the District Judge, Khulna, dated the 13th May 1921, reversing that of the Munsif, Second Court at that place, dated the 19th November 1920.

FACTS appear from the judgment.

Babu *Kshtera Kohan Ghose*, for the Appellant.—The learned District Judge is wrong in holding that my application for execution is barred by limitation. Even if it be conceded that the application of 1914 was barred by limitation by reason of its having been presented more than 3 years after the last step-in-aid of execution was taken in the execution case of 1911, but as on that application the Court rightly or wrongly directed execution to issue, it is no longer open to the judgment-debtors to say that that application was barred by limitation. That was the order of a competent Court having jurisdiction in the matter and if the order was not in accordance with law, appropriate procedure by way of appeal or revision ought to have been taken to remedy the error. That not having been done it is now too late to contend that the application of 1914 was barred by limitation. See *Mungul Pershad*

SITANATH DAS v. KANAK PROBHA DEBI.

Dichit v. *Grija Kant Lahiri* (1).

Dr. *Jadunath Kanjilal*, for the Respondent. —The argument of my learned friend would have considerable force if in the application of 1914 it was open to my clients to raise the objection that the application was barred by limitation. No execution was sought for by that application against the judgment-debtors Nos. 2 to 4. It was, therefore, not open to them to come in and plead the bar of limitation. See O. XXI, r. 11, 22, 23, Civil Procedure Code. Although these judgment-debtors were described as parties in the application, the practical effect was that they were no parties to the execution proceedings. Consequently, any order passed therein could not be binding upon them and they are perfectly competent to show that the application was barred by limitation. See *Harendra Lal Roy Chowdhry* v. *Sham Lal Sen* (2).

Babu *Kshetra Mohan Ghose* replied.

JUDGMENT.—This is an appeal against the order of the learned District Judge of Khulna in appeal rejecting an application for execution. The facts appear to be these:—The decree-holder obtained a decree against Rani Durga Sundari in 1900. Execution was taken out against Rani Durga Sundari in 1911 in which year she died. Execution was again taken out in 1914. Execution was sought for against the son, who was defendant No. 1, and the grandsons, who are judgment-debtors Nos. 2 to 4, were included as parties. This application was dismissed in default. Subsequently, further applications for execution were made against defendant No. 1. The other judgment-debtors were described as parties but execution was not asked for against them. Various sums were realised. The present appeal arises out of an application made in 1920 in which execution was sought for against respondent No. 1 and also the present respondents Nos. 2 to 4 and defendants Nos. 5 to 7. The Court of first instance allowed the execution to proceed against all the judgment-debtors, except Nos. 6 and 7 who are not before us. On appeal the learned District Judge held that the application was barred by limitation. His ground for holding this was that the last step-in-aid of execution in execution case of 1911 was on the 27th June 1911, and as the second execution case was filed on the 6th July 1914, more than three years later, the application for execution in 1914 is barred by limitation, and that as execution has not been sought against respondents Nos. 2 to 4 in the former proceeding it was open to them to raise in the present proceeding the question whether the execution proceedings of 1914 were not barred by limitation.

The decree-holder appeals and contends, relying on the Privy Council ruling in *Mungul Pershad Dichit* v. *Grija Kant Lahiri* (1), that it is not open to the respondents Nos. 2 to 4 to re-open the question as to whether the application for execution in 1914 was barred by limitation. We think that the learned District Judge was correct in the finding he has come to. It is clear, nor is it disputed, that execution was not asked for against respondents Nos. 2 to 4 before 1920. No doubt they were put down as parties to the suit but execution was not asked against them, and, therefore, it is quite clear, reading rr. 11, 22 and 23 of O. XXI, that it was not then open to them to come in and raise any objection. The only person who could come in and raise any objection was the person against whom execution was sought. So far as regards the application for execution in 1914 is concerned, they could not have urged any objection because the case was disposed of in default and, therefore, they had no opportunity, even if they had the right, of being heard. With regard to the other applications for execution, as I have pointed out, they would not have been allowed to be heard on the objection looking at the terms of O. XXI, rr. 11, 22 and 23. The present case, therefore, falls within the principles of the ruling reported as *Harendra Lal Roy Chowdhry* v. *Sham Lal Sen* (2), where it has been held that a judgment-debtor who was not a party to a previous application for execution of a decree or to any order made upon it is not precluded from showing that the said application was barred by limitation and that, therefore, it was not in accordance with law. With regard to the application of 1914 it was clearly barred by limitation under the provisions of Article 182

(1) 8 C. 51; 11 C. L. R. 113; 8 I. A. 123; 4 Sar. P. C. J. 249; 4 Ind. Dec. (N. S.) 32 (P. C.).

(2) 27 C. 210; 14 Ind. Dec. (N. S.) 139.

DEWA SINGH v. GOKAL.

The last step-in-aid of execution in 1911 was taken on 27th June 1911 when the notice was issued, and this was the last step taken in aid of execution in that proceeding.

For these reasons, the order of the learned Judge is right. The appeal fails and is dismissed with costs. We assess the hearing fee at two gold *mohurs*.

PANTON, J.—I agree.

B. N.

Appeal dismissed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 558 OF 1918.

May 2, 1921.

Present :—Mr. Justice Broadway and Mr. Justice Wilberforce.

DEWA SINGH—PLAINTIFF—APPELLANT

versus

GOKAL—DEFENDANT—RESPONDENT.

Res judicata—*Suit by reversioners that mortgage without consideration and necessity—Finding that all consideration did not pass—Subsequent suit by mortgagee for possession against mortgagor, whether barred.*

In a suit by reversioners for a declaration that a mortgage, being wanting in consideration and necessity, should not affect their reversionary interests, it was decided that all the consideration had not passed and that necessity was not proved. Subsequently, the mortgagee brought the present suit for possession against the mortgagor. The latter denied consideration and pleaded that the suit was barred by the rule of *res judicata* inasmuch as the question of consideration had already been decided in the previous suit:

Held, that the suit was not barred as there was no conflict of interest in the previous suit between the mortgagee-defendant and the mortgagor-defendant, and there was no issue whether the deed was valid and binding as between the mortgagor and mortgagee.

Dhanna Singh v. *Musammat Budhi*, 16 Ind. Cas. 80; 103 P. R. 1912; 157 P. W. R. 1912; 188 P. L. R. 1912, distinguished.

Thakur Das v. *Musammat Manna*, 77 P. R. 1894, relied upon.

Second appeal from the decree of the District Judge, Ludhiana, dated the 12th November 1917, affirming that of the Subordinate Judge, Second Class, Ludhiana, dated the 30th July 1917.

Dr. *Nand Lal*, for the Appellant.

Mr. *Abdul Ghani*, for the Respondent.

JUDGMENT.—In the present case the plaintiff-mortgagee sued for possession of land. The defendant denied receipt of consideration and also pleaded that the point of consideration had already been decided in a previous suit relating to this mortgage and that the present suit was barred by the rule of *res judicata*. The latter plea has been given effect to by both the Courts, which have followed *Dhanna Singh* v. *Musammat Budhi* (1). The mortgagee has, therefore, come up on second appeal, and we have heard on his behalf Dr. Nand Lal.

The previous suit referred to by the lower Courts was one brought by minor reversioners for the usual declaration that the alienation, being wanting in consideration and necessity, should not affect their reversionary rights. In that case it was decided that all the consideration had not passed and that necessity was not proved. It is impossible to understand how a decision of this character can have any effect on the present suit by the mortgagee. There was no conflict of interest in that case between the mortgagee-defendant and the mortgagor-defendant. In fact, we notice that the mortgagor himself admitted the passing of some of the consideration and the point now involved could not have been at issue between them. *Dhanna Singh* v. *Musammat Budhi* (1) is a judgment proceeding upon its own particular facts and the judgment laying down the law applicable to the present case is *Thakur Das* v. *Musammat Manna* (2), in which the learned Senior Judge of the Court pointed out that in the previous suit there was no issue whether the deed was valid and binding as between the mortgagor and the mortgagee. The same is the position in the present case.

We accept the appeal and remand the case to the first Court for the trial of the remaining issue. Costs will be costs in the cause. Court fee on appeal will be refunded.

W. C. A.

Appeal accepted: Case remanded.

(1) 16 Ind. Cas. 80; 103 P. R. 1912; 157 P. W. R. 1912; 188 P. L. R. 1912.

(2) 77 P. R. 1894.

RAGHUNATH SAHAY v. CHOWA MAHTON.

PATNA HIGH COURT.

APPEAL FROM APPELLATE ORDER No. 65 OF 1922.

July 6, 1922.

Present :—Mr. Justice Coutts and Mr. Justice Das.

Babu RAGHUNATH SAHAY AND OTHERS—DECREE-HOLDERS—APPELLANTS

versus

CHOWA MAHTON AND ANOTHER—OBJECTORS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), Sch. III, Art. 6, application of—Essential conditions for application of Article—Sale of portion of occupancy holding in execution of money-decree—Decree-holder not landlord.

It is essential for the application of Art. 6, Schedule III to the Bengal Tenancy Act that the decree must be obtained in a suit between the landlord and tenant, and that the provisions of the Bengal Tenancy Act must be applicable to them.

A decree-holder who is not the landlord can, against the will of the judgment-debtor and without the express consent of the landlord, cause a portion of his judgment-debtor's occupancy holding to be sold in execution of a money-decree even where there is no local custom of transferability.

Jugeshar Misra v. *Nath Koeri*, 65 Ind. Cas. 835; (1922) Pat. 49; 3 P. L. T. 205; 4 U. P. L. R. (Pat.) 9 (F. B.), followed.

Appeal from an order of the District Judge, Gaya.

Messrs *S. S. Bose* and *N. C. Ghosh*, for the Appellants.

Mr. *Bindeswari Prasad* for Mr. *B. C. Sinha*, for the Respondents.

JUDGMENT.

DAS, J.—This appeal is directed against an order of the learned District Judge of Gaya, dated the 3rd December 1921. The decree-holders are the appellants before us and they attempted to execute a decree which they had obtained as against the respondents. The learned District Judge has come to the conclusion that the application is barred by Art. 6 of the Third Schedule of the Bengal Tenancy Act and that the decree-holders are not entitled to sell a portion of the occupancy holding of the defendants. In my opinion the view taken by the learned District Judge is an erroneous one. The plaintiffs were the fractional landlords ; but at the time when they instituted the suit there was no relationship of landlord and tenant as between the plaintiffs and the defendants. The essential conditions which must be satisfied in order to attract the operation of Art. 6, Schedule III of the Bengal Tenancy Act are these : First, the decree must be obtained in a suit between the landlord and tenant ; and, secondly, the provisions of the Bengal Tenancy Act must be applicable to them. Here neither of these conditions is satisfied ; and, in my opinion, Art. 6, Schedle III of the Bengal Tenancy Act did not apply.

So far as the other point is concerned, the matter is concluded by a decision of the Full Bench of this Court in *Jugeshar Misra* v. *Nath Koeri* (1). The Full Bench of this Court came to the conclusion in that case that the decree-holder not being the landlord of the holding can, against the will of the judgment-debtor and without the express consent of the landlord, cause a portion of the judgment-debtor's occupancy holding to be sold in execution of a money-decree where there is no local custom of transferability. The decree-holder in this case is not the landlord of the holding and he is proceeding as against a portion of the occupancy holding of the judgment-debtor.

I would allow this appeal, set aside the order of the Court below, and direct that the execution do proceed.

COUTTS, J.—I agree.

P. D. & N. K

Appeal allowed.

(1) 65 Ind. Cas. 835; (1922) Pat. 49; 3 P. L. T. 205; 4 U. P. L. R. (Pat.) 9 (F. B.).

ASI BAI v. GIRDHARI RAM.

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No. 1435 OF 1920.

March 9, 1921.

Present:—Mr. Justice Scott Smith.

Musammat ASI BAI—APPELLANT

versus

GIRDHARI RAM—RESPONDENT.

Restitution of conjugal rights—Decree, manner of enforcing—Guardians and Wards Act (VIII of 1890), provisions of, inapplicable.

The provisions of the Guardians and Wards Act should not be put in force in order to enable a husband to get possession of the person of his wife. [p. 883, col. 2.]

Where a husband obtains a decree for restitution of conjugal rights against his wife, who is under

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the age of 18 years, his remedy to enforce the decree is by applying for execution of the same, and not by means of an application under the Guardians and Wards Act to be appointed the guardian of the person of his wife, especially where there is no necessity for the appointment of a guardian.

Miscellaneous first appeal from the order of the Senior Subordinate Judge, Muzaffargarh, dated the 13th May 1920.

Lala *Jagan Nath*, for the Appellant.

Mr. *Har Gopal* for Dr. *Gokal Chand Narang*, for the Respondent.

JUDGMENT.—This is an appeal from the order of the Subordinate Judge of Muzaffargarh appointing Girdhari Ram, respondent, guardian of *Musammat* Sitan Bai, his wife, under the Guardians and Wards Act. *Musammat* Sitan Bai is 16 years of age, and a decree has been passed against her in favour of Girdhari Ram for restitution of conjugal rights. Girdhari Ram sought to execute this decree by the imprisonment of his wife but the Subordinate Judge rejected his application and ordered that the decree should not be enforced by imprisonment of the girl till she attains the age of 18. This order was set aside by the District Judge to the extent that the latter officer ordered that Girdhari Ram could make another application, if so advised, for enforcement of his decree by imprisonment. Instead of doing this, he has applied to be appointed guardian of the person of *Musammat* Sitan Bai and has been so appointed.

It is contended in appeal that there was no necessity to appoint any guardian of *Musammat* Sitan Bai who has been living with her grandmother *Musammat* Asi Bai for many years, that the object of the respondent is merely to obtain possession of the person of his wife and that the provisions of the Guardians and Wards Act are not intended to apply to a case of this sort, and should not be enforced to enable a husband to get possession of his wife which he has failed to do by execution of the decree obtained by him for restitution of conjugal rights. No doubt, the lower Court is right in its view that, according to Hindu Law a husband is the legal guardian of the person of his wife, but the question is whether there is any necessity for appointing a guardian of the person of *Musammat* Sitan Bai. Previously her father, Hira Nand, was appointed her guardian but this appointment was set aside on appeal by the Chief Court on the 9th February 1916 in Civil Appeal No. 429 of 1913. At that time the minor was living with *Musammat* Asi Bai and has apparently been living with her ever since. It was held then that there was no necessity to appoint any guardian and I see no necessity for any such appointment now. I also do not think that the provisions of the Guardians and Wards Act should be put in force in order to enable a husband to get possession of the person of his wife. Girdhari Ram has got a decree against her for restitution of conjugal rights and this decree can be enforced by filing an application for execution, and it will be for the Executing Court to decide whether it should be enforced by imprisonment of the wife or not.

I accept the appeal and, setting aside the order of the Subordinate Judge, dismiss Girdhari Ram's application. There will be no order as to costs.

W. C. A. & N. H.

Appeal accepted.

CALCUTTA HIGH COURT.

CIVIL RULE No. 642 OF 1921.

February 27, 1922.

Present :—Mr. Justice Greaves and Mr. Justice Ghose.

Srimati HARI BHABINI DEBI AND ANOTHER —PETITIONERS

versus

NARENDRA NATH ROY, PLEADER, AND ANOTHER—OPPOSITE PARTIES.

Civil Procedure Code (Act V of 1908), O. XLI, r. 10 —Security for costs, appeal dismissed for failure to furnish—Court, power of, to extend time for furnishing security.

Where an appeal has been rejected on account of the appellants' failure to furnish security for costs within the time allowed by the Court, it is not open to the Court rejecting the appeal to extend the time for giving security. The appeal having been finally disposed of, no extension of time can be granted for doing any act relating to the appeal. [p 884, col. 2.]

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Balwant Singh v. *Daulat Singh*, 13 I. A. 57; 8 A. 315; 4 Sar. P. C. J. 707; 4 Ind. Dec. (N. S.) 1176 (P. C.), distinguished.

Rule against an order of the Court of the Additional District Judge, Howrah, in Title Appeal No. 110 of 1921.

FACTS appear from the judgment.

Babu *Manmatha Nath Ganguly*, for the Petitioners.—The Rule was obtained against an order dismissing an appeal under O. XLI, r. 10, for failure to deposit costs of suit. The facts shortly are these. We brought a suit to set aside a sale of a certain house against defendants-opposite parties. The first Court dismissed the suit. We appealed and at the instance of the respondents we were directed by the Appellate Court to furnish security for costs. We could not deposit the security in time and the appeal was dismissed. We then applied for restoration of the appeal. That application has been rejected. We put in a mortgage-bond as security for costs which was refused. I submit under the circumstances the learned Judge was wrong in dismissing the appeal. Refers to *Padmabati Dasi* v. *Rasik Lal Dhar* (1), *Badri Narain* v. *Sheo Koer* (2), *Balwant Singh* v. *Daulat Singh* (3) and *Jumnabai* v. *Vissondas* (4).

Dr. *Dwarka Nath Mitter* (with him Babu *Haradhone Chatterjee*), for the Opposite Parties, was not called upon to reply.

JUDGMENT.—This Rule was granted at the instance of the petitioners, the appellants, against an order of the Additional District Judge of Howrah of the 21st July 1921 refusing to restore an appeal. Shortly, the material facts are as follows:—The present applicants were plaintiffs in a suit to set aside a sale by them of a certain house property to one Narendra Nath Roy, their allegation being that they executed the document conveying the house to Narendra thinking that it was a mortgage and not a conveyance. The suit was heard and the Court disbelieved the story of the present petitioners, the plaintiffs in the suit. The present petitioners preferred an appeal against the decree dismissing their suit, and thereupon the respondents applied for an order that they should give security for costs. An order was made directing security to be given by the petitioners for costs in a sum of Rs. 300. We are satisfied from the order-sheet that on this occasion the petitioners were represented by a Pleader. The security was not given within the time ordered and on the 25th June 1921 the respondents to the appeal applied for dismissal of the appeal. The appellants' Pleader said that his clients intended to apply for further time within which to give the security and thereupon, as I suppose, the Judge was not satisfied that there was really to be a genuine application, he rejected the petitioners' application. Then, on the 21st July, an application was made to the District Judge to restore the appeal. The Judge refused the application saying that he did not know under what provisions of law the application was made. We think the order of the 21st July was perfectly right. By the order dated the 25th June the District Judge had rejected the appeal and consequently on the 21st July he had no jurisdiction remaining him to extend the time for giving security having regard to the fact that he had rejected the appeal. The learned Vakil for the petitioners relied on the case of *Balwant Singh* v. *Daulat Singh* (3). But in that case the Judicial Committee found it very difficult to understand exactly what order was made by the High Court and as we read the decision, it is not a decision that, in circumstances similar to the present, namely, where an appeal has been rejected an order can subsequently be made extending the time for giving security, all that the Judicial Committee did was in the uncertain state of things in the exercise of their own power to restore the appeal. It does not seem to us that the case reported as *Balwant Singh* v. *Daulat Singh* (3) is any authority for the proposition that if the Court has rejected or dismissed an appeal it is still open to that Court to extend the time for giving the security or to do any other act relating to the appeal which has already been finally disposed of.

(1) 6 Ind. Cas. 666; 37 C. 259.
(2) 17 I. A. 1; 17 C. 512; 5 Sar. P. C. J. 493; 8 Ind. Dec. (N. S.) 881 (P. C.).
(3) 13 I. A. 57; 8 A. 315; 4 Sar. P. C. J. 707; 4 Ind. Dec. (N. S.) 1176 (P. C.).
(4) 21 B. 576; 11 Ind. Dec. (N. S.) 386.

The result is that this Rule is discharged with costs, the hearing fee being assessed at one gold *mohur*.

R. N.

Rule discharged.

LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 576 OF 1921.

January 25, 1922.

Present:—Mr. Justice LeRossignol.

MUHAMMAD NIZAM UD DIN—PLAINTIFF—PETITIONER

versus

AMIN-UD-DIN AND OTHERS—DEFENDANTS—RESPONDENTS

Civil Procedure Code (Act V of 1908), O. XXI, rr. 66, 90—Execution of decree—Sale—Failure to state estimated price in proclamation—Irregularity—Substantial injury—Second appeal—Point taken for first time.

The mere omission to state in a sale proclamation the estimated price of the property to be sold does not amount to material irregularity within the meaning of r. 90 of O. XXI of the Civil Procedure Code.

Saadatmand Khan v. *Phul Kuar* 20 A. 412; 2 C. W. N. 550; 25 I. A. 146; 7 Sar. P. C. J. 380; 9 Ind. Dec. (N. S.) 624 (P. C.), distinguished.

A material irregularity in the publication or conduct of a sale would not justify the setting aside of the sale in the absence of proof that substantial injury to the applicant had resulted therefrom.

A point taken for the first time in second appeal deserves no consideration.

Petition, under section 44 Act VI of 1918, for revision of an order of the District Judge, Delhi, dated the 12th March 1921, affirming that of the Subordinate Judge, First Class, Delhi, dated the 20th December 1920.

Lala *Rama Nand*, for the Petitioner.

Lala *Sardha Ram*, for the Respondents.

JUDGMENT.—This is a petition to revise an order confirming a sale made by public auction in satisfaction of a decree.

The point now taken is taken for the first time in this Court, to the effect that the price of the property was not entered in the proclamation of sale.

The petition fails for several reasons. First, a point taken for the first time in this Court deserves no consideration. Second, the mere omission to state the estimated price of the property is not a material irregularity. Reference is made to *Saadatmand Khan* v. *Phul Kuar* (1) but the facts of that case differ greatly from the facts of this.

In that case, there was a gross misstatement of the estimated price, calculated to mislead; here there was no misstatement, only an omission, whilst the property was visible to all purchasers who were thus in a position to frame their own estimates.

Again, even if there had been a material irregularity in the publication or conduct of the sale, that would not justify interference in the absence of proof that substantial injury to petitioner had resulted therefrom. Here there is no such proof.

The petition is dismissed with costs.

Z. K.

Petition dismissed.

(1) 20 A. 412; 2 C. W. N. 550; 25 I. A. 146; 7 Sar. P. C. J. 380; 9 Ind. Dec. (N. S.) 624 (P. C.).

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No 173 OF 1921.

February 8, 1922.

Present:—Justice Sir John Woodroffe, Kt., and Mr. Justice Ghose.

ONKARMAL AGARWALA—DECREE-HOLDER—APPELLANT

versus

Rai Shehab NRITYA GOPAL CHAKI—SURETY, JUDGMENT-DEBTOR—RESPONDENT.

Surety, execution of decree against—Surety's liability co-extensive with that of judgment-debtor—Judgment-debtor's failure to have payments certified—Surety, if affected.

A person who stands surety for a judgment-debtor is bound so long as the judgment-debtor is bound and the latter is bound so long as any payments which he may have made to the decree-holder are not certified to the Court executing the decree. [p. 886, col. 2.]

Where, therefore, such payments are not certified to the Court executing the decree, an application for execution of the decree against the surety is maintainable. [p. 886, col. 2.]

Appeal against an order of the Additional District Judge, Pabna and Bogra at Pabna,

dated the 11th of April 1921, affirming that of the Munsif, First Court at Pabna, dated the 26th of February 1920.

FACTS appear from the judgment.

Babu *Atul Chandra Gupta*, for the Appellant.—The decree-holder is the appellant. The appeal arises out of proceedings in execution of a decree The respondent is the surety of the judgment-debtor. The question for decision is when an execution is taken against surety under section 145 of the Code of Civil Procedure whether O. XXI, r. 2 (3) operates as a bar or not. The properties of the judgment-debtor were attached before judgment and the respondent stood surety. His answer was that there was a criminal proceeding against the judgment-debtor and after his acquittal the plaintiff and the judgment debtor made up their case and a fraudulent decree having been passed thereafter he was not liable for the amount. My submission is that the surety is not entitled to set up that plea. I denied having been paid at all.

[GHOSE, J.—Why don't you proceed against the judgment-debtor?]

The judgment-debtor has transferred his properties to the surety. Refers to section 145 and O. XXI, r. 2 (3), Civil Procedure Code. Section 145 gives me the right to proceed against the surety for the decretal amount. The Court is clearly wrong when it says that O. XXI, r. 2 (3) would not apply because the surety is proceeded against. The surety is not without any remedy. A surety stands as a surety taking all the chances of an execution against him. I rely on the wording of sub-section (3) of section 145.

[GHOSE, J.—Is it "money payable under a decree?" The surety is only liable for the performance of the decree.]

If the payment had been made by the surety then the section would completely apply. But that is not the case here. My next point is that this point ought not to have been allowed to be raised on the petition filed by him by which he stated that the decree was fraudulent.

Babu *Brojolal Chakerbutty* (with him Babu *Krishna Kamal Moitra*), for the Respondent.—O. XXI, r. 2 (3) does not apply. The judgment-debtor or the decree-holder is required to certify payment to Court. I was not either of them. Therefore, I could not be liable under sub-section (3). Payment or no payment because there has been an understanding between judgment-debtor and decree-holder that would amount to my discharge. I am bound only by the contract of guarantee. Therefore, the provisions of the Contract Act would apply. Refers to sections 134 5 of the Indian Contract Act. These questions could be gone into under section 47, Civil Procedure Code. Refers to *Ramanathan Pillai* v. *Doraiswami Ayyangar* (1) *Motilal* v. *Chandrasangji* (2). The surety is not circumscribed by the rules which bind the judgdment debtor.

Babu *Atul Chandra Gupta* replied in brief.

JUDGMENT.—This appeal arises out of an application for execution by a decree-holder against a surety, who is the respondent in this appeal. The case of the surety is that the judgment-debtor for whom he stood surety, has paid the decree holder. This fact is contested, and it is also contended before us that we cannot take notice of any such payments, even if in fact they had been made, by reason of the circumstance that they were not certified. It may well be that the law as regards certification may not have any application as regards payments made by the surety himself,—a point, however, which we need not decide in this case, because it is not necessary. But that is not the case here. It is alleged that payments were made by the judgment-debtor and these payments were uncertified. The position of the surety appears to be this: The surety is bound so long as the judgment-debtor is bound. The judgment-debtor is bound so long as any payments which he may have made (and such alleged payments are contested in this case) are not certified to the Court. Therefore, we think that the argument of the appellant succeeds and the appeal must be decreed and the execution should be allowed to proceed. The appellant is entitled to his costs in this Court and in both the Courts below. The hearing fee in this appeal is assessed at two gold *mohurs*.

R. N.

Appeal decreed.

(1) 55 Ind. Cas. 363; 43 M. 325; 38 M. L. J. 65; 11 L. W. 45; (1920) M. W. N. 114; 27 M. L. T. 207.

(2) 12 Ind. Cas. 549; 36 B. 42; 13 Bom. L. R. 909.

ILAHI JAN v. HARI KISHEN DAS.

LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 793 OF 1921.
(FORMERLY CIVIL APPEAL No. 1038 OF 1921).
November 8, 1921.

Present:—Mr. Justice Broadway.

Musammat ILAHI JAN—OBJECTOR—PETITIONER

versus

HARI KISHEN DAS, CREDITOR—SRI RAM, RECEIVER AND RAMJI DASS, INSOLVENT—RESPONDENTS.

Provincial Insolvency Act (V of 1920), ss. 53, 75—Gift of money, whether 'transfer'—Order under s. 53—Appeal, second.

A gift of money made by an insolvent a few months before his being adjudged an insolvent to his mistress for the purpose of purchasing a motor car, amounts to a 'transfer' within the meaning of section 53 of the Provincial Insolvency Act and is liable to be set aside under the provisions of that section, even though the subject-matter of the gift is converted into a car.

Tankard, In re, Official Receiver, Ex parte, (1899) 2 Q. B. 57; 68 L. J. Q. B. 670; 80 L. T. 500; 47 W. R. 624; 6 Manson 188; 15 T. L. R. 332, relied upon.

No second appeal lies from an order under section 53 of the Provincial Insolvency Act annulling a transfer.

Petition for revision of an order of the District Judge, Ambala, dated the 3rd May 1921, affirming that of the Senior Subordinate Judge, First Class, Ambala, dated the 9th March 1921.

Dr. *Muhammad Iqbal*, for the Petitioner.

Mr. *Manohar Lal*, for the Respondents.

JUDGMENT.—On the 7th of October 1920, the creditors of one Ramji Dass filed a petition asking that the said Ramji Dass be adjudicated an insolvent. An enquiry was held and, on the 22nd of January 1921, Ramji Dass was adjudicated an insolvent under the provisions of the Insolvency Act V of 1920.

On the 6th, 7th and 8th of September 1920 Ramji Dass had given to *Musammat* Ilahi Jan —a prostitute—sums of money aggregating Rs. 4,400 with which she was to purchase—and did purchase—a motor car. This fact was known to the petitioning creditors, and a Receiver, appointed on the 23rd of October 1920, took steps to have an injunction issued to *Musammat* Ilahi Jan prohibiting her from disposing of the said car.

Finally, acting under section 53 of Act V of 1920, the Insolvency Court annulled the gift and directed the Receiver to sell the car for the benefit of the creditors.

It was held that the gift to *Musammat* Ilahi Jan was a "transfer" within the meaning of section 53 of Act V of 1920 and as such was liable to be annulled under that section.

An appeal to the District Judge having been dismissed, *Musammat* Ilahi Jan has come up to this Court, through Dr. Muhammad Iqbal, by way of a second appeal.

For the respondents Mr. Manohar Lal raised a preliminary objection to the effect that, under section 75 of Act V of 1920, the appeal was incompetent.

Dr. Iqbal frankly admitted that the contention was sound and that the appeal was not competent. He, however, urged that, under the first proviso to sub-clause (1) of section 75, this Court had powers to examine the proceedings and satisfy itself that the order made in appeal by the District Court was according to law. I held that the appeal failed as an appeal and decided to treat the matter as a Revision.

Dr. Iqbal argued his case at length and contended that section 53 of Act V of 1920 did not contemplate the annulment of a transaction of this nature.

He conceded that "money" was "property" within the meaning of that term as used in section 53, but contended that once the money gifted had been converted into some thing else (in this case a motor car) section 53 ceased to have any operation. The Receiver could follow the money gifted, but could not claim the car which had been purchased with that money.

The learned Advocate was unable to support his contention by any authority and I am unable to accept it as correct. As pointed out by Mr. Manohar Lal, section 53 of Act V of 1920 is practically a re-production of section 47 of the English Act and authorities under that section would apply to the Indian Act. In the present case it has been found that *Musammat* Ilahi Jan was the mistress of Ramji Das and that the money was given to her by him for the purchase of a motor car.

Under section 47 of the English Act a present of jewelry, furniture, *and money to buy furniture*, made by a bankrupt to a lady with whom he was intimate was set aside as amounting to a settlement or transfer.

Tankard, In re, Official Receiver, Ex parte (1). That case is on all fours with the present and I accordingly hold that the orders passed by the Courts below are correct and dismiss this petition with costs.

Z. K. & R. N.

Petition dismissed.

(1) (1899) 2 Q. B. 57; 68 L. J. Q. B. 670; 80 L. T. 500; 47 W. R. 624; 6 Manson 188; 15 T. L. R. 332.

LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 805 OF 1920.

January 25, 1922.

Present:—Mr. Justice Martineau.

THE FIRM NAND LAL-DAS MAL OF AMRITSAR—PLAINTIFF—PETITIONER

versus

THE FIRM MIAN MUHAMMAD ALI-ALI BHAI, THROUGH MUHAMMAD ALI OF BOMBAY—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 20—Contract Act (IX of 1872), s. 91—Delivery to Railway Company of goods sold—Railway, whether agent of buyer—Suit for damages for breach of contract—Place of suing.

The delivery by a seller of goods to a Railway Company for despatch to the buyer operates as a delivery to the buyer under section 91 of the Contract Act.

Therefore, a suit for breach of contract to deliver goods by the plaintiff, residing at Amritsar, against the defendant, residing at Bombay, cannot be brought in the Amritsar Court, if the contract was entered into at Bombay.

Petition, under section 25, Small Cause Courts Act, for revision of an order of the Judge, Small Cause Court, Amritsar, dated the 27th October 1920.

Mr. *Badr-ud-Din Kureshi*, for the Petitioner.

Lala *Fakir Chand*, for the Respondent.

JUDGMENT.—The plaintiffs, who carry on business in Amritsar, have brought a suit in the Small Cause Court at Amritsar, against a firm carrying on business in Bombay for damages for breach of a contract, made in Bombay, to sell goods to the

plaintiffs. The Judge of the Small Cause Court has returned the plaint, holding that the Amritsar Court has no jurisdiction. The plaintiffs have applied to this Court for revision, contending that as the goods were to be sent by the defendants to Amritsar for delivery to the plaintiffs the case is triable at Amritsar.

I agree with the lower Court in rejecting this contention. Delivery of the goods by the defendants to the Railway Company in Bombay for being despatched to Amritsar would, by section 91 of the Contract Act, have operated as a delivery to the plaintiffs, and the Railway Company would have held the goods as agents of the plaintiffs.

I dismiss the application with costs.

N. H.

Application dismissed.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 1353 OF 1918.

February 6, 1922.

Present:—Mr. Justice Abdul Raoof and Mr. Justice Harrison.

KANSHI RAM AND ANOTHER—DEFENDANTS—APPELLANTS

versus

ISHWAR DAS AND ANOTHER—PLAINTIFFS AND GHETE AND ANOTHER, MINORS THROUGH *Musammat* JATTI THEIR MOTHER—DEFENDANTS—RESPONDENTS.

Specific Relief Act (I of 1877), s. 27 (b)—Agreement to sell—Transfer in favour of third person—Specific performance—Burden of proof.

The general principle of clause (*b*) of section 27 of the Specific Relief Act and its illustration is that from the time of a contract for the sale of land, the vendor, as to the land, becomes a trustee for the vendee; and the vendee, as to the purchase-money, a trustee for the vendor, who has a lien upon the land therefor. And everyone coming in by subsequent and representative title, and every subsequent purchaser from either with notice, becomes subject to the same equities as the party would be to whom he succeeds, or from whom he purchased. [p. 890, col 1.]

A subsequent transferee who desires to take advantage of the exception contained in clause (*b*) of section 27 of the Specific Relief Act must prove (*a*) that he was a purchaser for value, (*b*) *bona fide*, and (*c*) without notice. [p. 890, col. 2.]

KANSHI RAM v. ISHWAR DAS.

One who owns property subject to a charge can, in general, convey no title higher or more free than his own and it lies always on a succeeding owner to make out a case to defeat such a prior charge. [p. 890, col. 2.]

Himatlal Motilal v. *Vasudeo Ganesh Mhashar*, 16 Ind. Cas. 680; 36 B. 446; 14 Bom. L. R. 632, *Hamid Hussain* v. *Bishen Sarup*, 46 Ind. Cas. 659; 137 P. W. R. 1918, relied upon.

Per *Harrison, J.*—Where, however, a subsequent transferee proves the payment of consideration in full, and also establishes that he acted in ignorance of the original contract, good faith must be presumed in the absence of evidence to the contrary. [p 892, col. 2.]

The burden of proving ignorance is on the subsequent transferee. [p. 892, col. 2.]

First appeal from a decree of the Subordinate Judge, First Class, Amritsar, dated the 26th Februay 1918.

Pandit *Sheo Narain*, R. B., for the Appellants.

Lala *Moti Sagar*, R. S., and Lala *Mehr Chand Mahajan* for Bakhshi *Tek Chand*, for the Respondents.

JUDGMENT.

ABDUL RAOOF, J.—(*January* 21, 1922).—This was a suit for the specific performance of a contract for sale in respect of two shops Nos. 1336 and 1337 which Vaishno Das, by an agreement dated the 25th March 1917, had agreed to sell to the plaintiffs, and which he had afterwards sold to Kanshi Ram and Hans Raj under two sale-deeds dated the 29th March and registered on the 30th March 1917. According to the terms of the agreement a sale-deed was to be executed and registered within two weeks and possession of the shops was to be delivered on the day of registration. The suit was instituted against Vaishno Das, the vendor, and Kanshi Ram and Hans Raj, the vendees. Vaishno Das, the defendant No. 1, having died during the pendency of the suit, his two sons, Gheti and Brij Lal, were impleaded as his legal representatives. Kanshi Ram and Hans Raj filed one written statement in which they raised the following defence, namely, that they had no notice of the contract in favour of the plaintiffs, that a contract for sale was executed by Vaishno Das in their favour on the 25th March 1917, and subsequently two sale-deeds were executed in their favour and that neither on the date of the execution of the agreement nor on the date of the completion of the sale-deed they had any knowledge of the contract in favour of the plaintiffs. They further pleaded that they were *bona fide* purchasers for consideration without notice of the plaintiffs' title. Vaishno Das filed a separate written statement and in addition to the defence set up by Kanshi Ram and Hans Raj he pleaded that the plaintiff No. 2 was not present at the time of the execution of the agreement dated the 25th March 1917, that the defendant No. 1 and plaintiff No. 1 had then entered into a verbal contract that if the plaintiff No. 2 would not give consent to the sale transaction to the defendant in respect thereof then in that case the contract for sale would be considered as cancelled but that the defendant No. 1 would give back the earnest money to the plaintiff No. 1, that accordingly the plaintiff No. 1, as was agreed upon, gave information to the defendants on that very day saying that as plaintiff No. 2 did not agree to the sale transaction it should be considered as cancelled and that plaintiff No. 1 would take back Rs. 200, the earnest money, from the defendant. It was further pleaded that the sale deeds in favour of Kanshi Ram and Hans Raj were executed after the cancellation of the contract in favour of the plaintiffs. The plaintiffs' right to enforce the contract was challenged on the above allegations and in the alternative it was further pleaded that as the agreements contained a condition as to the return of the earnest money and Rs. 200 as damages in case of the non-performance of the contract, the plaintiffs were not entitled to a decree for the specific performance of the contract. On the pleadings the following issues were framed:—

(1) Whether the plaintiffs had cancelled the contract with the defendants Nos. 1 and 2 and so the plaintiffs are not entitled to a decree for specific performance?

(2) Whether the defendants Nos. 3 and 4 had knowledge of the sale to the plaintiff and so the sale to defendants Nos. 3 and 4 is not valid?

(3) What relief are the plaintiffs entitled to, if Issues Nos. 1 and 2 are found for the plaintiffs?

The learned Subordinate Judge has found on all these issues in favour of the plaintiffs and has granted a decree for the specific performance of the contract in their favour,

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The defendants Nos. 3 and 4 have preferred this appeal and the decree of the Court below is challenged on the grounds set forth in their memorandum of appeal. It is admitted that the present claim was made in accordance with the provisions of section 27, clauses (*a*) and (*b*) of the Specific Relief Act I of 1877, which provides that "Except as otherwise provided by this Chapter, specific performance of a contract may be enforced against—

(*a*) either party thereto;

(*b*) any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract."

Before discussing the evidence bearing on the various issues arising in this case it is necessary to discuss the law relating to the respective rights of the parties to the suit. In the commentary of Mr. Collett relating to clause (*b*) of section 27 the position of the contracting parties is thus described:—

"The general principle of this clause and its illustration is that from the time of the contract for the sale of the land the vendor, as to the land, becomes a trustee for the vendee: and the vendee, as to the purchase-money, a trustee for the vendor, who has a lien upon the land therefor. And every one coming in by subsequent and representative title, and every subsequent purchaser from either with notice, becomes subject to the same equities as the party would be to whom he succeeds, or from whom he purchased.....The maxim of equity at the bottom of it all is that equity regards as done what is agreed to be done."

The defendants Nos. 3 and 4, however, claimed exception from this rule of equity under the proviso attached to clause (*b*), according to which a transferee for value, who has paid his money in good faith and without notice of the original contract, is exempted. It is, therefore, for the appellants to make out that they came within that exception.

In the case of *Himatlal Motilal* v. *Vasudeo Ganesh Mhashar* (1) the rule as to the *onus* of proof in such a case is thus stated in the head-note:—

"Defendants Nos. 3 and 4 having contracted to purchase the property from the same defendants who had contracted to sell it previously to the plaintiff, defendants Nos. 3 and 4 were bound to show three things, namely, that (1) they were purchasers for value and (2) *bona fide*, and (3) without notice. The plaintiff under his contract having a prior equity was entitled to succeed. One who owns property subject to a charge can, in general, convey no title higher or more free than his own and it lies always on a succeeding owner to make out a case to defeat such a prior charge."

A similar rule was laid down by a learned Judge of this Court in the case of *Hamid Hussain* v. *Bishen Sarup* (2).

The first question, however, to be decided in the case is whether the contract for sale in favour of the plaintiffs had been cancelled and the vendor was free to sell the property to the defendants Nos. 3 and 4. On this point Ganesh Das, Dallal, (D. W. No. 1) was produced. He was the Dallal, who had brought about the contract between the plaintiffs and Vaishno Das on the 25th March 1917. Subsequently on the same date another contract for sale was executed by Vaishno Das in favour of the defendants Nos. 3 and 4 in respect of the same property through the instrumentality of some brokers among whom the name of Ganesh Das is also mentioned in the written contract. This document is marked as Exhibit D-5. In the fourth condition given in the body of this agreement the following statement is made:—

"The transaction has been made through Lala Ganesh Das, Buta Ram and Ram Das, brokers."

There is no mention in this agreement that the previous agreement of the same date in favour of the plaintiffs had been cancelled. This is a very significant fact. Now Ganesh Das has deposed as follows:—

"I was the Dallal in this case. Dhani Ram was not present when the agreement was written and so he did not sign the agreement. Ishwar Das stated that the price had been changed from Rs. 6,000 to Rs. 6,500 and so he would consult his brother Dhani Ram, and then complete the sale. The owner gave the plaintiff time for two or three

(1) 16 Ind. Cas. 680; 36 B. 446; 14 Bom L. R. 634.

(2) 46 Ind. Cas. 659; 137 P. W. R. 1918.

hours and then the plaintiff stated that his brother did not agree and I got the *aura* (P) from the deed-writer. I returned the agreement to the plaintiff and got the writing D-4 from the plaintiff. So the negotiations with the plaintiff failed. I wanted some damages from the plaintiff and as he gave this writing, I knew nothing else."

This statement is falsified by the Exhibit D-4 mentioned by the witness. D-4 is an entry made by Ishwar Das in the book of Ganesh Das, a translation of which is to be found at page 18 of the printed record and is to the following effect:—

"I, Ishwar Das, have made a transaction of two shops situate Bazar Kasinan, through Ganesh Das. If I get any amount in connection with the sale deed I shall pay half the brokerage and if the sale-deed in respect of the shops is registered in my favour I shall pay the full amount of brokerage."

Instead of proving that the agreement in favour of the plaintiffs had been cancelled it clearly shows on the contrary that it still existed and that Ishwar Das had not given up his rights under it. Ganesh Das has tried to make out that he was not the Dallal in the transaction between the defendants though his name was mentioned in the agreement. This clearly indicates that he had been won over by the defendants Nos. 3 and 4 and invented this story to help their case. The learned Subordinate Judge was, therefore, justified in holding that Ganesh Das was at the bottom of this litigation, that he negotiated the sale in favour of the defendants Nos. 3 and 4 and that there was no foundation in the story relating to the cancellation of the contract.

On the question of notice the defendants Nos. 3 and 4 examined certain witnesses. Atma Ram had attested the two sale deeds D-1 and D 2 and the agreement Exhibit D-3 in favour of the defendants Nos. 3 and 4. He stated that the parties had agreed to the terms of the agreement in his favour and Vaishno Das did not state that he had sold the shops to any other person and that Vaishno Das had stated in clear terms that his title was clear.

Tirath Ram, another attesting witness of D-1 and D 2, had stated that plaintiffs' name was not mentioned in connection with this property.

Hari Ram, who was the writer of the Exhibits D-1 and D-2, stated that he was not told about the negotiations with the plaintiff.

Sant Ram (D. W. No. 5) has stated that he was present when the transaction between the defendants had taken place, his shop being close to defendants' shop and that he had not heard Vaishno Das speaking of the agreement with the plaintiff.

This class of evidence is utterly valueless and cannot help the defendant's case. If Vaishno Das in spite of the previous contract had agreed to sell the shops to the defendants Nos. 3 and 4 and as it was very unlikely that he would mention the fact before the witnesses. The contract with the plaintiffs was to sell the shops for Rs. 6,500 while he sold them for Rs. 7,200 to the defendants. The receipt of a higher price must have induced him to break his contract with the plaintiffs and it was unlikely that he would tell these witnesses that he was committing a breach of contract. Vaishno Das and the defendants Nos. 3 and 4 are residents of the same place, namely, Amritsar, and they carry on business in the Amritsar market. Ganesh Das is a broker who carries on his profession usually plied in the same market. It is very unlikely that the contract in favour of the plaintiffs must have remained undisclosed to the defendants-appellants. According to Ganesh Das the contract with the plaintiffs had been cancelled. Was it not, therefore, natural that he would have assured the defendants Nos. 3 and 4 that the contract in favour of the plaintiffs had been cancelled and that there was no obstacle in their way to purchase the shops? The probabilities are that the defendants Nos. 3 and 4 had knowledge of the plaintiffs' contract. The plaintiffs filed certain documentary evidence to establish notice. Exhibits P4 and P5, dated the 28th March 1917, are receipts for telegrams said to have been addressed to the defendants. Hari Chand, agent to Lala Balmokand, plaintiffs' Pleader, has produced Exhibits P4 and P5 and has stated that the telegrams had been despatched to the defendants informing them that the shops had already been sold to the plaintiffs. This secondary evidence as to the contents of the telegrams is admissible, as the original messages had been destroyed after three months as proved by letter marked Exhibit P7 received from the Deputy Accountant

KANSHI RAM v. ISHWAR DAS.

General, Telegraph Check Office, Calcutta. In addition to this an entry in the account-book of the plaintiffs has been produced which shows that two telegrams were despatched that day. It is true that it is not stated in the entry that those telegrams were addressed to the defendants, but this evidence taken along with the deposition of Hari Chand does establish that the telegrams were sent to the defendants. In addition to the above evidence the plaintiffs have relied upon a petition marked Exhibit P6 which was presented to the Registrar on the date on which the sale deeds in favour of the defendants Nos. 3 and 4 were registered. On the back of this petition there is an endorsement to the effect that it be kept in the office. This endorsement was made on the 30th March 1917. This clearly shows that this petition was presented on that date. The only question is whether it was presented before the deed was actually registered or it was presented after its registration. After mentioning the previous contract in his favour Ishwar Das makes the following allegation in the said petition :—

"I have given notice to both the persons, *viz.*, the vendor and the present vendee, by means of a telegram. I now again inform the vendee by means of this application before you that he should not get the sale-deed in respect of the said shops registered though it depends upon his will. He himself will be liable for his loss. He may be informed on my behalf at the time of registration of the deed."

From this statement it is clear that the sale-deed had not been registered till then. If this statement had not been true the petition would have been returned to Ishwar Das with an endorsement that registration had already taken place. The fact that it was retained in the office goes to show that the sale deeds had not been registered till then. The evidence produced by the defendants-appellants falls short of proving that they were *bona fide* purchasers without notice. On the other hand, the circumstances of the case and the evidence produced on behalf of the plaintiffs lead to the conclusion that the appellants most probably had knowledge of the previous contract in favour of the plaintiffs. The decision of the learned Subordinate Judge is fully supported by the evidence on the record and the circumstances of the case, and it is not possible to say that the learned Judge of the Court below has arrived at a wrong conclusion. In the above view it is clear that it is not a case in which damages should be granted in lieu of specific performance. In my opinion the appeal should be dismissed and I accordingly dismiss it with costs.

HARRISON, J.—(*February* 2, 1922).—The facts being that the father of defendants Nos. 1 and 2 executed a valid agreement to sell certain property to the plaintiffs and on the same day executed another agreement to sell the same property for a larger sum to defendants Nos. 3 and 4, and subsequently executed and registered a deed of sale in their favour, it has to be seen whether the circumstances surrounding this second transaction bring the vendees within the definition given in section 27 (*b*) of the Specific Relief Act and whether it is proved that they were transferees for value, who paid money in good faith and without notice of the original contract. The three essentials, therefore, are that payment of full consideration must be proved, good faith must be established and also ignorance of the original contract at the time the sale was effected. The payment of consideration is admitted, and the second and third points really resolved themselves into one, for, if the consideration was paid in full and the vendees were ignorant of the original contract, good faith must be presumed in the absence of any evidence to the contrary. The payment of the full market value is admitted. There is no doubt that the burden of proving ignorance is on the vendees but, inasmuch as they have to prove a negative and it is always extremely difficult to do so, it is in the nature of things impossible that they should produce a large quantity of clear and affirmative evidence. They set out to show that they acted as ignorant *bona fide* purchasers would have done; that inasmuch as both agreements were executed on the same day and the sale was registered five days later they had very little time in which to gain the requisite knowledge of the first transaction and that they received no communication whatsoever from the plaintiffs warning them of their rights. The property in question was a small portion of house property situated in Amritsar city such as is being sold every day. It was not a question as in *Himatlal Motilal* v.

Vasudeo Ganesh Mhashar (1) of an exceptional sale of a whole village such as rarely come into the market, a sale, moreover, which was negotiated with the knowledge of the whole country side and in which a large number of men were engaged as arbitrators to fix the price. The natural inferences to be drawn under these and other peculiar circumstances have no bearing and throw no light on the conduct of a man wishing to invest six thousand rupees in buying two shops in Amritsar. No sane man buys litigation if he can avoid it and if, before concluding his bargain he comes to know of there being any sort of cloud on the title such as the existence of a previous agreement to sell, the natural and reasonable course for him to adopt would be to withdraw and to look for a similar piece of property elsewhere with a perfectly clear title. It is, of course, dangerous to attach too much importance to an inference drawn from the conduct of the vendees, for if every subsequent sale where the full market price is paid is to be presumed to have been effected in ignorance of all previous agreements it will be impossible for the injured party ever to get redress. I think, however, that some value should be attached to the fact that the conduct of the second vendees in purchasing this property if they knew of the previous agreement would have been foolish in the extreme. It is true that the burden falls upon the vendees, but when the plaintiffs deliberately attempt to prove that in two distinct methods they conveyed the information, if the vendees can show that, they have not only completely failed to establish their contention but their conduct gives rise to certain suspicions. I think that the inference to be drawn from that conduct may, and in this case does, assist the vendees. The plaintiffs state that three days after the agreement had been signed they sent two telegrams to the vendor and to the vendees. In support of this allegation they produce Hari Chand, the agent of their Pleader, who states that such telegrams were despatched. He is not the man who wrote the telegrams nor yet the man who sent them, and it is not explained how he came to know the contents or the names of the addressees. The obvious persons who would know is Lala Balmokand, the Pleader, who is said to have directed the sending of the telegrams and who has not been produced—surely a very significant fact. A book of accounts is also produced to corroborate the fact of the sending of the telegrams, but this is kept in such a way as to be completely useless.

The second communication is stated to have been made by means of a notice sent to the Sub-Registrar requesting him to convey the information before the registration. The notice was produced and shown to have been signed by the Sub-Registrar. The Sub-Registrar himself was also produced and yet, strange to say, he was never questioned on the subject. Now the plaintiffs have attempted to prove that the information was given by two distinct communications and they have deliberately refrained at the last moment from producing and from questioning the witnesses whose evidence would have been conclusive had it been in their favour and the vendees, in my opinion, rightly contend that they are entitled to have an inference drawn that both these witnesses would, if produced and questioned, have said the precise contrary of which the plaintiffs denied. The vendees, therefore, have shown that they acted in a natural manner; that they paid the full market price, and that they did not receive the information in either of the two ways in which the plaintiffs say they did. What more could they possibly show? They say on oath that they were ignorant; that the positive allegations made by the plaintiffs are untrue. Only one point remains and that is the appearance of the name of Ganesh Das, broker, together with the names of the two other brokers in the sale-deed. This man, Ganesh Das, admittedly negotiated the first agreement in favour of the plaintiffs and was the sole broker and entitled to the whole of the commission if the transaction were completed. In the second he appears as one of three and entitled to a 1/3rd of the commission. He, therefore, would be a very heavy gainer if the first sale were put through, and it is entirely in his interests to support the plaintiffs. Instead of this we find when he goes into the witness-box that he stated he had nothing whatever to do with the second sale and that his name was merely added by the brokers, who had arranged it, and he tells a plausible and convincing story to explain how it was that the vendor came to deal with the vendees. In the first agreement one of the plaintiffs

only signed and the story is that this man was representing his brother, and as the price had been raised from Rs. 6,000 to Rs. 6,500, he reserved to himself the right to back out of the bargain if his absent brother did not agree. The brother did fail, and the broker thereupon did a very smart piece of business and obtained the agreement from the petition-writer with the intention of forcing Ishwar Das to pay him some part of his commission. On deciding to bring this case Ishwar Das had to get possession of this document. The broker naturally refused to give it up unless he was compensated and, accordingly, the entry D. 4 was made by Ishwar Das in which he undertook to pay the broker his full commission if he succeeded in his case and if he did not succeed in full and was awarded compensation only, to pay him half the brokerage. I see no reason to disbelieve this statement and all the more so because it gives the only rational explanation possible of the conduct of Ganesh Das. The alternatives resolve themselves into four (1) the vendor told the vendees of the previous agreement and they brought a bad title with their eyes open and subsequently bribed Ganesh Das to support them. The vendor would surely be the last person to inform the vendees of any defect in his title. (2) Ganesh Das negotiated the second sale and informed the vendees at the time that there was a good valid agreement subsisting in favour of Ishwar Das. This is open to the same objection as No. 1. (3) Ganesh Das negotiated the sale and did not inform the vendees. In this case they acted in ignorance and their sale is good. The fourth possibility is that Ganesh Das is speaking the truth and had nothing whatever to do with the second sale, and that neither he nor the vendor having informed the vendees, they acted in ignorance. This, I believe, is what actually happened. I find, therefore, that so far from the name of Ganesh Das in the sale-deed going against the vendees it aids their case to this extent that it has necessitated the telling of the true story of what actually happened. The first agreement broke down because of Ishwar Das' brother's failure to agree. The sale was then transacted. The plaintiffs realising afterwards that they had lost a good bargain, decided to bring the case, and in order to obtain the agreement had to make terms with Ganesh Das. The presence of Ganesh Das' name in the second sale is still explained. It may have been due to some private agreement between him and the two brokers who negotiated the sale that he was to have a share in business transacted by them. It may have been on account of the true broker's thinking that something was due to him on account of his having discovered the property and of their knowing that in spite of his having discovered the bargain, his sale had failed to materialise. Whatever the reason may have been, I do not think that his name in the deed tells against the vendees in any way, and I believe that the story told by him is true.

I would, therefore, accept the appeal and dismiss the plaintiffs' suit against the defendants Nos. 3 and 4 and as I find that Ishwar Das was to blame for the cancellation of the agreement I would give him a decree for Rs. 2,000 only against Gheti and Brij Lal, defendants Nos. 1 and 2, the sons of the vendor, this being the amount of the earnest-money to which he is entitled under the circumstances of the case that he was given the opportunity of which he availed himself to back out of the agreement. The costs of the defendants Nos. 3 and 4, I would order, to be paid throughout by the plaintiffs.

BY THE COURT—(*February* 6, 1922).—The appeal is dismissed with costs.

Z. K. & N. K.

Appeal dismissed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2329 OF 1918.

December 13, 1921.

Present:—Mr. Justice Broadway and Mr. Justice Martineau.

TARA CHAND AND ANOTHER—DEFENDANTS—APPELLANTS

versus

ABDUL AHAD—PLAINTIFF—RESPONDENT.

Appeal—Appellate Court, whether can take cognizance of facts since institution of suit—Suit for declaration—Dispossession of plaintiff during pendency of suit—Possession, decree for—Execution of decree—Sale—

TARA CHAND v. ABDUL AHAD.

Decree set aside—Auction-purchaser, rights of—Limitation Act (IX of 1908), Sch. I, Art. 12, applicability of.

An Appellate Court can take cognizance of matters which may have happened after the institution of the suit for the purpose of moulding the relief that a party is entitled to, provided it is not based on a new title which accrued after the action. [p. 897, col. 1.]

Sethrucherla Rama Chandra v. *Maharajah of Jeypore*, 34 Ind. Cas. 411; (1916) 1 M. W.N. 354; 19 M. L. T. 360, relied upon.

Subbaraya Chetty v. *Nachiar Ammal*, 44 Ind. Cas. 863; (1918) M. W. N. 199; 7 L. W. 403, referred to.

Plaintiff, who was in possession of a certain house, brought a suit for a declaration of his title in respect of it. During the pendency of the matter in the Appellate Court, the plaintiff was formally ousted from possession of two-thirds of the house under an order of a Court passed in certain partition proceedings. The Appellate Court, after the necessary amendment in the plaint, granted the plaintiff a declaration in respect of the one-third of the house of which he was in possession and gave him a decree for possession in respect of the remaining two-thirds:

Held, that the Appellate Court was justified in adopting this course. [p. 898, col. 1.]

A *bona fide* purchaser, who is not the decree-holder or any person claiming through him, at an auction sale in execution of a valid decree, acquires a valid title to the property purchased by him, which is not affected by the fact that the decree is subsequently set aside at the instance of a party thereto. [p. 898, col. 1.]

Rewa Mahton v. *Ram Kishen Singh*, 13 I. A. 106; 14 C. 18; 10 Ind. Jur. 428; 4 Sar. P. C. J. 746; 7 Ind. Dec. (N. S.) 13, *Zain-ul-Abdin Khan* v. *Muhammad Asghar Ali Khan*, 15 I. A. 12; 10 A. 166 5 Sar. P. C. J. 129; 6 Ind. Dec. (N. S.) 112, *Mukhoda Dassi* v. *Gopal Chunder Dutta*, 26 C. 734; 13 Ind. Dec. (N. S.) 1069, *Janakdhari Lal* v. *Mohant Gossain Lal*, 1 Ind. Cas. 871; 13 C. W. N. 710; 37 C. 107; 11 C. L. J. 254, relied upon.

Art. 12 of Schedule I to the Limitation Act refers to suits brought by parties to the decree which resulted in the sale, or by parties to the proceedings in which the sale took place, or by persons claiming through them, and does not apply to suits brought by persons who are not bound by the sale. Nor does it operate to bar a *defence*. [p. 898, col. 2.]

Second appeal from a decree of the District Judge, Delhi, dated the 13th June 1918, reversing that of the Subordinate Judge, First Class, Delhi, dated the 8th June 1916.

Dewan *Mehr Chand*, for the Appellants.

Lala *Sardha Ram*, for the Respondent.

JUDGMENT.—The following pedigree-table will afford assistance :—

LALLU MISAR=*Musammat* Gauran

Nathu Parshad. | Tara Chand. | Bhola Nath (died in 1899) =*Musammat* Bhuri.

Lallu Misar having died, a private partition of his property took place on the 28th March 1898. At that time Nathu Parshad was a major and Tara Chand and Bhola Nath were minors. One-third of the property was separated off and made over to Nathu Parshad. The other two-thirds were kept joint as the property of Tara Chand and Bhola Nath, *Musammat* Guaran, their mother, acting for them and taking no share herself. In the property comprising the two-thirds was included a house which will be referred to hereinafter as house No. 5.

Bhola Nath died in 1899 leaving a widow *Musammat* Bhuri. On the 3rd September 1902 *Musammat* Gauran and Tara Chand together mortgaged house No. 5 to one *Musammat* Lachhmi. In August 1904 *Musammat* Lachhmi brought a suit on this mortgage claiming to recover her money by sale of the property mortgaged. She obtained a decree on the 30th June 1905, her claim being fixed at Rs. 590 realisable by sale of house No. 5. Tara Chand appealed against this decree to the Divisional Judge, alleging that he had been a minor when he executed the mortgage which was, for that reason, not binding on him. His appeal was dismissed on the 24th August 1905 whereupon he preferred a revision to the Chief Court on the same grounds. This revision was accepted on the 13th July 1906 and the decree as against him was set aside.

On the 28th July 1905 *Musammat* Lachhmi had got house No. 5 attached in the execution of her decree, and on the 28th February 1906 this house was duly auctioned and was purchased by Abdul Ahad, the sale being confirmed on the 9th April 1906. Tara Chand appealed against the order confirming the sale but his appeal was dismissed on the 3rd May 1906. Possession of the house, however, had not been given to Abdul Ahad, and after the decision by the Chief Court (on the 13th July 1906), Tara Chand filed an application before the Executing Court objecting to the possession of house No. 5 being made over to Abdul Ahad. The matter was considered, and on the 3rd June 1907 an order was passed to the effect that possession was to be made over to Abdul Ahad. Possession was accordingly given to him on the 17th June 1907 and he filed a *dakhalnama* on the 19th June 1907. From the above it will be seen, that although the

decree against Tara Chand in the suit brought by *Musammat* Lachhmi had been set aside by the Chief Court on the 13th July 1903 so far as it affected Tara Chand, the house had actually been sold in execution of that decree and possession thereof made over to the auction-purchaser, Abdul Ahad.

After the mortgage of house No. 5 referred to above, but before *Musammat* Lachhmi instituted her suit, Tara Chand, on the 14th March 1903 instituted a suit for possession of his share of the entire property left by Lallu Misar. He sought to have the private partition of the 28th March 1898 set aside and a fresh partition made. *Musammat* Gauran and *Musammat* Bhuri were parties to this suit. Prior to the institution of this suit by Tara Chand, Nathu Parshad had been adjudicated an insolvent and the properties, which had fallen to his share under the private partition of the 28th March 1898, had been sold by the Receiver and purchased by certain persons who are known in these proceedings as defendants Nos. 9, 10 and 11. These purchasers were also made parties to the partition suit brought by Tara Chand on the 14th March 1903. On the 28th April 1904 Tara Chand's suit for partition was decreed, the partition of the 28th March 1898 being set aside. This decree was, of course, a preliminary one. The above-mentioned defendants Nos. 9, 10 and 11 appealed against this decree to the Divisional Judge, who remanded the case for further enquiry on the 26th November 1904. The Trial Court, however, on the 28th July 1905, again decreed Tara Chand's suit and set aside the private partition of 1898 and the said defendants Nos. 9, 10 and 11 again appealed against this decree, which was once more set aside by the Chief Court on the 30th January 1907, a further enquiry being ordered. This further enquiry resulted in being held that so far as defendants Nos. 9, 10 and 11 were concerned, the partition of 1898 held good. Tara Chand thus held a decree for partition of the property, but this decree did not affect those persons who had purchased Nathu Parshad's property, and as it is said they had purchased *all* the property that had fallen to Nathu Parshad's share. Tara Chand's decree affected only the two thirds that had been left joint in 1898 for himself and his brother Bhola Nath. His share, in the property which was liable to partition, was thus one-half, *Musammat* Bhuri being entitled to the other one half as the widow of Bhola Nath. The execution of this partition decree continued up to 1915 without anything substantial being done. In 1915 a Commissioner was appointed to divide the property liable to partition into two shares. Abdul Ahad then objected to the inclusion of this house No. 5 in the property liable to partition, alleging that he had bought the same at an auction sale in 1906. He also claimed to be entitled to one-third of this house on another ground. On the 15th December 1905 and the 8th May 1906 Tara Chand had mortgaged one-third of this house to one Jangli Mal, who brought a suit on the strength of his mortgages and obtained a decree on the 18th May 1910. In execution he sought to have this house sold, whereupon Abdul Ahad objected to the sale on the ground already referred to above, *viz.*, that he had bought it in 1906 and was the owner. His objection was disallowed on the 31st March 1911 on the ground that the decree, in execution of which the house had been sold, having been reversed the purchase by Abdul Ahad had no effect, and further, that his purchase had been subsequent to the mortgage by Tara Chand and for that reason Jangli Mal's claims were superior. Instead of pursuing the matter further, Abdul Ahad, recognising that the house had been encumbered at the time of his purchase, paid off Jangli Mal. His title to one-third of this house No. 5 was on the 23rd April 1915 recognised, but it was held that he was not entitled to the other two-thirds in the house.

Abdul Ahad thereupon filed a suit on the 8th June 1915 for a declaration that he was the owner of the whole house No. 5. At that time he was in possession of the whole house. A decree was passed in his favour giving him two-thirds of the house and holding that the remaining one-third belonged to *Musammat* Bhuri. On the 2nd November 1916 an appeal against this decree was accepted by Mr. Clifford. Tara Chand thereupon appealed to the Chief Court, when it was decided on the 6th December 1917 that Mr. Clifford's view was wrong and that Tara Chand was entitled to a half of all the property that remained. The appeal was, therefore, again remanded under O. XLI, r. 23 to the lower Appellate Court, and the learned District Judge

(Mr. Tapp) on the 18th June 1918, decreed Abdul Ahad's claim, giving him a declaration that he was the owner of one-third and granting him a decree for possession of the remaining two-thirds as owner on payment of the Court-fee on Rs. 734. As pointed out above, when Abdul Ahad instituted this suit on the 8th June 1915 he was in possession of the whole house. During the pendency of the case he was dispossessed of two-thirds of it, on the 15th November 1915, by an order of the Court dealing with the partition proceedings. Against this decree Tara Chand and *Musammat* Bhuri have come up to this Court in second appeal through Mr. Mehr Chand, and we have heard Mr. Sardha Ram for the respondent, Abdul Ahad.

It has been urged that the learned District Judge exceeded his powers when he granted Abdul Ahad a decree for possession of two-thirds of the house. Mr. Mehr Chand contended that under r. 17 of O. VI the Court could *allow* but *not direct* an amendment, and the suit *qua* the two-thirds should have been dismissed when it was ascertained that Abdul Ahad was not in possession thereof. Mr. Sardha Ram contended that the learned District Judge's order was correct and cited *Subbiraya Chetty* v. *Nachiar Ammal* (1) and *Sethrucherla Rama Chandra* v. *Maharajah of Jeypore* (2). In the former case it has held that Courts have powers in certain circumstances to grant a decree in a case where the cause of action arose subsequently to the filing of the plaint. In the latter case it was held that an Appellate Court can take cognizance of matters which may have happened after the institution of the suit for the purpose of moulding the relief that a party is entitled to, provided it is not based on a new title which accrued after the action. In the present suit it seems to us that the Court had power to grant the plaintiff a decree for possession in the existing circumstances. When the suit was filed the plaintiff was in possession of the whole house. He was apparently formally ousted from possession of two-thirds by an order of a Court. It has not been shown to us by Mr. Mehr Chand that this particular house has yet been divided into three specific shares. The house, therefore, still appears to be the joint property of Abdul Ahad and such other person or persons as may be entitled to a share in it, and we, therefore, consider that the decree is not assailable on this ground and hold accordingly.

Mr. Mehr Chand admitted that Abdul Ahad was entitled to one-third of the house, he having purchased that third from Jangli Mal. *Qua* the rest of the house, however, he contended that Abdul Ahad had no right, firstly, because *Musammat* Bhuri was not a party to the suit brought by *Musammat* Lachhmi in execution of whose decree the house was brought to sale, and further, that *Musammat* Bhuri being entitled to a half of this house her one-half share could not pass to Abdul Ahad under any sale to which she was not a party. As against this Mr. Sardha Ram urged that *Musammat* Bhuri was only entitled to a half of the whole property and not merely a half in this particular house. He contended that it was within the power of the partitioning Court to allot the whole of this house to Tara Chand and that in the event of such an allotment his purchase would be effective. We are not prepared to concede the proposition that the partitioning Court could allot this house to Tara Chand, but it has not been so allotted, and until partition by metes and bounds *Musammat* Bhuri has undoubtedly a one-half share in house No. 5. She was not a party to the suit brought by *Musammat* Lachhmi and her interests in the house could not, therefore, be affected by the purchase at the auction-sale of 1906. We hold, therefore, that the suit for possession of the one half share owned by *Musammat* Bhuri in the house cannot stand.

There remains one-sixth of the house to which Tara Chand would be entitled but for the fact that his interests in this house had been brought to sale and purchased by Abdul Ahad. It was contended by Mr. Mehr Chand on the authority of *Beti Kuar* v. *Janki Kuar* (3) and *Raoje Bhikaji* v. *Anant Laxman* (4) that the learned District Judge was wrong in saying that *Musammat* Gauran had a share in this house when it was brought to sale and that the decree in favour of

(1) 44 Ind. Cas. 863; (1918) 1 M. W. N. 199; 7 L. W. 407.

(2) 34 Ind. Cas. 411; (1916) 1 M. W. N. 354; 19 M. L. T. 360.

(3) 7 Ind. Cas. 908; 33 A. 118; 7 A. L. J. 980.

(4) 46 Ind. Cas. 760; 42 B. 535; 20 Bom. L. R. 671.

Musammat Lachhmi not having been set aside as against *Musammat* Gauran, the sale was, therefore, effective. Doubtless it is correct that *Musammat* Gauran could only claim a share when the property was actually divided up and partitioned by metes and bounds. Nevertheless we are of opinion that Abdul Ahad acquired a good title under his sale. Mr. Mehr Chand urged that this was not so, firstly, because Abdul Ahad had by his own conduct admitted that he had no claim in the house inasmuch as, after his objections had been dismissed in the execution proceedings brought by Jangli Mal, he purchased Jangli Mal's rights instead of appealing against the order rejecting his objections or bringing a suit. We agree, however, with Mr. Sardha Ram and hold that his failure to appeal or bring a suit did not amount to a recognition of Tara Chand's rights. It was perfectly clear that Jangli Mal's mortgage had priority to the purchase by Abdul Ahad and Abdul Ahad war, therefore, bound to pay off Jangli Mal, assuming that his purchase was a valid one. In our opinion a *bona fide* purchaser, who is not the decree-holder, or any person claiming through him, at an auction sale in execution of a valid decree, acquires a valid title to the property purchased by him, see *Rewa Mahton* v. *Ram Kishen Singh* (5), *Zain-ul-Abdin Khan* v. *Muhammad Asghar Ali Khan* (6) and *Mukhoda Dassi* v. *Gopal Chunder Dutta* (7) and *Janakdhari Lal* v. *Mohant Gossain Lal* (8). In the present case Abdul Ahad was an auction-purchaser who had nothing whatever to do with the decree-holder or the judgment-debtor. On the date of his purchase there was a valid and subsisting decree in execution of which the auction sale was held. He, therefore, acquired certain definite rights and is entitled to have those rights maintained. What he purchased was all the right, title and interest of Tara Chand in house No. 5, and inasmuch as Tara Chand but for this purchase by Abdul Ahad would be entitled to a one-sixth of this house, Abdul Ahad, as purchaser is, entitled to that one-sixth. The decree, therefore, granting him possession of one-sixth is, in our opinion, valid.

Before concluding we would refer to a contention raised by Mr. Sardha Ram to the effect that Abdul Ahad was entitled to the share belonging to *Musammat* Bhuri, inasmuch as *Musammat* Bhuri should have brought a suit to contest the sale. Reliance was placed on O. XXI, r. 92 and section 65, Civil Procedure Code, and it was contended that the suit should have been brought within one year of the order confirming the sale under Article 12 of the Indian Limitation Act. In our opinion this contention has no force. R. 92 of O. XXI, relates back to rr. 89, 90 and 91. R. 91 refers to a purchaser at an auction-sale. *Musammat* Bhuri was not a purchaser. R. 90 refers to a decree holder or any person entitled to a share in a rateable distribution or whose interests are affected by the sale. R. 89 refers to any person whose immoveable property has been sold and lays down the procedure to be adopted when such a person seeks to have the sale set aside. We do not think that *Musammat* Bhuri was such a person as is referred to in either r. 89 or r. 90, inasmuch as she was only entitled as a joint owner to a one-half share in all the property which was liable at that date to partition. In any event, Art. 12 does not prevent her from *defending* the claim now advanced by Abdul Ahad on the grounds she has set up, as it is well-settled that this Article refers to suits brought by parties to the decree which resulted in the sale, or by parties to the proceedings in which the sale took place, or by persons claiming through them, and does not apply to suits brought by persons who are not bound by the sale. The present is not a suit by *Musammat* Bhuri and, therefore, the Limitation Act does not affect her right to set up any defence that she may be entitled to make. Abdul Ahad by his purchase only acquired such right, title and interest in house No. 5 as appertained to Tara Chand, and his claim for that portion of this house, which has now been allotted to *Musammat* Bhuri, is untenable.

We accordingly accept this appeal so far as to dismiss the plaintiff's suit *qua Musammat* Bhuri's one-half share in the house

(5) 13 I. A. 106; 14 C. 18; 10 Ind. Jur. 428; 4 Sar. P. C. J. 746; 7 Ind. Dec. (N. S.) 13 (P. C.).

(6) 15 I. A. 12; 10 A. 166; 5 Sar. P. C. J. 129; 6 Ind. Dec. (N. S.) 112 (P. C.).

(7) 26 C. 734; 13 Ind. Dec. (N. S.) 1069.

(8) 1 Ind. Cas. 871; 13 C. W. N. 710; 37 C. 107; 11 C. L. J. 254.

We maintain the decree for possession of one-sixth to which Tara Chand is entitled. As said above, it has been admitted that Abdul Ahad is entitled to a one-third in the house of which he is in possession. In the circumstances we think the parties should bear their own costs in this Court and we order accordingly.

Z. K.

Appeal accepted.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 24 OF 1922.

July 20, 1922.

Present:—Mr. Hallifax, A. J. C.

NARAYEN RAO AND OTHERS—PLAINTIFFS—DECREE-HOLDERS—APPLICANTS

versus

BALKRISHNA—DEFENDANT—JUDGMENT-DEBTOR—NON-APPLICANT.

Execution, step-in-aid of—Payment out of Court—Application for record of same.

An oral application by a decree-holder to record a payment made to him out of the Court by the judgment-debtor is a step-in-aid of execution.

Lachhman v. *Gahreswar*, 65 Ind. Cas. 681; 18 N. L. R. 62, followed.

Appeal from an order of the Judge, Small Causes Court, Nagpur, dated the 24th November 1921, in Small Causes Court, Execution Case No. 1728 of 1918.

Mr. *M. R. Bobde*, for the Applicants.

Mr. *A. N. Chorghare*, for the Non Applicant.

ORDER.—The present application for execution was made on 5th November 1921. The next previous application was made on 30th June 1918, and that date has been taken in the lower Court as the starting point for limitation. If that were correct, the decree would undoubtedly be barred by time, but at the end of those proceedings there is an order, 15th January 1919, in the following words: "D. H. by Mr. Deopujari J. D. absent, Rs. 50 paid to D. H., Dismissed, partly satisfied. Costs on J. D. Rs. 2." As the judgment-debtor was absent it is not possible that this record of payment could have been made otherwise than on an oral application by the decree-holder. The starting point for limitation according to the ruling in *Lachhman* v. *Gahreshwar* (1) is, therefore, 15th January 1919, and the present application is well within time. The order of the lower Court dismissing that application is set aside and the proceedings are remanded to that Court for further action. The costs of this application in revision, in which Rs. 15 will be allowed as Pleader's fee, will be paid by the non-applicant judgment-debtor.

G. R. D.

Revision allowed.

(1) 65 Ind. Cas. 681; 18 N. L. R. 62.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1534 OF 1920.

January 18, 1921.

Present:—Mr. Justice Le Rossignol.

KISHEN SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

THE MUNICIPAL COMMITTEE OF AMRITSAR, THROUGH PRESIDENT OF COMMITTEE—DEFENDANT—RESPONDENT.

Punjab Municipal Act (III of 1911), s. 56 (1) (b)—Well sunk by private person and dedicated to public, whether vests in Municipality.

A well sunk as a charitable act by a private person and dedicated by him to the public must be regarded as a public place and vests in the Municipality under section 56 (1) (*b*) of the Punjab Municipal Act.

Second appeal from a decree of the Additional Judge, Amritsar at Lahore, dated the 23rd March 1920, reversing that of the Munsif, First Class, Amritsar, dated the 6th June 1919.

Mr. *M. S. Bhagat*, for the Appellants.

JUDGMENT.—This case for an injunction arose out of a resolution passed by the Amritsar Municipal Committee to close a well in a *Mohalla*.

The District Judge finds that the well is not a private well, but he does not say that it is a public well. On the evidence there can be no doubt that the well was sunk as a charitable act by a

TUKARAM v. MANGAYA.

private person and was by him dedicated to the public.

The well lies in a recess at the end of a lane which is a *cul de sac* and the recess together with the well must be regarded as a public place.

That being so, the well with its surrounding area vests in the Municipality under section 56 (1) (*b*), Municipal Act, and the Municipality may deal with it as it pleases, provided that no private rights are invaded.

In this case, the Municipality proposes to fill in the well and replace it by a stand pipe. And it is not for the Civil Courts to decide whether the policy of the Municipality in supplying pure water in pipes in lieu of doubtful water in wells is right or wrong.

I dismiss the appeal. No costs are allowed as the appeal is undefended.

Z. K.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 373 OF 1921.

July 21, 1922.

Present:—Mr. Kotwal, A. J. C.

TUKARAM AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

MANGAYA AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage—Redemption—Term fixed—Mortgagee, protection of—Presumption.

A mortgagor or a puisne mortgagee may redeem, at any time, unless it appears from the mortgage-deed or from other circumstances that the term was created in favour of the mortgagee as well as the mortgagor.

Jivan Lal v. *Dhunde*, 16 C. P. L. R. 59, followed.

Where a mortgagee of land is to enjoy the usufruct in lieu of interest and pay the rent to the *malguzar* and there is a possibility of his not being able to realise any profit in some years, if any term for redemption is fixed, the same should be presumed to be for the interest of the mortgagee as well.

Appeal from a decree of the District Judge, Chhindwara, dated the 29th April 1921, in Civil Appeal No. 26 of 1921.

Mr. *V. D. Sathaye*, for the Appellants.

Mr. *D. S. Tiwari*, for the Respondents.

JUDGMENT.—The term fixed for redemption in this case is one of fifty years. As held in *Jivan Lal* v. *Dhunde* (1), a mortgagor or puisne mortgagee may redeem at any time unless it appears from the nature of the mortgage or from other circumstances that the term was created in favour of the mortgagee as well as of the mortgagor. The circumstances of this case indicate that the term was created for the benefit of the mortgagee also. The mortgagee was to enjoy the usufruct in lieu of interest and pay the rent to the *malguzar*. There was a possibility of his not being able to realise any profit in some years, in which case he would have to pay the rent out of his own pocket and would suffer actual loss. If he was sure of remaining in possession for the fixed term, he might hope to make up the loss in some years by the profit in others, whereas if the mortgage was liable to be redeemed at any time the mortgagor chose, the mortgagee might stand to lose by his bargain. It can, therefore, be well presumed that the fixation of the term was in the interests of the mortgagee also. The terms of the mortgage itself indicate that redemption was not contemplated before the expiry of the fifty years. The two relevant passages in the mortgage-deed are:

(1) We agree to pay the principal without interest in 50 years.

(2) After the expiry of 50 years we shall re-pay the mortgagee and take back our land.

The first passage is admittedly ambiguous and must be interpreted in the light of the second. This makes out clearly that the land was to be taken back after the expiry of fifty years. I agree with the lower Appellate Court and hold that the suit is premature. The appeal is dismissed with costs.

N. P.

Appeal dismissed.

(1) 16 C. P. L. R. 59.

SHAHU v. BAKRI.

LAHORE HIGH COURT.
FIRST CIVIL APPEAL No. 3008 OF 1917.
January 29, 1921.
Present:—Sir Shadi Lal, Kt., Chief Justice, and Mr. Justice Wilberforce.
SHAHU—PLAINTIFF—APPELLANT
versus
BAKRI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Appeal—Memorandum not stamped even according to appellant's own valuation—Extension of time—Poverty and ignorance of law—Rejection of plaint—Decree—Appeal—Court-fee.

The plaint in a suit for possession of land, assessed to fluctuating land revenue was rejected on 2nd January 1917 on the ground that the plaintiff, who had paid Court-fee on ten times the land revenue, failed to pay Court-fee on the market value of the land within the period allowed by the Court. An appeal against the order of rejection was preferred on 21st March 1917 on a stamp of Rs. 2. The memorandum of appeal was returned as insufficiently stamped but it was re-filed without making good the deficiency. On 7th June 1917 Court-fee was paid on ten times the land revenue and at the hearing the appellant's poverty and ignorance of law were invoked as grounds of failure to make up the deficiency:

Held, (1) that no valid memorandum of appeal was presented within the period of limitation prescribed for the appeal inasmuch as the appellant had not paid Court-fee even on ten times the land revenue which was his own valuation of his claim;

(2) that the pleas of poverty and ignorance of law were not well-founded as it was the appellant's duty to pay the fee at least on the valuation which he had himself placed upon his claim.

An order rejecting a plaint for non-payment of deficient Court-fee, amounts to a decree, and a memorandum of appeal from such order must bear an *ad valorem* stamp.

First appeal from a decree of the Subordinate Judge, First Class, Sargodha, dated the 2nd January 1917.

Dr. *Nand Lal*, for the Appellant.

Mr. *M. L. Puri*, for the Respondents.

JUDGMENT.—The action, which has given rise to this appeal, was brought by the plaintiff appellant for the possession of a plot of land. It is admitted that land revenue, which was assessed on the land, was fluctuating, and consequently the Trial Judge held that valuation of the suit for the purpose of Court-fee was not ten times the land revenue upon which the plaintiff had paid the Court fee, but the market value of the land. The learned Judge accordingly directed the plaintiff to make up the deficiency in the Court fee within a prescribd period, and upon his failure to do so passed an order on the 2nd January 1917 rejecting the plaint. There can be no doubt that the order rejecting the plaint amounts to a decree, and that the memorandum of appeal from that decree must bear an *ad valorem* Court-fee.

On the 21st March 1917 the plaintiff presented to this Court a memorandum of appeal bearing a Court-fee label of Rs. 2, and it was pointed out to him that the document was insufficiently stamped. The memorandum of appeal was consequently returned to the appellant, but he re filed it on the 16th May 1917 without making up the deficiency in the Court-fee. It was not until the 7th June that he paid the Court-fee of Rs. 108 which would be the requisite Court-fee if ten times the land revenue were regarded as the valuation of the suit for the purpose of Court-fee. It is, however, unnecessary to determine the question whether the plaintiff was right in valuing the suit at ten times the land revenue, because it is clear that he did not pay even the fee leviable on that amount within the prescribed period of limitation. Indeed, he was granted indulgence to make up the deficiency, but he did not avail himself of that indulgence and re-filed the memorandum of appeal, as stated above, on the 16th May without affixing the proper Court-fee thereto. His Counsel explains the failure of his client to make good the deficiency by invoking the latter's poverty and ignorance of law, but we are unable to hold that either of these grounds is well founded. We consider that it was the appellant's duty to pay the fee at least on the valuation which he had himself placed upon his claim and that he has been guilty of negligence in not paying the fee calculated on that basis. We accordingly hold that no valid memorandum of appeal was presented within the period of limitation prescribed for the appeal, and that no adequate ground for an extension of the period has been established. The appeal is, therefore, dismissed with costs.

S. D.

Appeal dismissed.

IMPERIAL TOBACCO CO. OF INDIA LTD. v. SECRETARY OF STATE FOR INDIA.

CALCUTTA HIGH COURT.

CIVIL REVISIONAL JURISDICTION.

January 17, 1922.

Present:—Justice Sir John Woodroffe, Kt., Mr. Justice Greaves and Mr. Justice Ghose.

THE IMPERIAL TOBACCO COMPANY OF INDIA LIMITED—APPLICANT

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—OPPOSITE PARTY.

Income Tax Act (VII of 1918), ss. 31, 32, 33, 34—Agent, who may be—Agent must be in receipt of income—Indian Company, whether an agent of its share-holders resident outside British India—Interpretation of Statutes—Hardship.

Six persons, residing out of British India, were share-holders in an Indian Company, the income of which arose and accrued in British India. The profits due to those six share-holders were sent out to them by the Company, which on being assessed on the income of those six share-holders as the agent of the non-resident persons, objected that it could not be so assessed:

Held, per *Woodroffe and Greaves, JJ. (Ghose, J.* dissenting) that, under the circumstances of the case, the Company was neither an agent for, nor in receipt of income on behalf of, the six non-resident share-holders. [p 903, col. 1.]

Sections 31 and 34 of the Income Tax Act (VII of 1918) should be read together and not disjointly. The latter section merely defines who may be included as an agent under the former section. [p. 903, col. 1.]

To render an agent liable for income-tax for a person residing out of British India whether section 31 or section 34 be looked at, in either case the former must be in receipt of income on behalf of the latter within the terms of section 31. [p. 90', col. 1.]

Per *Ghose, J.*—A Company incorporated according to law, is an artificial legal person having an existence separate from its corporators. There is, therefore, no legal impediment to a Company being agent for any of its share-holders. The relation, however, of share-holder and Company is not in itself the relation of principal and agent. [p. 902, col. 2.]

Salomon v. *Salomon & Co.*, (1897) A. C. 22; 66 L. J. Ch. 35; 75 L. T. 426; 43 W. R. 193; 4 Manson 89; *Daimler Co., Ltd.* v. *Continental Tyre & Rubber Co*, (1916) 2 A. C 307 at p. 356; 85 L. J. K. B. 1333; 114 L. T. 1049; 60 S. J. 602; 32 T. L. R. 624, referred to.

The agent of a non-resident person need not be in receipt of income on behalf of such person. The mere fact of agency is sufficient to make him liable to be assessed in respect of the income of the principal. [p. 904, col. 1.]

Section 34 gives merely an extension of the meaning of the term "agent" as including persons who are treated as such and who may be assessed under section 33 (1) although such persons are not really agents; section 34 should be read in connection with the preceding section rather than with section 31. Section 34 refers to cases where the non-resident person has no agent in British India appointed by himself and, therefore, it becomes necessary to find a person who should be "deemed to be an agent" only for the purpose of the Income Tax Act. [p. 904, cols. 1 & 2]

Section 34, Income Tax Act, was enacted for the purpose of assessing the income of non-resident persons when they have not appointed agents residing in British India who might be assessed under section 33 (1). [p. 904, col. 2.]

It is a well-established rule that Courts ought not to be influenced by any notion of hardship in exceptional or individual cases in interpreting a Statute. [p. 905, col. 1.]

Reference under section 51 (1) of the Indian Income Tax Act of 1918.

FACTS appear from the judgment.

Mr. *Langford James*, for the Applicant.—This is a Reference by the Board of Revenue for assessment of super-tax against the Imperial Tobacco Company of India, Limited, as agent for some share-holders of the Company residing in England. The income arose and accrued in India. The Company disputed the liability as not being a Company within the meaning of the Act and prayed for reference under section 51 of the Indian Income Tax Act. The reference is on two points, *viz.*:—(1) Whether the Collector is right in holding that the Company is agent under section 34 of the Act. (2) If so, whether the assessment of the super-tax is right.

I submit under section 31 of the Act the Company cannot be deemed to be an agent because we did not receive on behalf of the share-holders. They cannot assess us with super-tax so long as the share-holders do not declare divided. We are in the position of a debtor. Section 34 must be read along with section 31.

Mr. *B. L. Mitter*, Standing Counsel, for the Government.—The Company are the servants of the share-holders whose money they receive and are in charge of. The intention of the Legislature is to be gathered from sections 31—34. The Company has business connection with the share holders residing abroad whose agents they are. The Company is clearly liable under section 34 of the Act. The income of the share-holders is received by the Company and it is remitted to them by their agent the Company. Clearly, therefore, they cannot shirk off the liability in any way.

Mr. *James* replied in brief.

JUDGMENT.

WOODROFFE, J.—In this case the applicant Company has been assessed to super tax as agent for six gentlemen mentioned in the reference. All these gentlemen are non-residents of British India. They are share-

holders in the Company and the assessment has been made in regard to the dividends payable to them by the Company. The Company is an Indian Limited Company and the income, of which assessment was made, arose and accrued in British India. The question is whether the Company is an agent for these gentlemen as defined in the Indian Income Tax Act, VII of 1918. It is their contention that they are not such agents, and that they are not in receipt of any income of the persons whose agents they are alleged to be.

The Board has held that they were such agents and the matter has been referred to us upon the application of the Company. One substantial question is whether sections 31 and 34 of the Indian Income Tax Act are to be read together or disjointly, in which latter case it would not be necessary in all cases that the agent should be in receipt of the income. On a consideration of this matter I am of opinion that section 34 merely defines who may be included as an agent under section 31. If so, the agent whether we look to sections 31 or 34 must be in receipt of income within the terms of the former section.

I do not think that the circumstances of this case show a receipt within the terms of the section. Though this is sufficient to determine the matter I may add that I am not satisfied that even if sections 31 and 34 be read disjointly, the Company was under the circumstances of this case an agent within the terms of the Act. The answer, therefore, to the first question, namely, whether the Collector of income-tax is right in holding that the Company is an agent for these share-holders, is answered in the negative. The second question, namely, if so, whether the Company has rightly been assessed to super-tax on their account, does not arise. A copy of this judgment is directed to be given to the Revenue Authority.

GREAVES, J.—I agree.

GROSE, J.—I regret very much that I am unable to concur in the judgment just pronounced. I think it necessary that I should state as clearly as I am able the reasons for which I have arrived at a different conclusion.

This is a reference made by the Chief Revenue Authority under section 51 (1) of the Income Tax Act, 1918 on the application of the Assessee, the Imperial Tobacco Company of India, Limited. Six persons who are all residing out of British India are share-holders in the Company. They were entitled to certain dividends for their shares in the Company, the profits of which accrued in British India and there is no question that the share holders are liable to pay super tax on their income so derived. The profits due to those share-holders were sent to them by the Company to their residence outside British India. The Company was assessed for the super tax due on the income of those six share-holders as agent of the non-resident persons under the provisions of the Income Tax Act and the Company has raised the objections that it cannot be so assessed. The questions on which the decision of this Court is sought are, (1) whether the Collector of income-tax is right in holding that the Company is agent for these share-holders under section 34, Act VII of 1918; and (2) if so, whether the Company has rightly been assessed to super-tax on their account.

A Company incorporated according to law is an artificial legal person having an existence separate from its corporators. There is, therefore, no legal impediment to a Company being agent for any of its share-holders. The relation, however, of share-holder and Company is not in itself the relation of principal and agent. *Salomon* v. *Salomon & Co.* (1), *Daimler Co., Ltd.* v. *Continental Tyre & Rubber Co.* (2). Something more would be necessary in order to constitute a Company an agent for its share-holders. The contention on behalf of the Company in this case is that it cannot be held to be agent of the non-resident share-holders so as to be liable to be assessed for income-tax for those share holders by the procedure taken by the Collector under section 34 of the Income Tax Act. It is urged that section 34 should be read along with section 31, and unless a person receives income on behalf of another residing out of British India he cannot be deemed to be an agent under section 34, and although the Company has the income of those persons it is not in receipt of such income. Assuming that the Company is not in receipt of the income, in order to see whether the Company may be treated

(1) (1897) A. C. 22; 66 L. J. Ch. 35; 75 L. T. 426; 43 W. R. 193; 4 Manson 89.

(2) (1916) 2 A. C. 307 at p. 356; 85 L. J. K. B. 1333 114 L. T. 1049; 60 S. J. 602; 32 T. L. R. 624.

as agent—the provisions of the Income Tax Act commencing from section 31 should be examined. Under section 31 an agent of any person residing out of British India being the receipient on behalf of such non-resident person of any income chargeable under the Act is held liable for the tax. If he is actually an agent and in receipt of income on behalf of the principal nothing more is necessary in order to render him liable, but the tax is to be levied upon and recoverable from him under section 31 irrespective of any other provision in any other section of the Act. It is not necessary in such a case for the Collector to give the agent so liable any notice under section 34 of his intention of treating him as agent of the non-resident person, because he is in fact the agent. Section 32 refers to the case where the income chargeable is received by the Court of Wards and certain other persons. This section has no direct bearing on the present question but it is noticeable that the income chargeable must be received by the Court of Wards or other persons in order that the tax may be levied upon them. Then comes section 33, sub-section (1) of which has an important bearing on the present question. Under this section any person residing out of British India whose income accrues or arises within British India "shall be chargeable to income-tax in the name of the agent of any such person and such agent shall be deemed to be for all the purposes of the Act the assessee in respect of such income-tax." As I read this section the agent of such non-resident person need not be in receipt of the income on behalf of such person there being no such provision in it as in the preceding sections. The mere fact of agency is sufficient to make him liable to be assessed in respect of the income of the principal. Coming to section 34 it seems to me that it gives merely an extension of the meaning of the term "agent" as including persons who are treated as such and who may be assessed under section 33 (1) although such persons are not really agents; section 34 should be read in connection with the preceding section rather than with section 31. Section 34 refers to cases where the non-resident person has no agent in British India appointed by himself and, therefore, it becomes necessary to find a person who should be "deemed to be an agent" only for the purpose of the Income Tax Act and that cannot be done by the Collector acting in accordance with the provisions of this section. Section 34, in my opinion, was enacted for the purpose of assessing the incomes of persons residing outside British India who are chargeable with income-tax here but who have not appointed any agents residing in British India who might be assessed under section 33 (1). To hold otherwise, it seems to me, would be to support an anomaly that a person receiving his income through an agent in this country would be assessed, but if he asks his debtor to remit the income direct to him he would escape liability to pay the tax, a thing which this section was intended to remove. It is only necessary that the person on whom the Collector has served a notice under section 34 is a "person employed by or on behalf of a person residing out of British India or having any business connection with such person" and if that condition is satisfied the person on whom such notice has been served shall, for the purposes of the Income Tax Act, be deemed to be the agent of such person. The question whether the Company is a person coming within the description of section 34 presents to my mind very little difficulty.

The Company remits the incomes of the persons resident outside British India and should be held to have been employed to do so by or on behalf of the non-resident persons. The Company again has without doubt 'connection' with the share holders and what can that connection be but business connection? The Company itself states in its letter to the Collector that on the declaration of a dividend the Company is in the position of debtor to the share holders. Therefore the Company also comes within the description of "having any business connection" with a non resident person. To say that such person should also be in receipt of income on behalf of the non-resident person would be to make the enactment of the section unnecessary, because a person in receipt of income is liable to be assessed under section 31; also it would not be necessary to give him notice of the Collector's intention to treat him as agent for a person receiving income, for another would be an agent under the general law

It was urged on behalf of the Company that to make one person liable to income-tax for another resident abroad, although he might not receive any income on behalf of such a person might, in some cases, cause great hardship. The answer to this is two-fold; (1) It is a well-established rule that Courts ought not to be influenced by any notion of hardship in exceptional or individual cases in interpreting a Statute, and (2) in order to prevent any case of hardship the proviso to section 34 has been enacted and the Collector may be trusted to give effect to any reasonable objection before treating a person as agent under this section. In the present case, however, there can be no such question of hardship. It may be observed that under section 21 of the repealed Income Tax Act (II of 1886) the tax was chargeable in the name of the agent where the income was received through the agent, and there was no provision corresponding to section 34 of present Act. The alterations in the ent Act were, in my opinion, made to ve an anomaly as I have already indi- l.

vould, therefore, answer the first question e affirmative. The answer to the second sion depends upon the first and no argu- was addressed on it. Therefore, the er to it should also be in the affirmative.

K & S. D. *Answered affirmatively.*

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL No. 102 OF 1920.

October 13, 1921.

nt:—Sir William Ayling, Kt., Officiating Chief Justice, and Mr. Justice Odgers.

. M. P. R. N. M. FIRM—PLAINTIFFS—APPELLANTS

versus

HEPERUMAL CHETTY—DEFENDANT—RESPONDENT.

ntract Act (IX of 1872), s. 62—Contract—Subse- agreement after breach, validity of—English and n Law.

ction 62 of the Contract Act applies even where sequent agreement has been come to between parties after breach of the original contract. 08, col. 1.]

ahur Kayal v. *Thakur Das*, 15 C. 319; 7 Ind. (N. S.) 796, dissented from.

dgment of Kumarasawami Sastri, J., in *Ramiah Bhagavathar* v. *Somasi Ambalam*, 29 Ind. Cas. 449, (1915) M. W. N. 403; 29 M. L. J. 125, followed.

Per *Ayling, Offg. C. J.*—There is no justification for restricting the operation of section 62 on the mere fact that it would otherwise contravene a somewhat technical rule of English Law. Section 63 was admittedly enacted in direct antagonism to English Law. Why should not section 62 be accepted on its face meaning in spite of a similar antagonism? [p. 906 col. 2.]

Per *Odgers, J.*—It is highly improbable that of these two sections, section 62 and section 63, the latter should constitute a clear modification of the English Law as to the requirement of consideration, while the former should be held (by implication and without any suggestion to that effect in the wording itself) to import the highly technical doctrine of accord and satisfaction. [p. 908, col. 2.]

If section 62 were only intended to apply before breach, why does it not say so? [p. 908, cols 1 & 2.]

Courts should not engraft on the plain meaning of the provisions of enactments, limitations founded on technical rules of English Law and pleading, especially in cases where such limitations are not suited to the conditions prevailing in this country. [p. 908, col. 2; p. 909, col 1.]

Appeal from the judgment and decree of Mr. Justice Krishnan, dated the 7th October 1920, passed in the exercise of the Ordinary Civil Jurisdiction of the High Court in O. S. No. 284 of 1919.

FACTS appear from the judgment.

Mr. *G. Krishnaswamy Aiyar*, for the Appellants.—Section 62 does not apply as the new agreement to cancel the sale with regard to the six bales was made after breach of the original contract. See *Manohur Koyal* v. *Thakur Das* (1). Section 62 of the Contract Act embodies the rule of English Law. The agreement to cancel the sale being *nudum pactum*, the plaintiffs must succeed. Section 62 does not apply to cases of substitution, rescission or alteration after breach of the original contract.

Mr. *Venkatasubba Rao* (with him Messrs. *Radha Krishnaya* and *V. Devanatha Aiyangar*), for the Respondent, referred to the judgment of Kumaraswami Sastri, J., in *Ramiah Bhagavathar* v. *Somasi Ambalam* (2), which dissented from the Calcutta decision.

The original contract as regards six bales was not executed and parties agreed to restrict its operation to eight bales only.

JUDGMENT.

AYLING, OFFG. C. J.—The transaction out of which this suit arises took place in July 1918, a time when speculation in piece goods was very brisk. Plaintiffs sold to defendant No. 14 bales of bleached mull;

(1) 15 C. 319; 7 Ind. Dec. (N. S.) 796.

(2) 29 Ind. Cas. 449; (1915) M. W. N. 403; 29 M. L. J. 125.

the goods were lying at the time with Muruganatha Chetty and Sons from whom plaintiffs had apparently themselves purchased them and whose shop was close to defendant's shop. Defendant in his turn sold the bales to one Amir Chand Idanmull giving him a delivery order on Muruganatha Chetty. Idanmull refused to take delivery of six out of the 14 bales on the ground of unsoundness. Defendant complained to plaintiffs, who undertook to re-place them by six sound bales, and induced defendant to take charge of the six bales left in Muruganathan's hands. This defendant did; but plaintiffs failed to exchange them for sound bales. Early in September prices fell heavily in consequence of the looting riots; and when plaintiffs subsequently offered to deliver six sound bales, defendants said it was too late. After some negotiation it was agreed that the sale contract in respect of these six bales should be cancelled. Plaintiffs took back three bales, but did not take delivery of the balance and now sues for the price of the whole quantity. The above is defendant's version which is spoken to in evidence and which the learned Trial Judge has found to be true. Plaintiffs deny any undertaking to re-place the six bales, or agreement to cancel the sale in respect of them; and sue on the basis of a completed sale.

On a consideration of the evidence I have no hesitation in agreeing with the learned Trial Judge, for the reasons given by him, in accepting the defendant's story as to the circumstances in which he came to be in possession of the six bales, and as to the agreement to cancel the sale in respect of them. This would entail the dismissal of plaintiffs' claim for the price of the six bales. *Vide* section 62 of the Indian Contract Act.

Appellants' Vakil's main argument before us has in fact been that section 62 has no application because the agreement to cancel the sale as regards the six bales was made after the defendant had broken the contract by omission to pay for the goods delivered. For this proposition of law he relies on *Manohur Koyal* v. *Thakur Das* (1).

Mr. G. Krishnaswami Ayyar assures us that this argument was addressed to the learned Trial Judge, although there is no reference to it in the latter's judgment. It rests on the assumption that there was a breach of the contract before the agreement for cancellation and this is certainly neither found nor admitted, nor is it raised in any of the issues in the case. Before this plea of the plaintiffs could be admitted, the fact of breach would have to be decided in their favour; and we should have to call for a finding on a properly framed issue.

I do not think we are either called upon to do this or should be justified in so doing. The learned Judges in *Manohur Koyal* v. *Thakur Das* (1) undoubtedly lay down the proposition that the provisions of section 62 do not apply after there has been a breach of the original contract. But with all respect I fail to see any justification for this restriction of the operation of the section on the mere fact that it would otherwise contravene a somewhat technical rule of English Law. Section 63 was admittedly enacted in direct antagonism to English Law. Why should not section 62 be accepted on its face meaning in spite of a similar antagonism? I agree in this connection with the remarks of Kumaraswami Sastri, J., in *Ramiah Bhagavathar* v *Somasi Ambalam* (2).

The present case at the time of the alleged cancellation was eminently one for amicable settlement. Plaintiffs were presumably urging that defendant had received goods according to contract and was bound to pay for them. Defendant was similarly complaining that plaintiffs had neither delivered proper goods in the first instance nor re-placed them within a reasonable time as promised. Whether the six bales were, as a matter of fact, sound or unsound was a somewhat moot point depending on alleged defect in packing. In such circumstances it seems to me both reasonable and desirable that the parties should be allowed to cancel the contract as for as these bales are concerned. Section 62 on the face of it allows them to do so; and unless compelled by stronger authority or reasoning, I see no reason to decline to give effect to it.

I, therefore, agree with the learned Trial Judge's rejection of plaintiffs' claim.

The only other point argued is as to costs in relation to the sum of Rs. 1,040

to which defendant admitted plaintiffs' claim and which defendant discharged out of Court. I see no reason to interfere with the Trial Judge's discretion as to awarding proportionate costs on this sum.

I would dismiss the appeal with costs.

ODGERS, J.—This is a suit for the recovery of the balance of the price of 14 bales of piece goods sold by plaintiffs to defendant on 23rd July 1918. The defendant admitted by his written statement that a sum of Rs. 1,010 2 0 was due to the plaintiffs as balance of price of 8 out of the 14 bales and that as to the remaining six bales the contract had, by mutual consent, been rescinded. The plaintiffs had the 14 bales in question with a firm called Muruganathan Chettey and the former gave the defendant a delivery order on that firm; the defendant endorsed the delivery order to one Ameerchand Idanmu'l to whom he had in his turn sold the goods. The Chetty firm delivered the goods to Idanmull who rejected 6 of the 14 bales as being unmerchantable as the packing was damaged. The defendant's case is that, on Idanmull's rejection of the six bales, he, the defendant, complained to plaintiffs' agent, Satagopa Pillai, and the latter promised to take back the six bales and re-place them by others. This was in July. On or about 24th September Satagopa Pillai offered the new bales, but the price having dropped by that time, defendant refused them and he and Satagopa Pillai agreed that the latter should take back the bales and that the contract should be cancelled with reference to them. Some question has been raised on the fact that three of the bales remained with defendant after the date of the alleged cancellation, but this is, in my opinion, satisfactorily explained by the evidence of D. W. No. 1 and D. W. No. 2. I have carefully considered the evidence and I have come to the conclusion that the finding of the learned Judge, that the cancellation alleged has been proved, is justified by the evidence. Satagopa Pillai, the plaintiffs' agent, with whom the contract was made and who is said to have entered into the agreement cancelling the contract as to the six bales, was not called at the trial.

On appeal, however, a point of law which does not seem to have been argued at the trial has been taken. It is said that the plaintiffs must succeed as the agreement to cancel is a mere *nudum pactum*, being without consideration and, therefore, illegal. It is said that section 62 of the Indian Contract Act, which, at first sight, governs this case, does not in fact do so, as it has no application to substitution, rescission or alteration after breach of the original contract. It is undoubtedly the English Law, arising from the evolution of the doctrine of consideration in that system, that a new contract after breach of the original one must be supported by consideration. As Eyre, C. J., said in *Lynn* v. *Bruce* (3). "Accord executed is satisfaction: accord executory is only substituting one cause of action in the room of another, which might go on to any extent." So an agreement to abandon a claim is said to be a mere *nudum pactum*. It will be remembered that in *Foakes* v. *Beer* (4), in which the necessity for fresh consideration was affirmed, Lord Blackburn went so far as to write an opinion dissenting from that of the majority of the Lords, but finding himself in the minority he did not deliver it.

This doctrine in fact applies only to executory contracts. I am not altogether satisfied that there has been a breach in this case. The 14 bales were delivered and six were rejected, but there was, as far as I can discover, no time for delivery fixed by the contract, nor can I find any evidence that defendant treated the rejection by his purchaser as a breach of contract on the part of the plaintiffs. Defendant seemed to be perfectly satisfied with the assurance of plaintiffs' agent that fresh bales would be substituted in a few days time. I think there is something to be said for the view that the contract as regards the six bales was not executed, and that before execution or even before the time for performance the parties agreed to confine the operation of the original contract to eight bales only, *i.e.*, they altered the original contract so as to include eight bales only. If this view is correct, there is

(3) (1794) 3 R. R. 381; 2 H. Bl. 317; 126 E. R. 571.
(4) (1884) 9 A. C. 622; 54 L. J. K. B. 130; 51 L. T. 838; 33 W. R. 283.

of course no doubt that section 62 applies and the parties were at perfect liberty to do this. I assume, however, for the purpose of this judgment that this view is wrong and that there was a breach of the original contract to deliver 14 bales and that the agreement to cancel the contract as to the six bales was only arrived at after a breach of the original contract.

It is said that this doctrine of the English Law is embodied in section 62 and that the words "before breach" must be read into the section. Reliance is placed on *Manohur Koyal* v. *Thakur Das* (1), where it was held that section 62 is a legislative expression of the Common Law and its provisions do not apply to a case where there has been a breach of the original contract before the subsequent agreement is come to. There, the Court found as a fact that the plaintiffs did not intend to accept defendant's mere promise to pay cash and give a bond. He neither paid nor tendered the bond. Had the finding been that plaintiffs did so intend to accept these promises in satisfaction of the original contract, I gather the judgment would have proceeded on different lines. Why cannot we hold in the present case that the mutual arragement to waive delivery on the one side and to waive payment on the other was a satisfaction of the original contract? As Subramania Ayyar, J., put it in *Davis* v. *Cundasami Mudali* (5). "The former case (*i. e.*, section 62) *ex hypothesi* necessarily implies consideration which is either the mutual renunciation of right or coupled with it the mutual undertaking of fresh obligations or the renunciation of some right on the one side and the undertaking of some obligation on the other, that forms the consequence of an agreement to rescind, substitute or alter, mentioned in section 62." It appears to me, therefore, that there is ground for saying that the case in *Manohur Koyal* v. *Thakur Das* (1), is different from that before us and that in the latter the mutual renunciation of right can be treated as satisfaction of the original contract. It appears, moreover, to me to be somewhat remarkable to hold that section 63 imports the highly technical rule of English Law. If the section were only intended to apply before breach, why does it not say so? The form of the English plea (on which most of the old cases proceed), as set out in *Manohur Koyal* v. *Thakur Das* (1), was "that after the alleged contract and before any breach thereof etc." It seems on principle unreasonable to import into the plain words of the section a modification based on such technical grounds. Further, there is authority for saying that section 63 "not only modified but is in direct antagonism to the law in England"—*Manohur Koyal* v. *Thakur Das* (1); see also *Davis* v. *Cundasami Mudali* (5), which holds that an agreement under section 63 does not require consideration to support it and where the English Law is considered. As Subramania Ayyar, J. said (page 402*): "Now the question arises whether the Indian Legislature intended to perpetuate such an unsatisfactory state of things in this country. I think that it did not, that in the Contract Act the doctrine of consideration was not extended to the regulation and restraining of the discharge of contract by agreement, and that the Legislature laid down by section 63 a rule different from that of the English Law." It is highly improbable that of these two sections, section 62 and section 63, the latter should constitute a clear modification of the English Law as to the requirement of consideration, while the former should be held (by implication and without any suggestion to that effect in the wording itself) to import the highly technical doctrine of accord and satisfaction. With great deference to the learned Judges who decided in 1888 *Manohur Koyal* v. *Thakur Das* (1), above referred to, I cannot think that there was any such intention. Further, we have the Madras case reported as *Ramiah Bhagavathar* v. *Somasi Ambalam* (2). Of the learned Judges, Seshagiri Ayyar, and Kumaraswami Sastri, JJ., who decided that case, the former was "not, as at present advised, prepared to dissent from *Manohur Koyal* v. *Thakur Das* (1)" but based his judgment on another ground. The latter distinctly disapproved of the doctrine in *Manohur Koyal* v. *Thakur Das* (1). He said: "I do not think that Courts should engraft on the plain meaning of the provisions of enactments, limitations founded on technical rules of English Law and pleading, especially in cases where such limitations are not suited

(5) 19 M. 398; 6 M.L.J. 202; 6 Ind. Dec. (N. S.) 983.

*Page of 19 M.—[*Ed.*].

to the conditions prevailing in this country." With these observations I respectfully agree and following that learned Judge, I am prepared, if necessary, to dissent from *Manohur Koyal* v. *Thakur Das* (1), for the reasons I have set out above.

I agree with the order as to costs proposed by my Lord.

On all these grounds the judgment of the learned Judge must be confirmed and the appeal dismissed with costs.

M. C. P. *Appeal dismissed.*

S. D.

CALCUTTA HIGH COURT.

CIVIL REVISIONAL JURISDICTION.

March 22, 1921.

Present :—Sir Lancelot Sanderson, Kt., Chief Justice, Justice Sir John Woodroffe, Kt., and Mr. Justice Richardson.

MESSRS. MARTIN & Co.

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL.

Excess Profits Duty Act (X of 1919), ss. 4, 5 (b), 6 (1) (b)—Income Tax Act (VII of 1918), ss. 12 (1), 14 (1)—Assets of firm consisting of money invested in public companies and in Government securities, if can be treated as capital employed in business of firm—"Capital employed in business," meaning of.

The expression "capital employed in the business" in the first proviso to section 6 (1) (b) of the Excess Profits Duty Act, includes capital of a firm invested by them in the course of their business in Government securities or in shares in public companies. Such investments must consequently be included in the capital computation both for the accounting period and "the standard years." [p. 911, col. 2.]

Per *Richardson, J.*—Neither on principle nor by reason of any specific provision contained in either the Excess Profits Duty Act or the Income Tax Act, does such capital cease to be the capital of a firm employed in the business, because it is so invested or because, in the case of the sharer, the dividends under the Income Tax Act are taxed at the source and are not, when paid to the firm, part of their taxable income. [p. 912, col. 2]

Reference under section 51 (1) of the Indian Income Tax Act and rule 31 of the Excess Profits Duty Rules.

Mr. *Langford James*, for the Assessee.

Mr. *B. L. Mitter* (with him Advocate General, Mr. *T. C. P. Gibbons*), for the Crown.

JUDGMENT.

SANDERSON, C. J.—This is a Reference under section 51 (1) of the Indian Income Tax Act, 1918, and rule 31 of the Excess Profits Duty Rules.

It appears that Messrs. Martin and Co., were required to pay duty upon excess profits calculated at a certain figure which is named in the Reference. The Adviser on Excess Profits Duty to the Government of India made a representation to the Board of Revenue that certain items in the calculation were wrong and under rule 20 of the Excess Profits Duty Rules, 1920, the Board called upon Messrs. Martin and Co., to show cause why the Excess Profits Duty Assessment should not be enhanced. On the 21st of January this year Messrs. Martin and Co. put in an answer to this requisition, and that answer is attached to the case. Messrs. Martin and Co., requested that if the contentions of the Board of Revenue were persisted in, reference should be made to the High Court on two questions. The questions were as follows: "(1) Whether they are entitled to treat as capital employed in the business such assets of the firm as consist of money invested in public companies and in Government securities and in loans to individuals and business concerns and similarly to treat as income of the business dividends and interest received on such investments and loans? (2) Whether the capital employed in the business should be ascertained in a manner analogous to that provided in section 5 (*b*) of Act X of 1919, for the ascertainment of profits in the accounting period?"

The first question was treated by the Board of Revenue under three heads, the first head relating to the capital invested by Messrs. Martin and Co. in public companies; the second one relating to money invested in Government securities, and the third one relating to loans to business concerns and individuals.

The decision of the Board was as follows: with regard to the first head they concluded: "The amount credited in the accounts in respect of dividends upon shares in these companies should be deducted from the total profits of Messrs. Martin and Co. and the capital value of the shares should be excluded from any capital computation both for the accounting period and the standard years." As regards the second head the Board concluded as follows: "In view of section 5 (*a*) of the Excess Profits Duty Act and in the absence of any specific provision of the Act regarding investments the Board is of opinion that the money invested by Messrs.

Martin and Co. in Government securities is part of the capital employed in their business and the income from these investments is part of the taxable income of the business." As to the third head they concluded that money lent by Messrs. Martin and Co. to business concerns and individuals was capital employed in their business and the income from interest on these loans was part of the income of the business.

As regards the finding under the first head Mr. Langford James who appeared for Messrs. Martin and Co. did not contest the conclusion of the Board that the amount credited in the accounts in respect of dividends from shares in the companies should be deducted from the total profits of Messrs. Martin and Co. but he did contest the second part of their conclusion, namely, that the capital value of the shares should be excluded from any capital computation both for the accounting period and the standard years.

Mr. B. L. Mitter, who appeared with the learned Advocate-General for the Board of Revenue, contended that the case should be remitted to the Board both as regards the investments in shares of public companies and as regards the investments in Government securities, inasmuch as, he alleged, it was a question of fact whether the investments in the shares of the companies and the investments in Government securities had been treated by Messrs. Martin and Co. as capital or merely as profits. We, however, pointed out during the course of the argument that this point apparently had not been raised before the Board of Revenue or by the Board of Revenue in the case submitted to this Court, but that, on the other hand, the Board had treated both the investments in the shares of the companies and the investments in Government securities as capital and that consequently we must deal with the reference upon that assumption; and, we declined to remit the case for a further finding to the Board of Revenue in those two respects.

The basis of the Board's decision as to the investments in shares of public companies was that the capital thus invested by Messrs. Martin and Co. was the capital of the companies, and could not, therefore, be said to be the capital employed by Messrs. Martin and Co, in their business, and further, that the income received by them from dividends on shares in the companies was part of the "taxable income" of these companies and was not part of the "taxable income" of Messrs. Martin and Co. within the meaning of section 14 (1) of the Income Tax Act, VII of 1918, or section 5 (2) of the Excess Profits Duty Act, X of 1919.

The material sections of the Excess Profits Duty Act, X of 1919, are sections 5 and 6. Section 5 provides as follows, "5. The profits of a business in the accounting period shall, at the option of the person by whom the Excess Profits Duty in respect of that business is payable, be or be deemed to be,—(*a*) the taxable income as finally ascertained for the purposes of the Indian Income Tax Act, 1918," for the present purpose it is not necessary for me to read the remainder of that section. Section 5, it appears from what I have read, deals with ascertainment of profits in the accounting period. Section 6 deals with the ascertainment of standard profits. It is not necessary for me to read sub-section (1) (*a*) of section 6, because that does not apply to this case but sub section (1) (*b*) of section 6 does apply and that provides as follows :—

"The standard profits of a business shall be.....at the option of the person by whom Excess Profits Duty in respect of the business is payable." (Then follow three sub-clauses the third of which is applicable to this case, namely) "if the profits of the business have been assessed for the said purposes in all the five years 1913, 1914, 1915, 1916 and 1917—the aggregate of one-fourth of the profits assessed in the years 1913 and 1914 and in such two of the years 1915, 1916 and 1917 as may be selected by the said person and one-fourth of the interest, if any, received in the same four years on securities forming part of the assets of the business". So far, therefore, it appears that the question of capital employed in the business does not arise, but to that section there is a proviso and that proviso is as follows, "provided that if the average capital employed in the business in the years adopted for the purpose of determining the standard profits is less or more than the capital so employed at the end of the accounting period there shall be made to or from the standard profits an addition or a deduction, as the case may be, which shall bear to the standard profits the same proportion as such increase or decrease of capital bears to

the average capital so employed in the years so adopted."

Then there is explanation, *viz.*, "for the purpose of ascertaining the average capital employed, the capital employed in the business in any year shall be deemed to be the capital so employed at the end of that year." This proviso applies when the standard profits are to be ascertained under section 6 (1) (*b*), as in this case. Therefore, it becomes necessary to ascertain what was the average capital employed in the business in the years adopted for the purpose of determining the standard profits: and, it also becomes necessary to ascertain what was the capital employed in the business at the end of the accounting period, and it is in reference to this proviso that the question arises whether the investments of Messrs. Martin and Co. in the shares of public companies are to be included or excluded both for the accounting period and for the period which has been described in the case as "the standard years." As to this matter, the learned Counsel appearing for the Board of Revenue admitted that he could not support the contention of the Board of Revenue that because the dividends received on the shares of these companies were not part of the "taxable income" of Messrs. Martin and Co., by reason of section 12 (1) of the Income Tax Act, VII of 1918, it must follow that the investments were not capital employed in the business of Messrs. Martin and Co.: and, therefore, the only question which remains to be considered is whether the investments in shares of public companies are capital employed in the business of the company or are not capital employed in the business of the company, because the investments must be considered as the capital of the companies themselves. I have already stated that in this reference, as this case is stated for our opinion, the investments must be taken as having been treated as part of the capital of the firm of Messrs. Martin and Co., and, that being so, in my judgment the investments in the shares of the public companies were capital employed in their business. The statement of Messrs. Martain and Co. which is to be found at page 7 of the paper-book was as follows: "The business of the firm is and has been for very many years carried on under the terms of a deed of partnership which thus describes the business which the firm may carry on. The business of the firm shall be that of engineers, contractors architects, builders, merchants and agents and such other business as the partners may from time to time decide," "(*b*) for very many years past the partners of the firm have from time to time decided to apply the money and assets of the partnership in various ventures, *e. g.*, they have invested money in shares in public companies; in response to an appeal by Government they invested money in War Loan. They have granted loans to individuals for whom they were constructing houses and to business concerns. Such investments have been made with the concurrence of all the partners. In many, if not, most cases the investments in public companies have been made with a direct reference to other business carried on by the partnership. Thus, for instance, the partnership acts as managing agents for a large number of companies. It is desirable that as such managing agents they should own shares in such companies and in one instance, at any rate, the articles render it obligatory upon them to hold shares in the company for which they act as managing agents. The partnership has also promoted companies, floated private concerns, in which the partnership was interested, into public companies and as a natural result taken shares. (*c*) The moneys so invested by the partners in the interest of the partnership have been invariably treated in the books of the firm as assets of the partnership and any profit or loss derived or suffered by the sale of such investments has been invariably treated as profit or loss derived or suffered by the partnership and all dividends or interest have been invariably in the profit and loss account of the partnership and such income employed for the general purposes of the partnership."

These being the facts, in my judgment, it being conceded that these investments have been treated as part of the capital of the firm, such investments were "capital in the business of the firm" and consequently as such must be included in the capital computation both for the accounting period and "the standard years."

As to the Government securities, Mr. B. L. Mitter agreed that there was on this point no difference in principle between these and the investments in public shares. if such investments were to be taken as having been treated by Messrs. Martin and Co. as capital: I,

consequently, agree with the conclusion arrived at by the Board in this respect.

The second question which I have already read deals with a different matter. The conclusion of the Board on that question was as follows: "In the opinion of the Board no addition can be made to the capital employed on the 3rd September 1918 as there is no provision in the Act for the exercise of an option similar to that allowed in section 5 (*b*) for the ascertainment of profits." There again I agree with the conclusion at which the Board of Revenue has arrived and for the reasons which they have stated.

The decision of the Board of Revenue with regard to the third head of the first question, which dealt with loans to individuals and business concerns was not contested.

Each party will pay his or thier own costs of this reference, on the ground that we have decided one question (the first question) in favour of Messrs. Martin and Co. and the other question (the second question) in favour of the Board of Revenue.

Let a copy of our judgment be sent to the Board of Revenue as soon as possible.

WOODROFFE, J.—I agree.

RICHARDSON, J.—The matter before us is how the amount of Excess Profits Duty payable by Messrs. Martin and Co. should be determined.

By section 4 of the Excess Profits Duty Act of 1919 the duty payable as 50 per cent. of the amount by which the "profits in the accounting period" exceed the "standard profits." By section 5 (*b*) for which Messrs. Martin and Co. opted "the profits in the accounting period" depend on the taxable income "for the total period specified, ascertained according to the provisions of the Indian Income Tax Act of 1918. Section 5 (*b*), therefore, incorporates by reference Chapter I of the Income Tax Act.

Under section 6 of the Excess Profits Duty Act the "standard profits" with which the "profits in the accounting period" have to be compared, depend or may in whole or in part depend, on the capital of the business or the capital employed in the business. Messrs. Martin and Co. selected one of the modes of settling the standard profits allowed by section 6 (1) (*b*).

Two questions of method are in dispute. Both relate to the computation of the capital of the firm. The first turns on the meaning of the words "capital employed in the business" in the first proviso to section 6 (1) (*b*) of the Excess Profits Duty Act, and was argued for the Secretary of State with reference to the provisions of sections 12 (1) and 14 (1) of the Income Tax Act.

In my opinion under the Excess Profits Duty Act "capital employed in the business" includes capital of the firm invested by them in the course of their business in Government securities or in shares in public companies. Neither on principle nor by reason of any specific provision in either of these Acts, does such capital cease to be the capital of the firm employed in the business because it is so invested or because in the case of the shares the dividends under the Income Tax Act are taxed at the source and are not, when paid to Messrs. Martin & Co., part of their taxable income. It will be observed that under section 12 (1) of the Income Tax Act dividends on shares in a company are only excluded when the company is liable to the tax and that under section 13 they are included in the total income for the purpose of determining the rate at which the tax is payable.

I should add that the Board's Reference assumes that the Government securities and shares represent capital invested by Messrs. Martin and Co.

The second question turns on the meaning of the words "capital so employed" (that is capital employed in the business) "at the end of the accounting period." Those words also occur in the proviso to section 6 (1) (*b*) of the Excess Profits Duty Act. This question was argued for Messrs. Martin and Co. with reference to the provisions of section 5 (*b*) of the same Act, and I agree that the question is concluded by the definition of "accounting period" in section 2. There is nothing in section 5 (*b*) which enables us to put a meaning on that definition other than that which the words plainly convey.

The learned Counsel for the parties, each in his turn, suggested—that if I may be permitted to say so, those suggestions were in no way unduly pressed—that recourse should be had to analogy for the purpose of supplying what appear to be, or what may possibly be, *lacunae* in the Act of 1919. Dealing with legislation of this kind, imposing a tax, drawn on scientific lines and laying down

positive rules for calculating the amount of the tax, we are clearly unable to take that course.

I concur, therefore, in the answers which my Lord has proposed to the questions put by the Board of Revenue.

B. N.

BOMBAY HIGH COURT.
CIVIL APPEAL No. 32 OF 1921.
January 18, 1922.
Present:—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Coyajee.
KHIMCHAND NAROTAMDAS BHAVSAR—DEFENDANT No. 1—APPELLANT
versus
BHOGILAL HIRACHAND SHAH—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), Sch. II, cl. 3, O. XXIII, r. 3—Arbitration—Reference through Court—Reference cancelled by parties—Arbitrator appointed out of Court—Application to file award as adjustment—Suit on award—Fresh reference to arbitration, effect of, on earlier arbitration proceedings.

In a suit for dissolution of partnership, an order was passed under clause 3 of Schedule II, Civil Procedure Code, referring the matters in dispute to two arbitrators. Later, the parties informed the Court that they had cancelled this reference and had privately appointed *T.* alone as the sole arbitrator. *T.* delivered his award on 18th April 1919. On 15th August 1919 plaintiff applied to file the award as an adjustment under O. XXIII, r. 3, of the Code. On the 18th March 1920 the parties, alleging that contentions had been raised against the award by some of the defendants, applied for the appointment of *T.* as arbitrator through the Court. The Court appointed *T.* as arbitrator who was to submit the award before the 15th April 1920. *T.* was unable to submit his award by that date so that the arbitration proceedings fell to the ground. On 17th November 1920 plaintiff sought to continue his application under O. XXIII, r. 3:

Held, that upon a proper construction of the application of 18th March 1920, and the order thereon, the previous arbitration proceedings were considered as at an end, as the parties had agreed to a fresh arbitration of a character different to the previous arbitration, although the arbitrator was the same: that the parties were relegated to their original position, that, therefore, the application in question could no longer be entertained and that the suit must continue. [p. 914, col. 1.]

Appeal from an order passed by the First Class, Subordinate Judge at Ahmedabad, in Civil Suit No. 85 of 1918.

Mr. *Jinnah* (with him Messrs. *H. D. Nanavati*, *T. P. Munim* and *H. V. Divalia*), for the Appellant.

Mr. *B. J. Desai* (with him Mr. *G. N. Thakor*), for the Respondents.

JUDGMENT.—The plaintiff sued for dissolution of partnership. The suit was filed on the 8th February 1918. On the 13th February 1918, an order was passed under the third clause of the Second Schedule of the Civil Procedure Code referring the matters in dispute to two arbitrators, Mr. Thakor Das and Mr. Trikamlal. Later on, the parties informed the Court that they had cancelled the reference to these gentlemen, and had privately appointed Mr. Trikamlal alone as the sole arbitrator. That was consequently an arbitration without the intervention of the Court. Mr. Trikamlal delivered his award on the 18th of April 1919. On the 15th August 1919 the plaintiff presented an application to file the award as an adjustment under O. XXIII, r. 3, of the Civil Procedure Code. But previous to that, on the 25th June 1919, he had filed a suit on the award, Suit No 572 of 1919.

Then, on the 18th March 1920, the parties made an application to the Court that as certain contentions had been raised against the award by the first and second defendants, for the sake of settling disputes between the parties the Court would be pleased to appoint Mr. Trikamlal as an arbitrator through the Court and, after taking evidence which the parties might have to adduce, he should give his award and the parties should treat that award as final. On the same day the Court appointed Mr. Trikamlal sole arbitrator with the consent of the parties, and he was to submit his award on or before the 15th April 1920. Mr. Trikamlal was unable to submit his award by that date and eventually returned the papers, so that the arbitration proceedings fell to the ground.

On the 17th November 1920, the plaintiff withdrew Suit No. 572 of 1919, and continued his application under O. XXIII, r. 3.

The first issue was whether the application, Exhibit 29, for recording an adjustment

on reference, dated 14th October 1918, and the alleged award dated 18th April 1919, could be entertained any longer after the application and order dated, 18th March 1920. On that issue the Judge found that the terms of Exhibit 47, *i. e.*, the application for a fresh Order of Reference, did not make the previous reference nugatory and of no effect, so that the previous reference and the award thereon remained to be enforced. The learned Judge admitted that no exact authority could be found, but he held that the previous contract was not cancelled, nor was a new complete contract that could be enforced substituted. It appears to us obvious that when the parties applied to the Court on the 18th March 1920 to appoint Mr. Trikamlal sole arbitrator, they agreed that all the previous arbitration proceedings should be annulled.

It was suggested by the respondents that the effect of the application and order of the 18th March 1920 was merely conditional, that if, for any reason, what we may call the third arbitration proceeding should result in nothing, the second arbitration proceeding could be revived, and any of the parties who wished to rely upon the second arbitration proceeding as an adjustment of the suit, should apply to the Court under O. XXIII, r. 3.

We cannot accept that proposition, which is opposed to general principles, and it is impossible to conceive what complications might result if such a suggestion were acceded to. But we must read, in our opinion, the application and order of the 18th March 1920, according to its ordinary meaning, and the only construction we can put on that application and order is that the previous arbitration proceedings were considered as at an end, as the parties had agreed to a fresh arbitration of a different character to the previous arbitration, although the arbitrator was the same. We think, therefore, that the finding of the learned Judge in the Court below that the present application to record the award of the second arbitration proceeding as an adjustment was a good application, was wrong, and that that arbitration having failed, the result was that the parties were relegated to their original position and the suit must continue.

It is not, therefore, necessary to deal with other issues in the case, and to decide whether a decree could be passed in terms of the award of the 18th April 1919. The appeal must be allowed and the suit must continue. The appellant to have his costs throughout from the plaintiff and defendants Nos. 2, 3 and 4.

W. C. A.

Appeal allowed.

PRIVY COUNCIL.

APPEAL FROM THE PATNA HIGH COURT.

May 25, 1922.

Present:—Lord Phillimore, Lord Carson, and Sir John Edge.

Rai RADHA KRISHNA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

BISHESHWAR SAHAY AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 72—Decree-holder purchasing property without permission—Purchase, whether void.

A purchase by a decree-holder who has not obtained permission to bid at an execution sale is neither void nor a nullity but is only to be avoided on the application of the judgment-debtor or some other person interested. The sale would be set aside if the property has not been realised to the best advantage. The conduct of a decree-holder or the fact that he had applied for permission to bid and been refused would not make much difference, for although that would be a fact which the Court might take into consideration in determining whether the sale should be avoided or not, even then it is doubtful whether it would be of any importance, as the question would not be whether the decree-holder had been contumacious, but whether the property had been really realised to the best advantage. [p 916, col. 2; p. 917, col. 1.]

Appeal against the decision of their Lordships (Atkinson and Das, JJ.,) of the Patna High Court, dated 27th February 1919, in First Appeal No. 10 of 1917 reversing the decree, dated 27th December 1916, made by the First Sub-Judge, Muzaffarpur.

Mr. *DeGruyther, K. C.*, and Mr. *Abdul Majid*, for the Appellants.

Mr. *B. Dube*, for the Respondents.

RADHA KRISHNA v. BISHESHWAR SAHAY.

JUDGMENT.

LORD PHILLIMORE.—Rai Gudar Sahay, a landowner in the District of Mozaffarpur, borrowed from a joint family of money-lenders to whom the defendants belong, a sum of Rs. 16,000 on the 2nd May 1873, and mortgaged for it his village, Mauza Kataya. The family afterwards separated, and upon the partition of their property various fractions in the mortgage became allotted to the different members. They, however, all joined in a suit brought in 1886 to enforce the mortgage and in the ordinary course obtained a decree on the 31st May 1886, under which if the money was not paid the property was to be brought to sale.

For a time no steps were taken to realise this decree, and the judgment-debtor paid off portions by purchasing, through a *benamidar*, the shares of some of the decree-holders, for prices which it is noteworthy were considerably less than the nominal values. In January 1889 he bought a share nominally worth Rs. 7,140 for Rs. 3,266; in March 1891, a share nominally worth Rs. 15,209 for Rs. 5,000; and in November 1894 shares nominally worth Rs. 24,619 for Rs. 7,176. This left something under 5 annas of the judgment unsatisfied and these were held in severalty by the respondent Bisheshar Sahay and two of his brothers. In 1898 Bisheshar, on behalf of himself and the remaining decree-holders, took proceedings to have the decree executed, and the property was sold by the Court on the 18th April 1899. By that time the judgment-debtor was dead, and his widow was proceeded against in his place. Upon the record of the execution proceedings one Hari Narain was declared purchaser of the village, and he obtained a certificate of sale and possession. The widow applied to set aside the sale on various grounds, but failed. She died in 1904 and was succeeded by her daughter, who died in 1910. Upon the daughter's death the estate of the original judgment-debtor devolved upon the appellants as the next heirs, and they in 1914 instituted the present suit, alleging that the proceedings at the sale had been collusive and fraudulent, that they had recently discovered that Bisheshar had applied to be allowed to bid and had been refused leave, but in spite of the refusal had purchased the village in the name of Hari Narain, who was his *benamidar*. The present appellants made certain other points which were disposed of in the course of the proceedings.

The respondent Bisheshar denied that Hari Narain was his *benamidar*, and said that Hari Narain was the true purchaser, who had since sold and transferred to him. He also took the point of the Statute of Limitations.

It must be taken to be true that he had applied to the Court for leave to bid and had been refused. Hari Narain purchased the property for Rs. 625 only and sold it, or purported to sell it to Bisheshar on the 9th December 1902 for Rs. 1,500. The case came before the Subordinate Judge, who by his decree, dated the 27th December 1916, decided in favour of the plaintiffs, the present appellants. He held that the purchase by Hari Narain was made by him as *benamidar* for Bisheshar Sahay, and he thought that the Statute of Limitations did not apply, because he held that it was not a suit to set aside a voidable sale, but a suit to recover possession of immoveable property by the heirs in reversion on the death of the last female heir, and was, therefore, covered by Article 141 of the Indian Limitation Act.

Bisheshar appealed to the High Court, which by its judgment, dated the 27th February 1919, reversed the decision, held that Hari Narain was not a *benamidar* and further held that the suit was barred by Article 12 of the Indian Limitation Act as being a suit to set aside a sale in execution of a decree by a Civil Court, for which the period of limitation is one year from the date when the sale is confirmed or would otherwise have become final and conclusive. If either of the defenses raised by Bisheshar be established, the judgment of the High Court at Patna would be right and the suit would fail.

Their Lordships will consider first the question whether it was proved that the transaction was *benami*. There is, as admitted in the judgment of the High Court, ground for suspecting that the transaction might be of this nature. The Judge of first instance took it as established, though there is some question as to the regularity of the proof, that Hari Narain was in position a servant and a servant to a brother

of Bisheshar, and one not likely to have money, though there was some evidence that he had engaged in commercial transactions. The sum for which the property was sold was exceedingly low. In the view of the Subordinate Judge it was worth Rs. 1,500 or Rs. 1,600 a year gross, from which should be deducted the revenue cesses amounting to about Rs. 400 a year. Not only, therefore, was the original price absurdly low, but Hari Narain, if he were the real purchaser, though making a considerable profit on the re-sale, nevertheless sold to Bisheshar for much less than he might have expected to get for the property.

But, on the other hand, the widow of the original judgment debtor, who seems to have been advised, made a number of objections to the sale and never raised this one and the matter waited for upwards of 15 years, by which time Hari Narain was dead before these proceedings were taken. It may be said that the widow and her advisers would not know who Hari Narain was, but the fact that the price was as low as it was would have put them upon inquiry, and indeed the witness for the plaintiffs, Khub Lal, if he is to be believed, told the widow's brother about it from the first. The fact that the decree-holders were content to take so small a proportion of the nominal value of their shares in the decree seems to point to there being deficiency in the mortgaged property. Moreover, Bisheshar's two brothers got in respect of their shares, which together were larger than Bisheshar's, only their small proportion of the net proceeds of the sale, and as they would certainly have known who Hari Narain was, they must either have been satisfied that the sale was good and that no more could have been realised, or they must have been parties to the fraud, which has not hitherto been suggested. Except the witness Khub Lal, whose evidence, taken as a whole, was unfortunate for the side which called him, and another witness whom the High Court thought unworthy of belief, there was nothing like affirmative evidence of a *benami* case.

Upon the whole, their Lordships agree with the view of the High Court that it has not been proved that Hari Narain was *benami* for Bisheshar. This is sufficient to dispose of the appeal.

With regard to the point on the Statute of Limitations as it was presented before the Courts in India, their Lordships are also of opinion that the decision of the High Court was right. The applicable section of the Code of Civil Procedure regulating sales in execution by the Court is as follows:—

"294. No holder of a decree in execution of which property is sold shall, without the express permission of the Court, bid for or purchase the property.

"When a decree-holder purchases with such permission, the purchase-money and the amount due on the decree may, if he so desires, be set off against one another, and the Court executing the decree shall enter up satisfaction of the decree in whole or in part accordingly.

"When a decree-holder purchases, by himself or through another person, without such permission, the Court may, if it thinks fit, on the application of the judgment-debtor or any other person interested in the sale, by order set aside the sale; and the costs of such application and order, and any deficiency of price which may happen on the re-sale and all expenses attending it, shall be paid by the decree-holder."

Upon the construction of this section it is evident that a purchase by a decree-holder who has not obtained permission is not void nor a nullity, but is only to be avoided on the application of the judgment-debtor or some other person interested. It would be injurious to those interested in the sale if a decree-holder who had been forced up in the bidding to give a large sum of money could escape from fulfilling his contract by getting the sale declared a nullity, and it would make all titles under such sales insecure if at later periods they were liable to be treated as nullities. A sale is to be set aside upon application and upon cause shown.

This position is well established and seems to have been accepted by the Subordinate Judge; but in his view the fact that the decree-holder had applied for permission and had been refused made a distinction. Their Lordships, however, cannot see that this makes any difference. He is still a decree-holder who has not obtained permission to bid. He is that and nothing more. If indeed an application were made

under the last paragraph of the section, his conduct might be one of the points which the Court would take into consideration in determining whether it would avoid the sale or not. It is doubtful even then whether it would be of any importance. The question would not be whether the decree-holder had been contumacious, but whether the property had been really realised to the best advantage. If it had not, the Court would set the sale aside; if it had, then it mattered not that the decree-holder bought without permission or that he had applied and been refused. If, then, the sale is voidable only and not void, Article 12 in the Act of 1903 applies, and the suit must be brought within one year. Therefore, it was too late. The Counsel for the appellants took a further point. He urged that this case might be treated as one of concealed fraud, to which section 18 of the Act and Article 95 would apply, and that the fraud consisted in concealing from the Court that the decree-holder who had been refused was in fact buying through his *benamidar*. Their Lordships deem it unnecessary to consider this contention, which was never put forward or discussed in the Courts in India, and the foundation for which is deficient. There is indeed allegation but there is no proof of the time when the fraud, supposing that there were fraud, became known to the plaintiffs (appellants). Moreover, for this purpose the widow would represent the estate, and the Court would have to be satisfied that she did not know. In this connection the evidence of Khub Lal would have to be further considered, as well, perhaps, as that of other witnesses for the plaintiffs.

For these reasons their Lordships deem it unnecessary to express any opinion upon this contention, and upon the whole, they will advise His Majesty that this appeal should be dismissed with costs.

N. K. & N. H.

Appeal dismissed.

Solicitors for the Appellants.—Messrs. *Truefitt* and *Francis*.

Solicitors for the Respondents.—Messrs. *Barrow, Rogers* and *Neville*.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL ORDER No. 31 OF 1921.

April 15, 1921.

Present:—Sir Lancelot Sanderson, Kt., Chief Justice, and Mr. Justice Richardson.

SARAT CHANDRA SARKAR—DEFENDANT—APPELLANT

versus

MAIHAR STONE AND LIME CO., LTD.—PLAINTIFF-RESPONDENT.

Letters Patent (Cal.) cl. 15—Order setting aside abatement if "judgment"—Civil Procedure Code (Act V of 1908), O. XXII, r. 9 (2) (3)—Abatement, when set aside.

A decision setting aside an abatement is a "judgment" within the meaning of clause 15 of the Letters Patent and is appealable. [p. 919, col. 1.]

An abatement ought not to be set aside as a matter of course or lightly. The plaintiff must satisfy the Court that he had a sufficient cause for not applying in time to set aside the abatement and bring a legal representative of the deceased defendant on the record. [p. 918, col. 2; p. 919, col. 1.]

Appeal from an order of Mr. Justice Pearson.

Mr. *N. N. Sircar*, for the Appellant.

Messrs. *Langford James* and *B. K. Ghosh*, for the Respondent.

JUDGMENT.

SANDERSON, C. J.—This is an appeal from the judgment of my learned brother Mr. Justice Pearson, whereby he set aside the abatement of a suit and directed that the record be amended by substituting Sarat Chandra Sarkar for the original defendant, Jadu Nath Sarkar, who has died. The learned Counsel, Mr. Langford James, took a preliminary objection that there was no right of appeal in respect of this judgment, but our attention was drawn to an unreported decision of this Court in *Padmabati* v. *Tulsi Munjuri Debi* (Appeal No. 16 of 1918, decided on the 18th June 1918) to which I was a party, the actual decision being given by my learned brother, Mr. Justice Woodroffe, and, when Mr. Langford James had read that decision, he agreed that he could not further contend that there was no right of appeal.

This case is one which I hope is out of the ordinary; and, in order to substantiate that remark, it is necessary for me to refer to some material dates. The suit was filed on the 1st of September 1916—we were informed that it was a suit to recover a sum of about Rs 1,900 which is alleged to have been due to the plaintiffs in respect of goods sold and delivered. The suit was

of a simple nature. The written statement was filed after considerable delay on or about the 2nd of June 1917. No steps were taken by the plaintiffs in this suit with the result that on the 22nd of December 1920, more than three years after the written statement had been filed, the case was put into the Special List by the officials of the Court to be disposed of by the learned Judge on the Original Side. It was alleged on behalf of the plaintiffs that it was then discovered that the defendant was dead; and, according to the evidence which was put in on behalf of the plaintiffs, it appears that, in consequence of an enquiry which was made, it was ascertained on the 26th of December 1920 that the defendant had died on the 24th of December 1918, leaving him surviving, Sarat Chandra Sarkar, his only heir and legal representative. It appears from the affidavit which was put in on behalf of the defendant, that an application was made on behalf of H. P. Moitra, on the 4th of January last, for an extract from the Death Register showing the death of the defendant, and that a certificate was obtained on the 5th January, so that it is clear that the plaintiffs knew on the 26th of December 1920, that the defendant had died on the 24th of December 1918 and they got the certificate on the 5th of January 1921. On the 22nd of December 1920 the learned Judge made an order that, in view of the fact that the Attorney for the plaintiffs had stated that the defendant was dead, and as he was taking steps to obtain substitution of the heirs of the defendant, the learned Judge directed that the case should appear in the list on the 12th January 1921 and that the plaintiffs' Attorney should then state what steps he had taken. The plaintiffs' Attorney took no steps; and, when the case again came in the list, on the 12th of January 1921, the learned Judge made an order that an application for revival should be made within a month and that in default the suit should be dismissed with costs. Even then the plaintiffs did not comply with the order, because it was not until the 12th of February that a notice was issued on behalf of the plaintiffs, addressed to the Attorney for the defendant on the record and also to Sarat Chandra Sarkar, such notice stating that an application would be made on the 15th of February, that the abatement should be set aside and that substitution should be effected; so that, even after the 26th of December, it seems to me that the plaintiffs were guilty of unexplained delay and neglect. In order to complete the story, I must give two or three other dates. The defendant died on the 24th of December 1918, and by reason of Article 177 of the Limitation Act, the suit abated on the 24th of June 1919. The plaintiffs, by reason of Article 171, had 60 days from the 24th of June 1919 within which they might make an application to set aside the abatement. No such application was made and the time expired on the 24th of August 1919. Therefore, the time for making an application to set aside the abatement had expired. It was necessary, therefore, for the plaintiffs to show, in these circumstances, that they had sufficient cause, within the meaning of section 5 of the Limitation Act, for not preferring the application within such a period. Assuming for the sake of this judgment, though I am not wholly satisfied about it, that the plaintiffs could get over that difficulty and that the learned Judge was right in entertaining the application, the plaintiffs had then to show under O. XXII, r. 9, that they were prevented by sufficient cause from continuing the suit. That means, in my judgment, that the plaintiffs had to satisfy the Court that there was sufficient cause for not applying in time to bring the legal representatives of the deceased defendant on the record. Ignorance of the death of the defendant up to the 22nd of December 1920, standing by itself, might be a sufficient cause. But, in my judgment, the death of the defendant having occurred in December 1918, it is clear that if the plaintiffs had shown the smallest diligence in prosecuting this suit in the ordinary way they must have discovered earlier than December 1920, two years after the death, the fact that the defendent was dead. In my judgment, the plaintiffs have failed to satisfy me that they were prevented by sufficient cause from continuing the suit within the meaning of O. XXII, r. 9.

For these reasons I am of opinion that the order which the learned Judge made setting aside the abatement and substitu-

ing the defendant's son for the defendant ought not to have been made. The facts of this case are so extraordinary that, although I have great respect for the opinion of the learned Judge, I am forced to the conclusion that this appeal must be allowed.

The result is that the learned Judge's order is set aside, including the order that the costs of the application should be costs in the cause, and the plaintiffs' application is dismissed. The plaintiffs must pay the costs of Sarat Chandra Sarkar, of the application before Mr. Justice Pearson and of this appeal.

RICHARDSON, J.—I agree. When a suit has abated, the setting aside of the abatement deprives the party in whose favour the abatement operates, of a valuable right. This, I understand, is why a decision which sets aside an abatement is a "judgment" within the meaning of clause 15 of the Letters Patent and, therefore, appealable. For the same reason an abatement ought not to be set aside as a matter of course or lightly. I am not of course suggesting for a moment that the learned Judge in the present case has made the order appealed from as a matter of course or lightly, but when all the facts are stated, as my Lord has stated them, it seems to me that Pearson, J., in confining himself to the somewhat narrow ground covered by the affidavits of the parties and in leaving out of account the deplorably dilatory conduct of the suit by the plaintiffs, has omitted to consider the question which arises under clause (3) of r. 9 of O. XXII. Under clause (2) of the rule, the plaintiffs had to satisfy the Court that they were prevented by some sufficient cause from continuing the suit within the period allowed by Article 177 of the Schedule of the Limitation Act. Under clause (3) the plaintiffs had to satisfy the Court that they had sufficient cause for not making the application to set aside the abatement within the period allowed by Article 171. The application was made long after the expiry of the latter period and, in my opinion, no sufficient cause has been shown for the delay. With great respect, therefore, to the learned Judge I agree that the appeal should be allowed.

N. K. *Appeal allowed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2456 OF 1919.

February 20, 1920.

Present :—Mr. Justice Broadway.

DIWAN CHAND—DEFENDANT—APPELLANT

versus

BISHEN DAS—PLAINTIFF—RESPONDENT.

Hindu Law—Joint family—Separation between sons—Arbitration—Mother not party—Maintenance allowed to mother instead of share—Mother, whether bound—Contract—Enforcement by third person deriving benefit—Heir of third person, position of—Contract Act (IX of 1872), s 37—Appeal, second—Question of law, new.

In a joint Hindu family consisting of a mother, her son and a grandson by a predeceased son, the last two wishing to separate, referred the matter to arbitration, and under the award which followed, divided the property among themselves, undertaking to contribute equally a certain sum for the maintenance of the mother. The latter did not recognise this arrangement and lived for the rest of her life with her son. On her death, the latter, as the heir to his mother's *stridhana*, sued the grandson for the arrears of maintenance:

Held, (1) that the mother being entitled to a third share under Hindu Law and being no party to the arbitration, was not bound to accept the maintenance allotted to her : [p. 920, col. 1.]

(2) that the mother not being privy to the contract of arbitration could not have brought a suit for the maintenance allowed to her under it; [p. 920, col. 1.]

(3) that, therefore, her son was debarred from suing for the same under section 37 of the Contract Act. [p. 920, col. 1.]

Mangal Sen v. *Muhammad Hussain*, 27 Ind. Cas. 737; 87 A. 115; 13 A. L. J. 73, followed.

A new point can be raised for the first time in second appeal provided it is purely a question of law which arises out of the findings of the Courts below and is not affected by any facts outside those findings. [p 921, col. 1.]

Ma Lay v. *Tun Shwe*, 51 Ind. Cas. 588; 10 L. B. R. 10; 12 Bur. L. T. 75, referred to.

Second appeal from a decree of the District Judge, Amritsar, dated the 20th October 1919, reversing that of the Munsif, First Class, Amritsar, dated the 31st March 1919.

Lala *Hargopal*, for Lala *Fakir Chand*, for the Appellant.

Dr. *G. C. Narang*, for the Respondent.

JUDGMENT.—The facts giving rise to this appeal are these. One Duni Chand, an Honorary Magistrate and a man of some wealth, died leaving him surviving a widow, *Musmmat* Parbati, a son Bishen Das and a grandson Diwan Chand. Diwan Chand was the son of Hari Chand, a deceased son of

Duni Chand. Bishen Das and Diwan Chand apparently desired to separate their shares. Admittedly, on a partition of the estate, *Musammat* Parbati was entitled to one-third. Bishen Das and Diwan Chand, however, drew up an agreement referring the matter to certain arbitrators who were asked to partition the property. On the 20th April 1915 the said arbitrators gave their award. Bishen Das and Diwan Chand each received approximately half of the estate left by Duni Chand and the arbitrators directed that a sum of Rs. 50 per mensem was to be paid to *Musammat* Parbati as maintenance. Diwan Chand had to pay Rs. 25 a month out of this, and as Bishen Das was in possession of a house which had been left undivided in which Dewan Chand had a half share, it was arranged that Bishen Das should pay Rs. 10 per mensem as rent, this sum being paid to *Musammat* Parbati towards Diwan Chand's contribution for her maintenance.

On the 23rd May 1915 Diwan Chand sent a money-order for Rs. 180 to *Musammat* Parbati. This amount was for maintenance for one year at the rate of Rs. 15 per mensem. The money-order was refused. Again, on the 29th June 1916, and later on the 17th June 1917, money-orders for Rs. 90 and Rs. 75 were sent by Diwan Chand but on each occasion were refused by *Musammat* Parbati. It should be noted that *Musammat* Parbati was living with her son Bishen Das and that she had not been a party to the reference to the arbitrators. Diwan Chand appears to have credited the amounts remitted by him, and refused by *Musammat* Parbati, to Parbati's account in his account-books. *Musammat* Parbati died and after her death Dewan Chand sued Bishen Das for the rent of the joint house, *viz.*, Rs. 10 per mensem which Bishen Das should have paid to *Musammat* Parbati but apparently did not. Diwan Chand obtained a decree. After this Bishen Das instituted the present suit for Rs. 800, being the amount payable to *Musammat* Parbati by Diwan Chand for a period of two years and eight months at the rate of Rs. 25 per mensem. He alleged that this sum represented the arrears of maintenance due to *Musammat* Prabati and that as such maintenance had formed her *istridhan* he, as her son, had succeeded to it. Diwan Chand pleaded that his grandmother had, out of love and affection for him, remitted the money due by him for her maintenance and that, therefore, no decree should be passed. The Trial Court dismissed the suit, holding that *Musammat* Parbati had waived her right to maintenance, and Bishen Das preferred an appeal to the District Judge at Amritsar, who came to the conclusion that there had been no waiver on the part of *Musammat* Parbati of her right to receive maintenance from Diwan Chand and that her refusal to accept the money-orders, referred to above, was due to the fact that she was dissatisfied with the award and wanted a larger share in the property. He accordingly decreed the plaintiff's suit. Against this decree Diwan Chand has now preferred this second appeal to this Court and on his behalf I have heard Lala Har Gopal while Dr. Gokal Chand Narang has appeared on behalf of Bishen Das.

Lala Har Gopal's contention was that inasmuch as *Musammat* Parbati had refused to receive the moneys sent to her, her refusal amounted to an assertion on her part that she did not accept the arrangement made by the arbitrators and was claiming her one-third share. He pointed out that the fact that Bishen Das had not paid her the Rs. 10 per mensem that he had undertaken to pay on behalf of Diwan Chand was a further indication of *Musammat* Parbati's intention to claim share in the estate and not to accept maintenance in lieu thereof. He also drew attention to the fact that a telegram purporting to have been sent by *Musammat* Parbati shortly after the last money-order had been refused showed that she was contemplating a suit for her one-third share. Reference was made to section 37 of the Indian Contract Act and *Mangal Sen* v. *Muhammad Hussain* (1) and it was argued that inasmuch as *Musammat* Parbati could not have sued for maintenance herself, her son could not now sue for arrears. In *Mangal Sen* v. *Muhammad Hussain* (1) it was held that where on a lease of certain land the lessees undertook, as between themselves and their lessor, to be responsible for the payment to the Zamindars

(1) 27 Ind. Cas. 737; 37 A. 115; 13 A. L. J. 73.

of certain sums which the lessor was primarily bound to pay, the Zemindars could not enforce this covenant against the lessees. It was thus contended that the learned District Judge, having found that *Musammat* Parbati had refused to accept the maintenance provided for her by the award because she desired to obtain her one-third share in the entire property, he should have held that the suit by the plaintiff was not competent. Dr. Gokal Chand Narang urged that this was entirely a new point which could not be raised as it had not been urged in the Courts below. To this Lala Har Gopal replied that the point was not a new one but arose out of the facts that had been stated in the pleadings, the facts being that, under the award to which *Musammat* Parbati was not a party she had been allowed a certain sum as maintenance which sum she had refused to accept. He contended that the mere fact that his client alleged that the refusal to accept this maintenance was due to love and affection did not affect the issue. In any event, he argued that it is a pure question of law arising out of the findings of the Courts below and one which was patent on the record. *Ma Lay* v. *Tun Shue* (2) was cited as authority. In that case it was held that a new point could be raised for the first time in second appeal provided it was purely a question of law which arose out of the findings of the Courts below and was not affected by any facts outside the findings. Dr. Gokal Chand Narang conceded this but urged that the new point of law should have been mentioned in the grounds of appeal in order that the other side might have notice of it, and pointed out that there was no mention of this new point in the grounds of appeal to this Court, at any rate, in that form. It seems to me, however, that ground No. 2 of the grounds of appeal to this Court covers this point and there it is urged that *Musammat* Parbati having refused to receive the maintenance the plaintiff was not entitled to maintain a suit for the recovery of arrears of such maintenance. It seems to me that Lala Har Gopal's contention is correct and that there is force in his argument. *Musammat* Parbati was not bound by the reference to the arbitrators; she was not, therefore, bound to accept maintenance, being entitled to a definite share in her husband's estate. It also appears clear, having regard to the authority in *Mangal Sen* v. *Muhammad Hussain* (1), that she could not have maintained a suit against Diwan Chand under that award for her maintenance and that, therefore, Bishan Das who claims as her heir cannot maintain this suit for arrears. Dr. Gokal Chand then urged that, in any event, his client could claim contribution from Diwan Chand inasmuch as *Musammat* Parbati had been living with him and had been maintained by him during the period in question. The suit, however, is not for contribution, and inasmuch as *Musammat* Parbati was not entitled to a share in the estate and had not agreed to maintenance in lieu thereof, I am unable to hold that the nature of the suit can now be changed so as to make the suit for arrears of maintenance one for contribution.

In these circumstances, I must accept the appeal and, setting aside the order of the lower Appellate Court, restore that of the Trial Court dismissing the suit. In the circumstances, however, I leave the parties to bear their own costs.

N. H.

Appeal accepted.

(2) 51 Ind. Cas. 588; 10 L. B. R. 10; 12 Bur. L. T. 75.

PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT.

December 15, 1919.

Present:—Viscount Finlay, Lord Sumner, Lord Parmoor and Lord Justice Clerk.

THE EAST INDIAN RAILWAY COMPANY—APPELLANTS

versus

Major ANDREW TORTON KIRKWOOD—RESPONDENT.

Burden of proof, question of—Question not material after evidence of both parties is out—Witnesses, credibility of—Shifty witnesses—Demeanour in witness-box—Trial Judge's impressions.

EAST INDIAN RY. CO. v. KIRKWOOD.

However important the question of the burden of proof may be in the early stages of a case, after all the evidence is out on both sides, it must be looked at as a whole, and the truth of the occurrence must be inferred from it. [p. 922, col. 2.]

The statement of a shifty witness that he was not at a given place, is not of itself proof that he was. [p. 923, col. 1.]

When a Trial Judge disbelieves witnesses on grounds connected with their demeanour in the witness-box and the impression they produced upon him, effect should, in the absence of anything to the contrary, be given to the view formed of the witnesses by the only Judge who saw and heard them. [p. 923, col. 1.]

Appeal from a judgment and decree of the High Court, (Sir Lancelot Sanderson, C. J., Woodroffe and Mookerjee, JJ.), dated 29th August 1917 reversing a decree of the District Judge of Patna, dated 12th May 1913.

Sir *John Simon*, *K. C.*, and *Sir William Garth*, for the Appellants.

Mr. *F. Baden Fuller*, for the Respondent.

JUDGMENT.

LORD SUMNER.—No question of law is involved in this case nor are the facts in themselves of an out of the way kind, but in the Courts below they have led to great differences of opinion. It has been common ground that the burden of proof was on the appellants, except as to the question of damages, though before the trial the District Judge made an order that the plaintiff should give his evidence first on all issues. On appeal much stress was laid on this error. The District Judge is said to have been led by it into misconceptions as to the truthfulness of the plaintiff's witnesses, to have thought that the plaintiff must fail if his witnesses were not believed, to have been provoked by the conduct of the plaintiff's case into believing the wrong side, and, having gone to see the site of the accident for himself, to have mentioned what he saw in his judgment, which was not evidence. In the view of some members of the High Court, these matters seem to have gone some way to the reversal of his judgment, even though it turned largely on his view of the demeanour of witness called before him on a pure question of fact.

Their Lordships are of opinion that these strictures do the learned Trial Judge less than justice. Perusal of his elaborate and detailed judgment shows that, when he came to weigh the evidence, his mind was fully alive to the true aspect of the burden of proof, and that his reasons for giving credence to some witnesses and not to others are judicial and clear, and give no ground for saying that his conclusions of fact are "vitiated" (per Woodroffe, J.) by any error of law as to the burden of proof. They find no misdirection of himself in his judgment; they acquit him of any suspicion of bias, and if, in the course of an arduous trial which lasted sixteen days, he made any observations of too severe a character (which they by no means are inclined to affirm), they were not made without provocation and had no effect upon his judgment. Their Lordships cannot find that the order criticised worked any injustice to the plaintiff in substance, and in general litigants consider that they gain an advantage by having the first word and the last.

On the other hand, their Lordships think that some portions of the judgments of the members of the High Court, who thought that the judgment of the Trial Judge ought to be reversed, were unduly influenced by consideration of the question of the burden of proof. However important this question may be in the early stages of a case, after all the evidence is out on both sides, it must be looked at as a whole, and the truth of the occurrence must be inferred from it. The judgments in question have not sufficiently observed this.

Two questions have been discussed, one "How came the rail to be displaced?" the other, "Why was not the displacement seen in time?" Upon the first, the great controversy was whether any servants of the Railway Company were on the spot at all when the rail was taken out. The time when this was done, could be determined within narrow limits, for trains had passed over the spot in safety down to about 4 A. M., and the time of the accident was fixed at 5-38 A. M., or thereabouts. The removal of the rail in itself was, to say the least of it, equally consistent with sabotage by strangers as with negligent conduct of the Company's own men. The defendants gave a considerable quantity of credible evidence to show that in ordinary course their gangs of linesmen would not assemble for the day's work till after this time,

and so far from this being contradicted, the plaintiff's case assumed this to be so, for an ingenious but hardly convincing attempt was made to show that on this particular day all the men must have been independently misled as to the time by the passage of a special train, although the state of the light would have told them plainly that they were getting up and going to work needlessly early. The coolies themselves were called and denied that they were on the line at the material time at all. Some of their tools were found close to the scene of the accident, and they denied the identity and ownership of these tools. This falsehood is capable of being explained without necessarily assuming that nothing that they said was true, but let it be that their evidence was wholly untrustworthy. The statement of shifty witnesses that they were not at a given place, is not of itself proof that they were. The plaintiff accordingly called witnesses, who swore to having seen these men on the line at the critical time and place, but the learned Trial Judge disbelieved them on grounds connected with their demeanour in the witness-box and the impression they produced on him, and nothing in the record shows that effect should not be given to the view formed of these witnesses by the only Judge who saw and heard them. There remains the question of the tools. In the High Court D. Chatterjee, J., speaks of this incident as furnishing "the key to the whole situation." Its importance greatly depends on its significance, and unless its nature is such as to point with reasonable probability to the presence of the railway coolies at the place where the rail was removed at or just before the time when this was done, the incident is not of great significance. One hypothesis, namely, that the tools were accidentally left behind when the men left work the evening before, may be set aside for they ought not to have been left behind, and the man responsible for them said that he locked them up in their box and kept the key. Next day the box with its lock was intact, and most of the tools were in it, but the three tools in question were found on the line. There does not appear to have been anything singular about this box or its lock. That it might have been unlocked with another key if it ever was really locked at all is not in itself an extravagant hypothesis, and the evidence does not exclude it. Even if the train wreckers obtained the key by the connivance of one of the Railway Company's coolies, that does not show that the removal of the rail which caused the accident was the work of persons for whose act in so doing the Railway Company was responsible. The incident of the tools would undoubtedly be very material as corroboration of trustworthy evidence that the Railway Company's coolies took out the rail, but if the evidence of this essential fact fails because the witnesses are unworthy of credit, there is nothing for this corroboration to operate upon.

The plaintiff's theory was that the defendants' gang of coolies, having assembled at an exceptionally and needlessly early hour, proceeded to their work at the place of the accident, turning a deaf ear to a *tamasha*, which was proceeding at a neighbouring village, and then began to remove the rail; that then they thought better of it and, without waiting to turn and re-place the rail, which was what they were there to do, returned to the *tamasha*, and took their chance that no unexpected and unscheduled train would appear on the scene. It is true there was such a *tamasha*, for *puja* with a *nautch* in honour of the sun was being performed at the time in question, but the evidence that the coolies came there after first going along the line and removing the rail did not satisfy the Trial Judge, and his conclusion in this respect does not seem to be open to serious criticism. The theory laboured under obvious difficulties but they need not be dwelt upon, for the necessary foundation of fact was never laid on which such a theory might have been successfully reared. Upon this part of the case their Lordships are in agreement with the Judges who were in a minority in the High Court, and, although it was for the Railway Company under the circumstances of such an accident on their line to acquit themselves of responsibility, think that on a review of the whole of the evidence they succeeded in doing so. They established that at the material time their coolies had no occasion to be at this spot at all, and in any case

ought not to have removed a rail, and the evidence with which the plaintiff met this *prima facie* answer, that they actually were there nevertheless, was not believed by the Trial Judge, who was best qualified to appraise it.

The second point, that there was a bad look-out on the engine, was presented at the trial in a somewhat peculiar way. There was a good deal of evidence about it, and it cannot be said that enough foundation was not laid to enable the point to be developed on appeal, but the fact remains that at the trial the case was not presented as a case of bad look-out failing to prevent the accident, but the driver's conduct was treated as evidence going to the precise state of the light, and, therefore, to the precise time of the occurrence, corroborating the plaintiff's case that the defendants' coolies removed the rail. One may be surprised that a separate case of bad look-out was not fought, but it was not. Perhaps the plaintiff's advisers, being fully informed of the local circumstances, decided not to raise the contention that the absence of the rail could have been seen far enough off to enable the train to be stopped in safety. Otherwise they ought in fairness to have put to the engine driver and fire man the plain question, whether they were not negligent in failing to see that the rail was gone in time to stop the train. Suggestions were made that the engine was out of order, in some way that would prove negligence causing the accident, and that the speed was excessive, but clearly both broke down. Their Lordships are unable to agree with those members of the High Court, who considered that the condition of the engine and the failure to pull up in time, established liability.

The case is no doubt one of complexity in its details, and presents in very full measure the evidentiary difficulties which attend all accident cases and particularly Indian accident cases, but, in spite of the sharply divergent opinions expressed in the High Court which their Lordships have been much assisted in appreciating by the fullness with which they have been stated and maintained, they are of opinion that the judgment of the Trial Judge was right and ought to be restored. Their Lordships will accordingly humbly advise His Majesty that the appeal should be allowed with costs here and below, and that the judgment in favour of the plaintiff should be set aside and that judgment should be entered for the defendants.

W. C. A.

Appeal allowed.

Solicitors for the Appellants.—Messrs. *Freshfields* and *Lease.*

Solicitors for the Respondents.—Messrs. *Light* and *Fulton.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2534 OF 1919.

February 23, 1920.

Present:—Mr. Justice Abdul Raoof.

HAR KISHEN SINGH—DEFENDANT—APPELLANT

versus

KALA RAM—PLAINTIFF AND WASU RAM, MINOR, UNDER THE GUARDIANSHIP OF THE AHLMAD OF THE MUNSIF'S COURT, JHANG—DEFENDANT—RESPONDENTS.

Gurdians and Wards Act (VIII of 1890*), s.* 29—*Sale by guardian of minor's property—Permission of Court—Punjab Pre-emption Act (I of* 1913*), s.* 3 (5) (a), *application of.*

In the case of a sale by the guardian of a minor's property where the terms of the sale are settled between the parties privately but in order to complete it permission of the Court is obtained under section 29 of the Guardians and Wards Act, the sale is completed by the guardian privately and cannot be said to have been effected in pursuance of an order of a Civil Court. Clause 5 (*a*) of section 3 of the Punjab Pre-emption Act prohibiting a claim for pre-emption does not, therefore, apply to a case like this. [p. 925, cols. 1 & 2]

Piare Lal v. *Ganeshi Lal*, 1 Ind. Cas. 474; 43 P. R. 1909; 41 P. W. R. 1909; 72 P. L. R. 1909, distinguished.

Ahmad Jan v *Kishen Chand*, 52 Ind. Cas. 337; 1 L. L. J. 101; 93 P. L. R. 1919; 73 P. W. R. 1919, followed.

Second appeal from the decree of the District Judge, Jhang, at Sargodha, dated the 4th June 1919, confirming that of the Munsif, First Class, Jhang, dated the 4th February 1919.

Bhagat *Govind Das*, for the Appellant.

Mr. *Bhagat Ram Puri*, for the Respondents.

JUDGMENT.—This is a second appeal in a pre-emption suit. The property sold

HAR KISHEN SINGH v. KALA RAM.

belonged to Wasu Ram, minor, defendant in the case. His guardian proposed to sell it to the defendant No. 1, Har Kishen Singh. The property was under mortgage. What was, therefore, proposed to be sold was the equity of redemption in the property. Having settled the terms of the proposed sale, the guardian made an application under section 29 of the Guardains and Wards Act for permission to execute a sale-dead. The permission was granted and the sale-deed in question, dated the 26th of November 1916, was executed and registered. The plaintiff thereupon instituted a suit for pre emption. One of the pleas raised in defence was that under the Punjab Pre-emption Act I of 1913, a suit for pre-emption was not maintainable. Section 3, clause 5 (*a*) was relied upon in support of this contention and it was argued that inasmuch as the sale was effected in pursuance of an order of a Civil Court, the claim of pre emption was prohibited under the said clause. The Court of first instance held that the sale was effected privately on a permission being obtained from the Court and the suit was, therefore, not barred. On appeal by the defendant vendee to the lower Appellate Court, the decree of the first Court was upheld. Defendant has now come up in second appeal to this Court, and the only question which requires decision in this case is whether the suit is prohibited under section 3, clause 5 (*a*) of the Pre-emption Act. It cannot be said that it was a sale in execution of a decree for money but it is contended that it is a sale in execution of an order of a Civil Court. In my opinion there is no force in this contention. According to the plain wording of clause 5 (*a*), the present sale cannot be said to have been effected in obedience of any order of the Court. The terms of the sale were settled between the parties privately, but as to complete a sale on behalf of a minor permission had to be obtained under section 29 of the Guardians and Wards Act. It was, therefore, obtained by the guardian and the sale was completed by the guardian privately in favour of the vendee. On behalf of the appellant the case of *Piare Lal* v. *Ganeshi Lal* (1) was relied upon. That was a case in which a right of pre-emption was claimed on a sale having been effected in pursuance of an order by Court under section 356 of the old Code of Civil Procedure and it was held in that case that the sale was in execution of an order of a Civil Court within the terms of section 3, clause 5 (*a*) of the Punjab Pre emption Act, and consequently not open to a claim for pre-emption. That was clearly a case covered by the bar provided under clause 5 (*a*). Under the old Code of Civil Prosedure an insolvent judgment debtor could apply for a declaration of his insolvency. By section 351 of the Code it was provided that the Court being satisfied on the points mentioned in that section would declare the judgment-debtor an insolvent. By section 352 it was provided that "the creditors mentioned in the application, and the other persons (if any) alleging themselves to be creditors of the insolvent, shall then produce evidence of the amount and particulars of their respective pecuniary claims against him; and the Court shall by order determine the persons who have proved themselves to be the insolvent's creditors and their respective debts; and shall frame a schedule of such persons and debts; and the declaration under section 351 shall be deemed to be a decree in favour of each of the said creditors for their said respective debts." By section 356 it was provided that "the Receiver shall proceed under the direction of the Court to convert the property into money, etc., etc." The sale under section 356, therefore, was a sale in execution of a decree and was effected in obedience to the direction of the Court. Such a sale beyond any doubt would come under section 3, clause 5 (*a*). The case relied upon, therefore, cannot be any authority in this case.

On behalf of the respondent the case of *Ahmad Jan* v. *Kishen Chand* (2) has been relied upon. In that case a sale was effected by the judgment debtor in virtue of a certificate granted to him by the Executing Court under Order XXI, rule 83, of the present Civil Procedure Code, and it was held that such a sale was a private sale in spite of the fact that it could not become absolute until confirmed by the Court. In the present case even a sanction of the Court was not made necessary by the order granting permission to the guardian

(1) 1 Ind. Cas. 474; 46 P. R. 1909; 41 P. W. R. 1909; 72 P. L. R. 1909.

(2) 52 Ind. Cas. 337; 1 L. L. J. 101; 93 P. L. R. 1919; 73 P. W. R. 1919.

to execute the sale deed. In my opinion the principle laid down in the case relied upon by the respondent fully applies to the present case. The sale in this case, as I have said above, was private sale and a claim for pre-emption is not prohibited by section 3, clause 5 (*a*).

The decisions of the Courts below are right and the appeal must fail. I accordingly dismiss it with costs.

N. H. & R. N.

Appeal dismissed.

PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT.

July 12, 1921.

Present:—Viscount Haldane, Lord Atkinson and Lord Phillimore.

THE CORPORATION OF CALCUTTA —PLAINTIFFS—APPELLANTS

versus

THE CHAIRMAN OF THE COSSIPORE AND CHITPORE MUNICIPALITY —DEFENDANT—RESPONDENT.

Bengal Municipal Act (III of 1884), s. 101, proviso—"Machinery," meaning of—Water Reservoir and its supporting structure, whether "machinery."

The word "machinery" in the proviso to section 101 of the Bengal Municipal Act when used in ordinary language, *prima facie*, means some mechanical contrivances which by themselves or in combination with one or more other mechanical contrivances by the combined movement and interdependent operation of their respective parts generate power or evoke, modify, apply or direct natural forces with the object in each case of effecting so definite and specific a result. [p. 931, col. 1.]

But the determination in a given case of what is or is not "machinery" must to a large extent depend upon the special facts of the case. [p. 931, col. 1.]

A balancing tank into which water is pumped for distribution in the water mains of a Municipality together with the supporting structure of such tank is not 'machinery.' [p. 931, col. 2.]

Chamberlayne v. *Collins*, (1894) 70 L. T. 217 at p. 218; 9 R. 311 and *Auckland City Corporation* v. *Auckland Gas Co., Limited*, 37 New Zealand Law Report 1028, distinguished.

Attorney-General v. *Cory Brothers & Co.*, (1921) A. C. 521; 90 L. J. Ch. 221; 125 L. T. 98; 85 J. P. 129; 19 L. G. R. 145; 37 T. L. R. 348, referred to.

Appeal from a judgment and decree of the Calcutta High Court, dated the 18th March 1919, reported as 54 Ind. Cas. 337, reversing a decree of the Subordinate Judge, Second Court, 24-Parganas.

Messrs. *Macmorran, K. C., Dunne, K. C.* and Mr. *Latter* for the Appellants.

Mr. *Konstam, K. C.*, and Mr. *Kenworthy Brown* (with them Mr. *De Gruyther, K. C*), for the Respondent.

JUDGMENT.

LORD ATKINSON.—This is an appeal against the decree of the High Court of Judicature at Fort William in Bengal, dated the 18th March 1919.

The suit out of which this appeal has arisen was instituted in the Subordinate Court at Alipore by the present appellants against the present respondent. The question raised therein was whether the Cossipore and Chitpore Municipality had acted *ultra vires* in assessing the Corporation of Calcutta on an annual value of Rs. 25,000 in respect of a certain holding described in the plaint.

The Subordinate Judge answered this question in the affirmative and gave a decree for the plaintiffs, the Corporation of Calcutta. But his judgment was reversed by the final decree of the High Court above-mentioned whereby the suit was dismissed with costs.

The present appeal has been preferred by the plaintiffs, the Corporation of Calcutta, from this decree.

The appellants supply Calcutta with water and for this purpose own two holdings of land, one situate at 71, Barrackpore Road, Tallah, on which there is now and has, for some time past, been a Reservoir and a Pumping Station. This piece of land has been assessed as a separate holding for the purposes of the Bengal Municipal Act, 1884 (Bengal Act III of 1884), and the other, an adjoining holding, No. 1, Khelat Babu's Lane, situate about 380 to 400 feet distant from the Pumping Station and measuring about 16 *bighas*, 18 *cottahs* and 5 *chittacks* of land. It is with regard to the assessment of this latter piece of land (hereinafter referred to as No. 2 holding) that this litigation has arisen. Both pieces of land are within the Municipal boundary of the defendant's Municipality (the respondent).

The principal water-works of the appellants are situate at a place named Pulta, about

15 miles from Calcutta, and its principal pumping and distributing station is at Tallah; the pump and engine-house are situate on the piece of land, called in this case holding or lot No. 1, at 71, Barrackpore Road. On this latter plot a very large underground Reservoir has been constructed, from which the water is pumped into the mains at the rate of about 2,000,000 gallons per hour. These pumps work continuously, night and day.

Lot or holding No. 2 is described in the appellants' plaint as measuring about 16 *bighas*, 18 *cottahs* and 5 *chittacks*, and having upon it an old stone masonry building measuring 30 by 20 feet, used as an out-office, and an overhead steel tank, resting on and supported by steel columns and girders. This tank is styled a balancing tank, and is capable of holding when full about 9,000,000 gallons. It is by pipes connected with the pumping-house.

Before its erection the appellants endeavoured to send through their mains to Calcutta a constant supply of water, as far as possible at an equal pressure. In addition to the pumps and underground Reservoirs at their main pumping station, they had a number of subsidiary pumps and Reservoirs at different places in or near the town. These subsidiary pumps only worked during the day time. This system of distribution was adopted in order to cope, if possible, with the difficulty presented by the extreme want of uniformity in the rate at which water was used and consumed in Calcutta. During the hours of the morning, from 6 o'clock to 10 o'clock, the consumption in Calcutta amounted to nearly 4 million gallons per hour, about twice as much as the principal pumps were capable of pumping into the mains; while during the afternoon and the evening so much less water was consumed in the town that the principal pumps, working as they did continuously, were able to supply what was sufficient. After the erection of the balancing tank the subsidiary pumps and Reservoirs were no longer used, and the following method was adopted in substitution for them to furnish Calcutta with a constant and at all times an adequate supply of water. When the consumption in Calcutta exceeded what the pumps could pump into the mains, the balancing tank was tapped by opening with the hand a cock or valve on one of the pipes connecting the tank with the water mains Through this pipe the water flowed into the mains. Not only did it mingle with and increase the volume of the water already in the mains, but, by reason of the elevation of the tank the force of gravity acting on the water the moment it passed from the tank into the pipes, caused it to rush as it were through the pipe and increase the velocity at which the whole volume of water in the mains flowed toward the town. When the demand in the town had decreased to less than the pumps could supply, a cock on another pipe connected with the tank was by hand opened and the unneeded surplus water was pumped back into the tank, replenishing it so as to raise the level of the water in it to what it was before the discharge of the morning took place. Before the erection of this tank the holding No. 2 of the appellants was, by the Commissioners of the Municipality, in exercise of their powers under the aforesaid Act of 1884, assessed at the annual value of Rs. 1,053.

After the erection of the tank with its supporting structure, which cost the appellants about 20 lakhs of rupees, they assessed this holding at the annual value of Rs. 1,27,030 on the basis of the cost of construction, and demanded rates to the amount of Rs. 1,462-5 3. On an objection being made by the appellants this assessment was, in the month of August 1914, revised and reduced to Rs. 30,000, that being the yearly rent at which, according to the respondent assessors, it might reasonably be expected to be let as it stood to a hypothetical tenant. On a further revision in March 1916, the assessment was on the same basis reduced to Rs. 25,000. It was not really disputed that the rise in the assessment from Rs. 1,053 to Rs. 30,000 was due to the fact that the value of the tank and its supporting structure was not excluded from consideration. The appellants contend that the tank and its supporting structure are, within the meaning of the third proviso of section 101 of the Bengal Municipal Act of 1884, "machinery," and, being so, that the respondent was bound by the provisions of that section to exclude them from consideration in making the assessment of lot No. 2, and that in taking them into consideration and thereby raising the

assessment they acted *ultra vires*. Section 101 runs as follows :—

"101. The gross annual rent at which any holding may be reasonably expected to let shall be deemed to be the annual value thereof, and such value shall accordingly be determined by the Commissioners, and entered in the valuation list :

"Provided that, (except in the Darjeeling Municipality) if there be on a holding any building or buildings the actual cost of erection of which can be ascertained or estimated, the annual value of such holding shall in no case be deemed to exceed an amount which would be equal to seven-and-a-half per centum on such cost, in addition to a reasonable ground-rent for the land comprised in the holding :

"Provided also that, where the actual cost so ascertained shall exceed one lakh of rupees, the percentage on the annual value to be levied in respect of so much of the cost as is in excess of one lakh of rupees shall not exceed one-fourth of the percentage determined by the Commissioners under section 102 :

"Provided further that in estimating the annual value of a holding under this section, the value of any machinery that may be on such holding shall not be taken into consideration".

It thus results that the sole question for decision on this appeal is whether or not this balancing tank with its supporting structure is "machinery" within the meaning of the last proviso of this section. No definition of the term "machinery" is to be found in the Act. It is not an easy task to define its meaning. Perhaps, the consideration of what are the precise functions which the tank and its supports respectively discharge may afford some assistance. The supporting structure merely serves to give the tank elevation so that the water which is allowed to escape from it may have a fall. The same function would be discharged by any hillside into an excavation upon which a Reservoir was constructed at an adequate height above the house or town which the Reservoir has to supply with water.

Then, as to the tank itself, what functions does it discharge ? It is a receptacle for water. It holds the water that is poured into it as long as that is desired. It is stationary. It does not move, nor do any of its parts move, the one upon the other. While water is in it the force of gravity acts upon the water ; but the strength and rigidity of its sides counteract that force and prevent the escape or movement of the water. When this water is allowed to escape from it through a hole or holes in its side into pipes, the same force of gravity acts upon the water and pushes or draws it down the pipes, but this force of gravity acting on the unimprisoned water is neither generated, modified, directed nor applied by the tank. The latter does not move anything automatically. If it be a machine and its parts be machinery, then it is difficult to see why every Reservoir which holds the water that is poured into it and lets that water escape from it through an opening on its side or bottom when that opening is not blocked up, is not equally a machine.

With a view of showing that the tank was a machine or machinery, it was urged on behalf of the appellants that the flow into the pipes of the water allowed to escape from it regulated the course of the water in the pipes and kept up a uniform pressure. But the nature and character of the functions which a Reservoir performs cannot depend upon the work done by the water drawn off from it, or the use to which that water is put. These functions remain the same, whether the escaped water be allowed to flow over land and irrigate it, or be used to water roads, or to drive a dynamo for the purpose of lighting a house or houses with electric light.

Section 6 of the aforesaid Act, no doubt, provides that holding means land held under one title, or agreement and surrounded by one set of boundaries, and further provides that where two or more adjoining holdings form part or parcel of the site or premises of a dwelling-house, manufactory, warehouse or place of trade or business, such holdings shall be deemed to be one holding for the purposes of the Act, other than those mentioned in clause (*a*) of its 85th section (*i. e.* the taxing of persons) and further provides that holdings separated by a road or other means of communication are to be deemed to be adjoining within the meaning of that section

Mr. Macnorran, as their Lordships understood him, having regard apparently to these provisions, contended on behalf of the appellants that in order to determine what was the true meaning of the word "machinery," as used in section 101 of this Act, the works and erections on the two lots numbered 1 and 2 respectively, should be taken as a whole, and viewed as so many interdependent parts of one machanical unit, but if that contention were sound, the underground reservoir, the roof and walls of the engine-house, if not indeed the old stone building used as an office, would all be covered by the word "machinery," quite as completely as would the tank and its supporting structure. The word "machinery" is often used in an entirely metaphorical sense, as in the phrase "the machinery of Government," but, in their Lordships' opinion, neither this engine-house nor this office could, according to the ordinary use of language, possibly be held to be "machinery" within the meaning of this Statute, while, on the other hand, if the tank and its supports be "machinery," it is difficult to see why the underground reservoir is not also "machinery." There is no essential difference between the two, except their situation, the one is buried underground, the other is raised high into the air. Skill, care and money are expended equally on the construction of both. Water is pumped or let flow into the underground reservoir (it does not appear which) from some external source, is stored there and pumped out of it into the mains. Into the tank water is pumped, stored there and allowed when occasion requires to flow out of it through an aperture in its side or bottom into the same mains. Their respective functions so closely resemble each other as to be in essence identical, yet it was not contended, nor even suggested, that the underground reservoir was "machinery."

The functions discharged by the tank closely resemble those discharged by the cisterns built on the roofs of those country houses which are situated far away from any system of water-works. The rain water which falls upon the roof of the house is conducted by rain shoots or pipes into the cisterns, is stored there till needed, and is through an aperture or apertures in its sides or bottom drawn by the force of gravity through pipes into the interior of the dwelling-house to satisfy domestic needs of different kinds. If the cistern rested on a tower built purposely to support it, the case would not be altered. Yet, in their Lordships' view, no intelligent person would, in the ordinary use of language, describe this cistern, whether supported on the roof of the dwelling house or on such a tower, together with the rain shoots and rain pipes, as "machinery," and still less would they describe the roof of the house, acting in this case the part of a catchment basin, as "machinery," nor even the water pipes in the interior of the house, nor all the four together. The money of the householder, the skill of the plumber, the carpenter, the mason, and possibly the slater, all have to be expended to fix *in situ* this system of water supply, just as the similar expense must have been incurred and skill exercised to erect the tank and its supports, but that consideration does not by itself make the one structure or the other "machinery." Nor in the case of the cistern would the fact that the water was drawn into it by the action of a hydraulic ram erected 100 yards from the dwelling-house on the bank of a swiftly flowing river alter the case.

Illustrations such as these may possibly be better guides to the true meaning of the word "machinery," when used in ordinary speech, than scientific definitions. For there is nothing in the language of this Statute of 1884 or in the objects it was designed to effect, to suggest that its words are used in any special sense, differing from their ordinary sense. A completed machine or a number of completed machines may, of course, according to the ordinary use of language, be properly described as "machinery," so may those parts or members of a machine which when assembled, as it is styled, form a complete machine: so also may some of such of those parts, which when assembled with the other necessary parts, would form a complete machine be styled "machinery"; but none of these conditions exists in the present case.

Much reliance was placed by the appellants' Counsel in argument on a passage on the judgment of Lord Davey in the case of

Chamberlayne v. *Collins* (1) but nowhere else. The question he was dealing with was whether within the meaning of a covenant in the lease with which he was dealing a switchback Railway with its equipment was "operative machinery."

The first part of the passage runs thus:—

"There is always great danger in giving definitions, but I think I may say that 'machinery' implies the application of mechanical means to the attainment of some particular end by the help of natural forces, and the addition of the word 'operative' means 'with the potentiality of operating or doing work.' It is clear to my mind that a switchback Railway comes within that definition."

He then gives his reason for so thinking in the following words:—

"Because it is a thing skilfully built with curves of a particular shape which by their peculiar form supply the motive power which actuates the carriages which run up and down the Railway."

With all respect for Lord Davey, the words "supply motor power" do not appear to their Lordships to be very happily chosen. When a solid body is placed upon an inclined plane, two natural forces operate upon it—the force of friction and the force of gravity. If it moves down along this plane it is the resultant of those two forces which pull or push it down. The force which the inclined plane contributes is the force of friction. The force of gravity acts with equal strength, whether the slope of the plane be gentle or steep. The force of friction is in this instance a retarding, not an accelerating, force. If the incline of the plane be very gentle and its surface rough, the force of friction will so effectually counteract the operation of the force of gravity that the solid body will remain at rest. If, on the other hand, the incline of the plane be steep and its surface smooth, the force of gravity will so overcome the force of friction that the resultant of the two will pull or push the body down the incline. Of course, if the solid body be mounted on wheels running on rails the force of friction will be greatly diminished.

The curves of the switchback Railway may by their shape favour the operation of the force of gravity, but they cannot increase or diminish that force. It is always constant. The only force the curves contribute to the action of the car is the retarding force of friction, which tends to prevent their movement. It is an error to say that the shape of the curves "supplies motive power." It may give and does give to the ever present force of gravity the opportunity of exerting itself more effectually. That is all.

If a man standing on the roof of a house and holding in his hand a stone, drops that stone into the street below, he does not in any way generate or supply the force which brings the stone to the ground with a velocity which increases as the square of the height of the man's hand above the street, and as momentum is weight multiplied by velocity, the stone strikes the ground with great force. But that force is, in no proper sense of the term, generated or supplied by the man. While he held the stone in his hand he overcame the action of the force of gravity by the upward pressure of his hand. When he drops the stone he simply withdraws that upward pressure and allows the force of gravity to take full effect.

So, in the present case, it would, in the view of their Lordships, be an entire mistake to treat the force which hurries through mains the water that escapes from this tank, as a force generated or supplied or directed by the tank itself. The tank no more actuates the rush of the escaping or escaped water than does, in the above example, the hand of the man on the roof of the house actuate the fall of the stone he held in it. The respective effects of the forces of gravity and friction on solid bodies resting on a sloping hillside were much discussed in the case of the Rhondda Valley land slip, *Attorney-General* v. *Cory Brothers & Co.* (2). It may well be, however, that in the case of a switchback Railway there is great art and ingenuity in constructing its curves in such a way that the momentum gathered by a car in descending one curve is sufficient to carry it up the next in front, but not to carry it over the summit of the latter with a dangerous speed, but there is no art or ingenuity of that kind expended in so raising the height of the structure on which water takes stand so that the head pressure desired will be obtained,

(1) (1894) 70 L. T. 217 at p. 218; 9 R. 311.

(2) (1921) A. C. 521; 90 L. J. Ch. 221; 125 L. T. 98; 85 J. P. 129; 19 L. G. R. 145; 37 T. L. R. 343.

no more than there would be in selecting the site of a reservoir to be constructed on a hill-side.

The word "machinery" must mean something more than a collection of ordinary tools. It must mean something more than a solid structure built upon the ground, whose parts either do not move at all, or, if they do move, do not move the one with or upon the other in interdependent action with the object of producing a specific and definite result.

Their Lordships concur with Lord Davey in thinking that there is great danger in attempting to give a definition of the word "machinery" which will be applicable in all cases. It may be impossible to succeed in such an attempt. If their Lordships were obliged to run the hazard of the attempt they would be inclined to say that the word "machinery," when used in ordinary language *prima facie*, means some mechanical contrivances which, by themselves or in combination whith one or more other mechanical contrivances, by the combined movement and interdependent operation of their respective parts generate power, or evoke, modify, apply or direct natural forces with the object in each case of effecting so definite and specific a result. The tank and its supporting structure do not satisfy this defintion.

But their Lordships think that, however, skillfully definitions of "machinery" may be framed, the determination in any given case of what is or is not "machinery," must, to a large extent, depend upon the special facts of that case. In the present case their Lordships' view is that if this tank were fed by water, whether continuously, or as it is, intermittently, but from a natural source such as a mountain burn for example, no intelligent person would, in the ordinary use of language, describe it with its supporting structure as "machinery." The fact that the water it receives does not flow into it from some such a source, but is pumped into it, does not alter its character essentially, especially as the pumps which supply the water are situated at a distance of over 300 yards from it on a holding different from, though adjoining, that on which it stands, that these pumps were constructed and worked in all essentials as they are now worked long before its erection was thought of, and that it is only the unneeded surplus of the water raised by these pumps in their ordinary operation from the underground reservoir that is diverted into it. They are, therefore, of opinion that neither this tank nor its supporting structure, nor both combined, are machinery within the meaning of the 101st section of the above-mentioned Statute of 1884; that the respondent was justified in taking the value of these works into consideration as he has done in making the assessment of the appellants' No. 2 holding; that the decree appealed from was right and should be affirmed, and this appeal dismissed, and they will humbly advise His Majesty accordingly. Some reliance was placed by the appellants upon the case of *Auckland City Corporation v. Auckland Gas Co., Limited* (3). But that case is fundamentally distinguishable from the present one. What was then decided was that "the main pipes gasometers and governors" of a gas company were, when taken all together, "machinery." The appellants must pay the respondent's costs.

W. C. A.

Appeal dismissed.

Solicitors for the Appellants.—Messrs. *Orr, Digram and Co.*

Solicitors for the Respondent.—Messrs. *Pugh and Co.*

(3) 37 New Zealand Law Report 1028.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 355 OF 1916.

July 17, 1919.

Present :—Mr. Justice Stuart and Mr. Justice Ryves.

DALIP NARAIN SINGH AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

PARMAOTI BIBI AND OTHERS—DEFENDANTS—RESPONDENTS.

Execution sale—Ancestral property—Sale by Civil Court, whether void.

A sale of ancestral property by a Civil Court is not void in law. [p. 933, col. 1.]

FatmatulKubra v. *Achchi Begam*, 21 Ind. Cas. 831; 36 A. 33; 11 A. L. J. 1009, distinguished.

Behari Singh v. *Mukat Singh*, 26 A. 278; 3 A. L. J. 140; A. W. N. (1906) 3, followed.

DALIP NARAIN SINGH v. PARMAOTI BIBI.

First appeal from a decree of the Additional Subordinate Judge, Gorakhpur, dated the 26th of July 1916.

Dr. *Surendra Nath Sen* and Munshi *Janki Prasad*, for the Appellants.

Mr. *B. E. O'Conor*, The Hon'ble Dr. *Tej Bahadur Sapru*, Dr. *S. M. Sulaiman* and Maulvi *Mukhtar Ahmad*, for the Respondents.

JUDGMENT.—The plaintiffs in the suit, out of which this appeal arises, are two minors. They sued Parmaoti Bibi, decree-holder, the auction-purchaser and *pro forma*, their father, who was the judgment-debtor. It appears that the decree holder, Parmaoti Bibi, obtained a decree against their father on a promissory-note in the Court of Small Causes and that in execution of that decree the property in dispute was brought to sale and was purchased by the defendant No. 2. The father of the plaintiffs, that is, the judgment-debtor, made two unsuccessful attempts to have the sale set aside. This suit is now brought on behalf of the minors for possession of two-thirds of the property on the ground that only the father's interest could be sold in execution of the decree, which is against him alone, and that their share in the property could not be sold.

In the Court below, it was stated in the plaint that the father was extravagant, of weak intellect, and a simpleton, and that the debt had been incurred for immoral purposes. The actual wording of the plaint is as follows :—

"A simple money-decree was obtained against defendant No. 3 on the basis of a pro-note which was executed not for any family necessity, but for immoral pursuits."

Only one issue on this point was raised. It is the second issue, which runs :—"Whether the debt to realize which the suit was filed was tainted with immorality."

There were two other main grounds of attack against the sale. One was that the property being ancestral it could not legally be sold by the Civil Court and that, as it had been sold by the Civil Court, the sale must be treated as a nullity. And, secondly, that an arrangement had been come to shortly after the auction sale, before it had been confirmed, by which the auction-purchaser agreed to accept the amount bid at the sale *plus* 5 per cent. and to have the sale set aside.

These two last were apparently the main grounds on which it was sought in the Trial Court to have the sale set aside. On both these grounds the plaintiffs failed. The Court found that the sale had been confirmed, and that, though it was an irregularity for the Civil Court to have held it, as the property was ancestral, nevertheless that was a mere irregularity and did not render the sale void. On the other grounds it found that the immorality of the debt of the father had not been proved and also that the fraud alleged on behalf of the auction-purchaser had not been established. It, therefore, dismissed the suit.

On appeal before us six grounds are taken. They deal one and all with the validity of the sale. The learned Counsel who argued the appeal, however, raised another point. He argued that there was nothing to show that the suit in the Small Cause Court, which was decided *ex parte*, had been brought against the father in his capacity as head of the family or that the debt for which he was sued was one incurred for family purposes, and, that, therefore, even if it be held that it was unnecessary to implead the father expressly as the manager of a joint Hindu family, nevertheless, in the words of Mr. Justice Banerji in the Full Bench case of *Hori Lal* v. *Nimman Kunwar* (1) "it was essential that the manager was sued in respect of a family debt," and he asked us to remit an issue on the point for further inquiry. It seems to us, however, that the matter is concluded by the way in which the suit was fought in the lower Court. It was never alleged clearly that the debt incurred by the father was not one for family purposes. What was alleged was that it was an immoral debt, and, therefore, of course, could not be for family necessity.

The only issue raised on the point, as we have stated, was on the question of its immoral nature, and that has been found against the plaintiff, and it has not been attempted to show to us that that finding is wrong. Their Lordships of the Privy Council in a very recent case, *viz.*, *Sripat Singh Dugar* v. *Prodyot Kumar Tagore* (2) said :—

(1) 15 Ind. Cas. 126; 34 A. 549 at p. 561; 9 A. L. J. 819 (F. B.).

(2) 39 Ind. Cas. 252; 44 C. 524 at p. 532; 32 M. L. J. 133; 15 A. L. J. 147; (1917) M. W. N. 193; 21 C. W. N. 442; 25 C. L. J. 220; 21 M. L. T. 222; 19 Bom. L. R. 290; 44 I. A. 1 (P. C.).

HARDIAL-RAM CHAND v. POKHAR DAS.

"The property in question was joint property governed by the Mitakshara Law. By that law a judgment against the father of the family cannot be executed against the whole of the Mitakshara property, if the debt in respect of which the judgment has been obtained was a debt incurred for illegal or immoral purposes. In every other event it is open to the execution creditor to sell the whole of the estate in satisfaction of the judgment obtained against the father alone."

It seems to us, especially as the point was not raised in the grounds of appeal, that we need not discuss the matter further.

The next ground raised was that, in view of the finding that the property was ancestral, its sale by the Civil Court was void in law, and for this proposition reliance has been placed on *Fatmatul Kubra* v. *Achchi Begam* (3). But that was an execution appeal. The sale had not then been confirmed, and all that the Court did was to order a proper procedure to be followed, namely, that the property being ancestral should be handed over to the Collector for execution of the decree. The point really is concluded by *Behari Singh* v. *Mukat Singh* (4) which is almost on all fours with this case. The other grounds of appeal are not pressed. The result is that the appeal fails and is dismissed with costs.

Appeal dismissed.

N. H.

(3) 21 Ind Cas 831; 36 A. 38; 11 A. L. J. 1009.
(4) 28 A. 273; 3 A. L. J. 140; A. W. N. (1906) 3.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 285 OF 1916.

December 8, 1919.

Present:—Mr. Justice Shadi Lal and Mr. Justice Broadway.

THE SHOP HARDIAL-RAM CHAND, THROUGH RAM CHAND—PLAINTIFF—APPELLANT

versus

POKHAR DAS AND ANOTHER—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 85, applicability of—Open and current account.

One essential to render Art. 85 of Schedule I to the Limitation Act applicable is, that each party must be capable of making a demand against the other during the currency of the account, and where this is not so, the requirements of the Article are not fulfilled, even though the account is current and open. [p. 934, col. 1.]

First appeal from a decree of the District Judge, (old style), Lyallpur, dated the 24th February 1914.

Lala *Tirath Ram*, for the Appellant.

Mehta *Bahadur Chand*, for the Respondents.

JUDGMENT.—In the suit out of which this appeal has arisen the plaintiffs-appellants claimed the sum of Rs. 3,000 from the defendants-respondents on the basis of book-accounts. The Trial Court came to the conclusion that Art. 85 of the Indian Limitation Act was applicable and dismissed the suit, at the same time directing the parties to bear their own costs. The plaintiffs have preferred this appeal through Lala Tirath Ram, and defendants, through Mehta Bahadur Chand, have filed cross-objections claiming their costs.

The point for determination in this appeal is, whether Art. 85 of the Limitation Act is applicable?

That Aritcle applies when a suit is based on a *mutual, open* and *current* account where there have been reciprocal demands between the parties.

Counsel have drawn our attention to various decisions, *viz.*, *Ram Pershad* v. *Harbans Singh* (1), *Velu Pillai* v. *Ghose Mahomed* (2), *Shive Gowda* v. *Fernandez* (3), *Ebrahim Ahmed* v. *Abdul Huq* (4), *Ganesh* v. *Gyanu* (5), *Namberumal Chetty* v. *Kotayya* (6), *Chittar Mal* v. *Behari Lal* (7) and *Thuppati Veeri Chetti* v. *Moluguvam Renganayakulu Aiyar* (8). With these decisions we are in accord, but the question must be decided on the circumstances of each case. In the present case, no doubt, the account between the parties was a current account containing items between the parties from which the balance due to one

(1) 6 C. L. J. 158.
(2) 17 M. 293; 4 M. L. J. 140, 6 Ind. Dec. (N. S.) 203.
(3) 8 Ind. Cas. 141; 34 M. 513; 8 M. L. T. 412; (1911) 1 M. W. N. 1; 21 M. L. J. 391.
(4) 27 Ind. Cas. 879; 8 Bur. L. T. 116; 8 L. B. R. 149.
(5) 22 B. 606; 11 Ind. Dec. (N. S.) 986.
(6) 21 Ind. Cas. 773.
(7) 4 Ind. Cas. 261; 32 A. 11; 6 A. L. J. 921.
(8) 17 Ind. Cas. 48; 23 M. L. J. 516.

of them could be ascertained. In so far as it was a running account which had neither been settled nor closed it was also an open account. To render the Article applicable, however, it is also necessary that each party must have a demand against the other. It is not necessary that any demand should actually have been made. Both parties must, however, have been capable of making a demand. In the present case, however, it has not been shown to us that the defendants-respondents could have made any such demand at any period during the currency of the account and the requirements of the Article have, therefore, not been fulfilled.

We accordingly accept this appeal and setting aside the order of dismissal, remand the suit to the Court of the Subordinate Judge for decision of the remaining issues. The cross-objections are dismissed. The stamp on appeal will be refunded and costs in this Court will follow the event.

W. C. A.

Appeal accepted.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 299 OF 1919.

February 6, 1922.

Present :—Mr. Justice Piggott and Mr. Justice Walsh.

BHATELAY CHUNNI LAL—PLAINTIFF—APPELLANT

versus

CHAKKERPAN—AUCTION PURCHASER AND PAHALWAN SINGH—DEFENDANTS—RESPONDENTS.

Execution sale—Ancestral property, sale of—Property described as non-ancestral by judgment-debtor—Suit to set aside sale—Substantial injury.

Where to the knowledge of the judgment-debtor property attached in execution of the decree is treated as non-ancestral and is described as non-ancestral in the written pleading presented by him before the Execution Court that Court is within its jurisdiction in putting up the property for sale. If it turns out that the description was mistaken, a suit to set aside the sale would fail unless it is established that the judgment-debtor has really suffered substantial injury.

Behari Singh v. *Mukat Singh*, 28 A. 273; A. W. N. (1906) 3; 3 A. L. J. 140 and *Dalip Narain Singh* v. *Parmaoti Bibi*, 67 Ind. Cas. 931; 42 A. 58; 17 A. L. J. 982, referred to.

First appeal against a decree of the Subordinate Judge, Mainpuri.

Dr. *S. N. Sen*, for the Appellant.

Mr. *Baleshwari Prasad*, for the Respondents.

JUDGMENT.—The object of the suit, out of which this appeal arises, was to set aside an auction-sale, held on the 20th of July 1915, of property belonging to the plaintiff. The defendants impleaded were the auction-purchaser and the decree-holders at whose instance the property was sold. The plaintiff came into Court with serious allegations of fraud against the defendants. We must not be understood to hold that, on the allegations made, the suit was not maintainable. As a matter of fact, however, there was no evidence worth discussing of any fraud on the part of the defendants. On the contrary, it was clear that the plaintiff had knowledge of the execution proceedings and an opportunity of being heard in the Execution Court. Practically all that was really contended in the Court below was that the property in suit, being in fact ancestral property, had been wrongly sold as non-ancestral. In the first place, the plaintiff failed to satisfy the Court below on the question of fact as to the nature, whether ancestral or non-ancestral, of the property. The oral evidence on which he relies we could not treat as sufficient in face of the contrary finding of the Court below. The point really argued before us has been that the Trial Court ought to have admitted additional documentary evidence on this point and the evidence is tendered before us for admission to-day. We think that no good case is made out for the admission of fresh evidence in face of the reasons given by the Trial Court in its judgment. In any case, however, the question sought to be raised could not influence the decision of the suit. It is quite clear that in the Execution Court the property in question was treated as non-ancestral to the knowledge of the present plaintiff, then judgment-debtor. It was in fact described by him as non-ancestral in a written pleading which he entered before the Execution Court. The Court was, therefore, within its jurisdiction in putting up for sale property which, on the admission of the parties concerned before it, was rightly described as non-ancestral. If that

JAGAT SINGH v. SUNDAR SINGH.

description was in fact a mistaken description, the plaintiff is to blame, and there is no proof on this record that he has really suffered substantial injury. On the principles laid down by this Court in the case of *Behari Singh* v. *Mukat Singh* (1) and recently re-affirmed in the case of *Dalip Narain Singh* v. *Parmaoti Bibi* (2) this suit could not succeed, even if by the admission of further evidence the plaintiff was to secure a finding that the property in suit was after all ancestral although the plaintiff had allowed it to be sold as non ancestral. This appeal fails and we dismiss it accordingly with costs.

N. H. & W. C. A.

Appeal dismissed.

(1) 28 A. 273; A. W. N. (1906) 8; 3 A. L. J. 140.
(2) 67 Ind. Cas. 931; 42 A. 58; 17 A. L. J. 982.

LAHORE HIGH COURT.

MISCELLANEOUS SECOND CIVIL APPEAL No. 1039 OF 1919.

October 8, 1919.

Present:—Mr. Justice Martineau.

JAGAT SINGH AND ANOTHER—DEFENDANTS—APPELLANTS

versus

SUNDAR SINGH—PLAINTIFF—RESPONDENT.

Guardians and Wards Act (VIII of 1890), s. 41 (2)—Guardian, discharge of—Essential of valid discharge.

In the absence of an express order discharging him, the guardian of a minor is not relieved of his liability to render accounts. An order that nothing is due from the guardian according to the account filed by him does not operate as a discharge.

Miscellaneous second appeal from an order of the Additional District Judge, Lahore, dated the 3rd January 1919, reversing that of the Senior Subordinate Judge, First Class, Lahore, dated the 15th August 1918.

Mr. *C. H. Oertel*, for the Appellants.

Mr. *Ganpat Rai*, for the Respondent.

JUDGMENT.—One Gurdit Singh was appointed by the Court to be the guardian of the plaintiff. He died in 1913. The plaintiff who came of age in January 1918, has brought the present suit against Gurdit Singh's son and his surety to recover Rs. 1,188-13-0 which he alleges to have been due to him from Gurdit Singh. The Subordinate Judge held that Gurdit Singh had been discharged under section 41 (4) of the Guardians and Wards Act by an order passed by him on the 9th April 1918, and that the suit was, therefore, not maintainable. The District Judge on appeal has differed from the view taken by the Subordinate Judge and has remanded the case for disposal of the other issues.

The only question is, whether Gurdit Singh was discharged by the order of the 9th April 1918. As the learned District Judge points out, it is difficult to see how the order could be regarded as one discharging Gurdit Singh when the latter had died some years before it was passed. Further, it has been held in *Amar Nath* v. *Raghpat Rai* (1) that a guardian is not relieved of his liability to render accounts unless there is an express order discharging him. In the present case it does not appear that there was either an express or an implied order discharging Gurdit Singh. What the Subordinate Judge said in the order of the 9th April 1918 was that nothing was due from Gurdit Singh *according to the account filed by him*, but he did not say that he accepted the account as correct.

I agree, therefore, with the lower Appellate Court that Gurdit Singh was not discharged, and I dismiss the appeal with costs.

W. C. A.

Appeal dismissed.

(1) 41 Ind. Cas. 344; 25 P. R. 1918; 73 P. W. R. 1917; 108 P. L. R. 1917.

DAYARAM PREMJI v. BECHARDAS DOONGERSEY.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL No. 138 OF 1921.

February 27, 1922.

Present:—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Coyajee.

DAYARAM PREMJI—DEFENDANT No. 1—APPELLANT

versus

BECHARDAS DOONGERSEY—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 6 (a)—Release of reversionary rights in favour of widow in possession—Family arrangement—Estoppel—Costs—Appeal.

A relinquishment deed, which purports to be a transfer of reversionary rights, in favour of a widow in possession of her deceased husband's estate by the brother of her husband, is against the provisions of section 6 (*a*), of the Transfer of Property Act, and, therefore, cannot vest an absolute estate in the widow. Such a relinquishment deed is not a family arrangement, and nor would it operate as an estoppel, inasmuch as if she alienated the property in her lifetime, she, being in possession as a widow, could dispose of it in any event, while an estoppel could only take effect if she purported to deal with the property relying upon the deed of relinquishment.

The question of costs cannot form the subject-matter of an appeal by itself unless some important principle is involved, but where an appeal is heard on its merits, it is open to the Court of Appeal to consider the question of costs.

Appeal from the decision of Mr. Justice Kajiji.

Messrs. *Desai* and *Kania*, for the Appellant.

Mr. *Jinnah*, for the Respondent.

JUDGMENT.—The plaintiff, who died pending the hearing of the suit, claimed to set aside a document executed by him on the 6th November 1917, by which he purported to release all his rights as a reversioner in the estate of his deceased brother Virji, in favour of his widow Sunderabai. Really, the document of the 6th November 1917 transgressed against the provisions of section 6 (*a*) of the Transfer of Property Act, and, therefore, could not take effect as vesting in the widow the absolute estate in the property left by her husband. She might have disposed of the immoveable property in her lifetime, but she had not done so, and, therefore, on her death, the property would go to her nearest reversioner. However, Sunderabai made a Will apparently thinking that she was absolutely entitled to her husband's estate, and her executor, the first defendant, resists the plaintiff's claim.

It was first suggested that the transaction evidenced by the relinquishment deed of 6th November 1917 was a family arrangement, and, therefore, should be given effect to. But on reading that document it will be clearly seen that it purports to be a transfer of Mulji's right as a reversionary heir in the estate of his deceased brother.

Then the first defendant objected to the plaintiff's suit on the ground of estoppel. It is difficult to see how there could be any estoppel, as that estoppel could only take effect, if Sunderabai in her lifetime, relying upon the relinquishment deed, purported to deal with the property, which she could have done in any event and, therefore, the relinquishment deed could have had no effect with regard to any alienations she might have made in her lifetime. But as she possessed the property in fact, there is nothing on which the estoppel could act, and on her death it went in the ordinary course of law to the reversioner. The appeal, therefore, must be dismissed with costs.

But the appellants object to the order made in the lower Court directing the first defendant, as executor of Sunderabai, to pay the plaintiff's costs of the suit. That could not form the subject-matter of an appeal by itself, unless it could be said that some important principle was involved. But now as we are hearing the appeal on its merits it is open to us to consider whether it is right in a suit of this character that the plaintiff should get his costs from the first defendant. He claimed far more than what he was entitled to, and also made allegations in the plaint that by some means or other he was wrongfully induced to relinquish his reversionary rights, and considering that he was responsible for all the troubles which have arisen, we certainly think it is not just to make the first defendant pay the plaintiff's costs of the suit. The order of the lower Court will be varied by directing that as between the plaintiff and the first defendant each party is to pay his own costs. The appellants will pay the costs of the appeal.

S. D. *Appeal dismissed.*

LACHHMAN SINGH v. PARTAP SINGH.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No 3356 OF 1916.

March 13, 1921.

Present :—Mr. Justice Leslie-Jones and Mr. Justice Broadway.

LACHHMAN SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

PARTAP SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Succession—Hindu Sikh Jat, marriage of, with Muslim convert to Sikhism—Collaterals, acquiescence of—Son born of marriage—Legitimacy.

K. S, a Sikh landed proprietor, with the full consent of all his collaterals contracted a *chadar andazi* according to Hindu doctrines with a woman of the Arain caste, who had previously been converted to Sikhism : a son, *P. S.*, was born of this marriage and was acknowledged by the near collaterals of *K. S.* as the latter's legitimate son: after the death of *K. S.* his near collaterals brought the present suit for possession of his estate on the ground that *P. S.* was not his legitimate son :

Held, that the suit must fail, as the plaintiffs were not competent to deny the legitimacy of *K.S.*

First appeal from a decree of the Senior Subordinate Judge, Montgomery, dated the 31st October 1916.

Messrs. *Aziz Ahmad* and *Muhammad Rafi*, for the Appellants.

Bakhshi *Tek Chand* and Lala *Amar Nath Chopra*, for the Respondents.

JUDGMENT.—One Kahan Singht, who was owner of land both in the Lahore and Montgomery Districts, had married two wives but had no issue. He was persuaded that if he married a Muhammadan woman she could bear him a son and he, therefore, took unto himself an Arain woman named *Musammat* Jawai who bore him a son named, Partap Singh in 1892. In 1903 Kahan Singh gifted his propertey in the Montgomery District to Partap Singh who obtained mutation in September 1904, and after the death of Kahan Singh in January 1905 Partap Singh obtained mutation of the Lahore land also as his father's heir.

The present suit is by a number of near collaterals, all of whom are descendants of the father of Kahan Singh, and they claim the land gifted to and inherited by Partap Singh on the grounds that Kahan Singh was not competent to alienate his land by gift in the presence of his collaterals and that Partap Singh is not his lawful heir.

It was pleaded *inter alia* that *Musammat* Jawai having been previously converted to Sikhism was married to Kahan Singh by Sikh rites ; and if these facts are established, there can be no doubt that Partap Singh is the legitimate son of Kahan Singh, *vide Dalip Kaur* v. *Fatti* (1). Although, however, issues were framed on the two questions of conversion and marriage, the Subordinate Judge did not decide them but dismissed the suit on the ground that, although the parties were governed by custom the plaintiffs were precluded from maintaining their action by reason of the consent of their ancestors which had not been shown to be collusive or wrongful.

Exhibit D I is an agreement, dated the 22nd April 1889 in which Kahan Singh recited the history of his married life and explained how all his near collaterals had agreed to his marriage with *Mussammat* Jawai and how with their permission he had performed with her the *chadar andazi* ceremony in accordance with Hindu doctrines. This agreement, as is not denied, was signed by his brother Daya Singh, by Jhanda Singh and Sadda Singh sons of Daya Singh who are now defendants Nos. 2 and 3, by Chattar Singh, his nephew, since deceased, and by Jaimal Singh and Buta Singh, sons of Chattar Singh who are now defendants Nos. 4 and 5. Subsequently on the 16th October 1893 a further agreement was executed by the said Jaimal Singh in which he recited the fact that with the consent of collaterals Kahan Singh had married *Musammat* Jawai by *chadar andazi* and that the child born of their union was formally acknowledged as his lawful son. He went on to say that he would treat Partap Singh or any other male child lawfully born thereafter from the womb of *Musammat* Jawai as having been born of the Sikh woman and would not bring any claim in respect of the property left by the said Kahan Singh. This document (Exhibit D-IV) was registered. There is another similar document (Exhibit D III) dated the 17th August 1893 executed by Daya Singh and Buta Singh as well as by Jaimal Singh.

Subsequently, after the death of Kahan Singh, defendants Nos. 2 to 5 allowed Partap Singh

(1) 18 Ind. Cas. 930; 99 P. R. 1913; 41 P. W. R. 1913; 100 P. L. R. 1913.

to redeem from them land which had been mortgaged by Kahan Singh.

Nevertheless in 1914 defendants Nos. 2 to 5 instituted a suit for possession of the very land which is now in dispute. That suit was dismissed in default as the plaintiffs absented themselves for the obvious reason that in the face of their previous agreements they had no hopes of success.

The present plaintiffs are all sons and grandsons of defendants Nos. 2 to 5, and Counsel who has appeared for them before us has not even attempted to show that the acts of their ancestors were collusive or improper. Indeed there appears to be no doubt that they made a perfectly genuine agreement with Kahan Singh that he might marry *Musammat* Jawai and that they would recognise his offspring from her as legitimate.

Counsel for the appellants has argued that the question of legitimacy is one of law and that for that reason the plaintiffs appellants cannot be estopped from urging that Partap Singh is not legitimate. The answer is that defendants Nos. 2 to 5 and their fathers did much more than acknowledge that Partap Singh was legitimate and that by their agreement to recognise *Musammat* Jawai as a lawful wife, they altered the whole course of the lives of both Kahan Singh and *Musammat* Jawai. There is no reason to suppose that *Musammat* Jawai or her parents would have consented to her living with Kahan Singh except as a recognised wife and if she did not go to him as such Partap Singh would never have been born. Similarly if Kahan Singh had not been assured by his near relatives that they would recognise *Musammat* Jawai as his wife, it would have been open to him in order to get a son to marry some other woman to whom no objection could possibly be raised. The agreement (Exhibit D-I) which, as already stated, is signed by all near relatives, shows that he was a particular man who was not prepared to enter on a union which would be considered as irregular but that he had a strong desire to obtain a son, and the presumption is that he would have done all that lay in his power to satisfy his wish. By their action his relatives left him to live and die in the belief that his wish had been satisfied. Counsel for the appellants has referred us to *Tek Chand* v. *Gopal Devi* (2). As already pointed out, we are not dealing here with mere representations in law, and one of the Judges who was a party to that ruling was also a party to Civil Appeal No. 1894 of 1913 (unpublished) which is quoted at length and with approval in *Chuhar* v. *Jas Kaur* (3) a ruling which is very pertinent in the present case.

We have no hesitation in holding that the plaintiffs appellants are not competent to deny the legitimacy of Partap Singh, and we, therefore, dismiss their appeal with costs.

W. C. A.

Appeal dismissed.

(2) 13 Ind. Cas. 482; 46 P. R. 1912; 127 P. L. R. 1912; 180 P. W. R. 1912.

(3) 41 Ind. Cas. 927; 69 P. R. 1917; 103 P. W. R. 1917.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL NO. 88 OF 1921.

February 27, 1922.

Present:—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Coyajee.

HIRALAL D. NANAVATI—DEFENDANT—APPELLANT

versus

KASTURBHAI MANIBHAI NAGARSETH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 110—Appeal to Privy Council—Suit to eject tenant of house—Value of suit, method of computing.

The value of a suit, for the purposes of an appeal to His Majesty in Council to eject a tenant from premises occupied by him, is the monthly rent of the premises capitalised at 20 years' purchase.

Petition for a certificate to appeal to the King in Council.

Mr. *Jinnah*, for the Appellant.

Sir *Thomas Strangman*, Advocate-General, for the Respondents.

JUDGMENT.—We think that in this case a certificate to appeal to His Majesty's Privy Council must be granted. The plaintiffs seek to eject their tenant in order that they may occupy the premises themselves, while the tenant seeks the protection of the Bombay Rent Act. The

decree, therefore, allowing possession of the tenancy involves directly a claim or question to or respecting property over Rs. 10,000, as the monthly rent of the premises is Rs. 275 and capitalised at twenty years purchase the value of the property will be over Rs. 10,000.

Costs to be costs in the appeal.

W. C. A. *Rule made absolute.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1337 OF 1918.

December 20, 1921.

Present :—Mr. Justice Scott-Smith and Mr. Justice Harrison.

ABDUL SAMAD—DEFENDANT—APPELLANT

versus

THE MUNICIPAL COMMITTEE, DELHI—PLAINTIFF—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 100—Charge on immoveable property when created by document—Limitation Act (IX of 1908), Sch. I, Arts. 132, 116, applicability of—Construction of document—"Amla," meaning of.

For a document to create a charge on immoveable property under section 100, Transfer of Property Act, it must be a document that creates such charge immediately on its execution and not one that merely creates a charge that operates at some future time. [p. 940, col. 1.]

Madho Misser v *Sidh Binaik Upadhya*, 14 C. 687: 7 Ind Dec (N. S.) 456, relied upon.

Article 132, Schedule I to the Limitation Act, is wide enough to apply to all cases where there is an effective and binding charge upon immoveable property whether created under the Transfer of Property Act or otherwise. [p. 940, col. 1.]

Fazul Nishan v. *Muhammadji*, 33 P. R. 1897, relied upon.

Where the arrears of rent of a plot of land leased to the defendant were to be recovered from the "*amla*" standing on the plot:

Held, that the word "*amla*" was intended to mean the actual building or superstructure on the land and not merely the materials. [p. 940, col. 1.]

Fazul Nishan v. *Muhammadji*, 33 P. R. 1897, followed.

Obiter.—A suit to recover rent reserved by a registered instrument is governed by Article 116 of Schedule I of the Limitation Act.

Second appeal from a decree of the District Judge, Delhi, dated the 27th March 1918, affirming that of the Subordinate Judge, Second Class, Delhi, dated the 17th December 1917.

Pandit *Sheo Narain*, R. B., for the Appellant.

Mr. *Raj Narain* and Kanwar *Dalip Singh*, for the Respondents.

JUDGMENT.—In the suit out of which the present second appeal arises the Municipal Committee, Delhi, plaintiff, sued Abdul Samad, defendant-appellant, for recovery of Rs. 1,499-15 6 on account of rent recoverable from certain *amla* standing upon a specified plot of land, and in case the whole amount could not be recovered from the said *amla*, it was prayed that the balance might be recovered from the person and other property of the defendant. The lower Appellate Court has held that the plaintiff, under the terms of the *kabuliyat*, Exhibit P-2, had a charge upon the superstructure on the land and that, therefore, Article 132 of the Limitation Act applied as regards the claim against that property. It further held that as the *kabuliyat* was a registered document, Article 116 of the Limitation Act applied so far as the claim was against the person and other property of the defendant. It accordingly decreed the plaintiff's claim, and the defendant has filed a second appeal to this Court.

The brief facts are as follows:—The land was originally leased along with other land by the Municipal Committee to one Muhammad Ishaq. The latter transferred his rights in the plot in dispute to Nanak Chand and Jhabban Lal who themselves attorned to the Committee by the *kabuliyat* of the 11th January 1905. This *kabuliyat* provides for the payment of rent amounting to Rs. 20 8-0 per mensem, and the 5th clause contains the words *ba adm adaigi amla maujuda upar arazi zer-kiraya se Committee ko wasul karneka kull ikhtiar hoga.* Pandit Sheo Narain who appeared on behalf of the appellant argued that the word *amla* meant the materials of the building on the land leased and not the actual building or superstructure itself. We have consulted three dictionaries in order to find out what the meaning of this word "*amla*" is. In Fallon's Hindustani Dictionary it is said to mean materials; in Platts' Hindustani Dictionary and Steingass' Persian-English Dictionary the meaning is given as premises, building or materials of

a dilapidated house. The 4th clause of the *kabuliyat* gives the lessees authority to mortgage or sell the *amla* standing on the land subject to the other conditions of the deed. We think it is clear from this and from the other clauses of the deed that the word "*amla*" was intended to mean the actual building or superstructure on the land and not merely the materials.

The next argument of Pandit Sheo Narain was that no charge upon the building can be said to have been created within the meaning of section 100 of the Transfer of Property Act. In *Modho Misser* v. *Sidh Binoik Upadhya* (1) it was held that for a document to create a charge on immoveable property under section 100 of the Transfer of Property Act, it must be a document that creates such charge immediately on its execution, and not one that merely creates a charge that operates at some future time. Again, in Gour's Transfer of Property Act, 4th Edition, at pages 1255-56 it is said: 'Where a charge is created by a document it must be a document that creates such charge immediately on its execution and which, therefore, does not operate only as a charge at some future time, such as in the event of non-payment of money secured by it,—the latter being the possibility of a 'charge' ultimately arising on the land, not 'a charge' within the meaning of the section." It was not seriously contended by Mr. Raj Narain on behalf of the respondent that a charge was immediately created by the *kabuliyat*, and in our opinion it is clear that no charge was so created within the meaning of section 100 of the Transfer of Property Act. Article 132 of the Limitation Act is wide enough, however, to apply to all cases where there is an effective and binding charge upon immoveable property whether created under the Transfer of Property Act or otherwise. What was done in this case was, to make the building for the time being liable for any unpaid rent; in other words, the building was hypothecated for the due payment of the rent. In *Fazul Nishan* v. *Muhammadji* (2), quoted in its judgment by the lower Appellate Court, it was held that where property was hypothecated by a guardian appointed under the Guardians and Wards Act, for the due performance of his duty, Article 132 of the Limitation Act was applicable. We, therefore, agree with the lower Appellate Court that the building standing on the land was hypothecated for the due payment of the rent.

Another argument put forward by Pandit Sheo Narain was that even if it be considered that the building was charged with the payment of the rent, still the right of residence was not so charged and the building could not be sold as a whole, and that if it were sold for payment of the rent, the purchaser would have to remove the materials. He argues, therefore, that what was really charged was the materials, in other words, moveable property. We cannot accept this argument. It may be that the purchaser would have to remove the materials, but the building itself was charged and we are, therefore, clear that under the *kabuliyat* the Municipal Committee had a charge on the immoveable property and that Article 132 of the Limitation Act is applicable.

Another point was whether the *kabuliyat* being a registered one, a suit to recover rent would be governed by Article 115 or 116 of the Limitation Act. Pandit Sheo Narain points out that the Allahabad High Court has held that suits for rent are governed by Article 110 of the Limitation Act even if the deed of rent is a registered one. He admits, however, that the other High Courts have held that in such a case Article 116 is applicable. In our opinion Article 116 is applicable as held by the lower Appellate Court, but the matter is not really of much importance as the parties admit that the whole amount of the rent decreed has already been paid into Court and the necessity to realize any part of it from the person or other property of the defendant will not arise.

As we have held that the 12 year rule applies, it is not necessary for us to discuss the question of appropriation of payments. The plaintiff has deducted from its claim the sum of Rs. 837 which was due from it to the defendant and has only claimed the balance.

The appeal fails and is dismissed with costs.

N. K.

Appeal dismissed.

(1) 14 C. 687; 7 Ind. Dec. (N. S.) 456.
(2) 33 P. R. 1897.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 230 OF 1921.
January 20, 1922.
Present:—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Coyajee.

POONA CHITRASHALA STEAM PRESS —PLAINTIFFS—APPELLANTS
versus
GAJANAN INDUSTRIAL AND TRADING Co.—DEFENDANT—RESPONDENT.

Promissory-note signed by member of Company—Company, liability of.

A promissory-note was written on paper on which was printed the name of a Company, and there was in addition on the paper a rubber stamp impression of the Company; the note was passed in lieu of the balance due on account of certain machinery purchased for the Company, and was signed "T. N. Joshi for Joshi Patwardhan & Co., Secretaries, Treasurers and Agents":

Held, that the promissory-note was drawn on behalf of the Company, and that the Company was liable for the amount thereof.

Second appeal from the decision of the First Class Subordinate Judge, A. P. at Satara, in Appeal No. 387 of 1919 confirming the decree passed by the Subordinate Judge at Wai, in Civil Suit No. 169 of 1917.

Mr. *Pendse*, (with him Mr. *H. G. Kulkarni*), for the Appellants.

Mr. *K. H. Kelkar*, for the Respondents.

JUDGMENT.—The plaintiffs sued to recover Rs. 2,575-1-0, the balance still due on a promissory-note passed by the defendant Company. Both the lower Courts have rejected the claim on the ground that the promissory-note signed by T. N. Joshi for Joshi, Patwardhan and Company, Secretaries, Treasurers and Agents, does not come within the provisions of section 72 of the Indian Companies Act, 1882, which was the Act prevailing when the note was passed. The Appellate Court has found that T. N. Joshi had implied authority to sign the promissory-note on behalf of the Company as against third parties, and there can be no doubt on the evidence that the Secretaries, Treasurers and Agents, would be the persons to sign documents of this character in accordance with the Articles of Association, and the terms of their employment; and whatever private arrangement there may have been between Joshi and the Company, with regard to the machinery in respect of which this promissory note was passed, that would not affect the rights of third parties. The only question is whether it can be said that this promissory-note has been drawn on behalf of the Company, and for that purpose we must look at the contents of the note, and we find there is at the top of the note the heading "The Gajanan Industrial and Trading Company, Limitted, Wai", and there is a rubber stamp, which was evidently used as the stamp of the Company in addition. There can be no doubt then that the Secretaries, Treasurers and Agents signed the promissory note on behalf of the Company, and there is no reason for dismissing the claim, because the stamp appears at the top of the paper, instead of beneath the signature. The Company undoubtedly purchased the machinery, used the machinery, and was liable to pay for the machinery. If a claim had been made for goods sold and delivered there could be no answer. It seems to us that the defence is a most dishonest one. At the most it was, as the learned Judge below pointed out, a technical defence, and consequently neither of the Courts gave the successful defendants their costs. We think there should be a decree for the amount of the promissory-note in addition to the amount of Rs. 83 6-0 with interest at the $3\frac{3}{4}$ per cent. from the date of the note until judgment, with costs throughout, and interest at six per cent. on the amount of the note till payment.

W. C. A.

Decree varied.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1500 OF 1917.
May 12, 1921.
Present :—Mr. Justice Abdul Raoof and Mr. Justice Harrison.

AMAR CHAND AND OTHERS—DEFENDANTS —APPELLANTS
versus
RAM RAKHA—PLAINTIFF—RESPONDENT.

Possession, suit for—Defendant alleging sale—Sale found to be invalid—Title and ownership, proof of.

AMAR CHAND v. RAM RAKHA.

Plaintiff sued to recover possession of land from defendants whom he described as trespassers; the defendants in reply asserted title under a deed of sale in their favour executed by the plaintiff's guardian during his minority; plaintiff impugned the sale, and it was found that it was not for his benefit and was, therefore, not binding on him:

Held, that the defendants having failed to prove title, plaintiff should succeed without being asked to prove his own title to ownership. [p. 943, col. 1.]

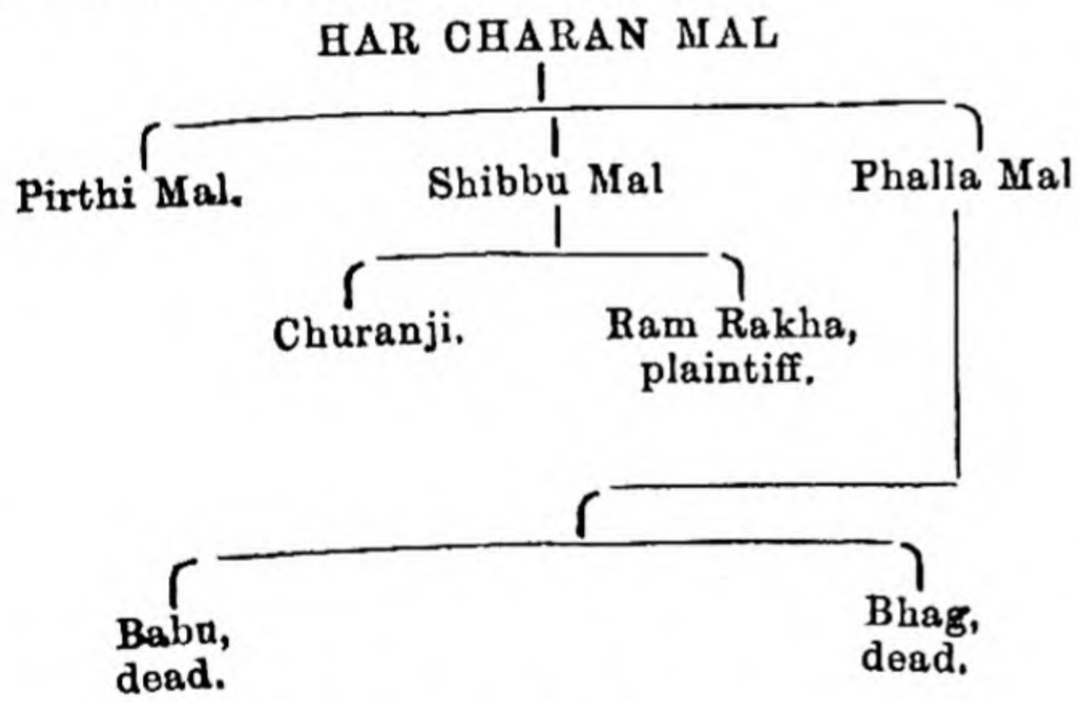
Ghulam Muhammad v. *Latif Ahmad Khan*, 14 Ind. Cas. 495; 17 P. R. 1912; 56 P. W. R. 1912; 88 P. L. R. 1912, *Abdul Hamid* v. *Sarbuland Khan*, 78 P. R. 1902; 137 P. L. R. 1902, referred to.

Second appeal from the decree of the District Judge, Hoshiarpur, dated the 11th January 1917, varying that of the Munsif, First Class, Garhshankar, District Hoshiarpur, dated the 24th March 1917.

Bakhshi *Tek Chand* and Lala *Mehr Chand, Mahajan*, for the Appellants.

Lala *Fakir Chand*, for the Respondent.

JUDGMENT.—The following pedigree table is of assistance in understanding the facts of this case:—



Pirthi Mal being childless is said to have adopted Ram Rakha, the younger minor son of his brother Shibbu Mal. He died in 1902 leaving the property in dispute, which he had purchased before the alleged adoption in October 1894. In 1905 Shibbu Mal, the real father of Ram Rakha, purporting to act as his guardian sold the property for Rs. 66 to Ganda Mal, father of the defendants. The deed recited the factum of adoption and the title of the vendor rested on this fact. When he attained majority, Ram Rakha brought a suit against the representatives of the vendee describing them as trespassers, who had been in possession for some five years, and against them he claimed possession. The form of the suit is, we think, of considerable importance. The plaint did not mention the deed of sale nor was the suit one to impugn it as not binding on the plaintiff. The defendants replied urging the sale and also attacking the adoption. The finding was that the sale was not for the benefit of the minor, but that there had been no valid adoption, and, therefore, the plaintiff was given a decree for one-fourth of the property only.

On appeal the District Judge held that, whether the adoption was good or bad, the defendants, who derived title from the plaintiff, could not impugn it after accepting that adoption at the time of purchasing the land, and the plaintiff was, therefore, given a decree for possession of the whole.

The vendees present this second appeal and urge that the case is governed by *Ghulam Muhammad* v. *Latif Ahmad Khan*(1), that there is no question of estoppel, legal or equitable, and that they are fully justified in questioning the vendor's title.

We have to see whether *Ghulam Muhammad* v. *Latif Ahmad Khan*(1) governs the case and, if not, whether the sale was, as a matter of fact, for the benefit of the minor. In that case it was held that a mortgagee in a suit by minor sons for possession of the mortgaged property on the ground that the mortgage was not for their benefit, can question the title of the mortgagor in so far as to assert that there were others entitled to a share. The cases are very similar. There is, however, an all important distinction which, in our opinion, wholly differentiates this case from the ruling quoted. There the plaintiffs sued for possession on the ground that the mortgage was not for their benefit, that is to say, they made the mortgage an essential portion of the foundation of their case and then proceeded to attack it and it was pointed out by the learned Judge that they could not both approbate and reprobate the mortgage, and could not show that it was wholly void and inoperative as against them, and, at the same time, rely on the contents of the document in order to put the defendants out of Court. This is not what has happened here. The plaintiff sued for possession against a trespasser. The defendants replied that they were not trespassers but had acquired a good title by sale. This sale, on which they relied, was then impugned by the

(1) 14 Ind. Cas. 495; 17 P. R. 1912; 56 P. W. R. 1912; 88 P. L. R. 1912.

plaintiff and shown not to be binding on him inasmuch as it was not for his benefit. The defendants, therefore, were shown to have no title and the plaintiff was entitled to succeed, as a matter of right, without having to prove his own title. He had been in possession up till the time of sale, i.e., 1905. The defendants had then occupied the land and he brought a suit against them within 12 years. Section 9 of the Specific Relief Act as explained in *Abdul Hamid* v. *Sarbuland Khan* (2) does not take away his remedy and was not intended to do so. It is urged by Counsel for the appellant that this is tantamount to allowing the plaintiff to present a new case on second appeal but the record of the original Court shows that this was the position taken up from the beginning. It is true that the contest subsequently centred round the question of adoption, but this cannot alter the fact that originally the plaintiff sued to eject the trespassers, and, as soon as it was shown that the trespassers' title was bad and they were nothing but trespassers, he was entitled to his relief and the question of the adoption should not have arisen. The distinction may be somewhat technical but nonetheless it is a very real distinction. We are, therefore, of opinion that the question of adoption did not arise and that the question of estoppel and the applicability of *Ghulam Muhammad* v. *Latif Ahmad Khan* (1) did not arise either. As soon as the plaintiff showed that the defendants' title was bad he was entitled to his decree on the mere ground of his previous ownership. To quote from *Abdul Hamid* v. *Sarbuland Khan* (2) page 316. "In such a suit, unless defendant proves title, plaintiff should succeed without being asked to prove his own title to ownership, and even if the defendant proves that he (plaintiff) has no such title, section 9 of the Specific Relief Act, does not expressly take away this remedy, and was not intended to do so."

It remains to be seen whether it has been shown that the sale was for the benefit of the minor. The details of the sale show a curious state of things in that the property was purchased by Pirthi Mal for Rs. 115 in 1894 and sold 11 years later for Rs. 66. No explanation has been given of this curious fall. Pirthi Mal left a large estate and no sort of explanation has been given as to why this land should have been sold, nor has it been explained how the sale can possibly have benefited the minor.

On the above findings we dismiss the appeal with costs.

W. C. A.

Appeal dismissed.

(2) 78 P. R. 1902; 137 P. L. R. 1902.

CALCUTTA HIGH COURT.
CIVIL RULE NO. 620 OF 1922.
February 1, 1922.
Present:—Mr. Justice Greaves.
RAM HARI KAPALI AND OTHERS—PLAINTIFFS—PETITIONERS
versus
ROHINI KANTA CHAKRAVARTY, AND OTHERS—DEFENDANTS—OPPOSITE PARTY.

Limitation Act (IX of 1908), Sch. I, Art. 62—Suit to recover money from son of late Pleader received for payment to plaintiff—Money received for plaintiff's use—Limitation.

A suit to recover from the son and legal representative of the plaintiff's late Pleader a sum of money alleged to have been received by the latter out of Court for payment to the plaintiff, falls under Article 62 of the Schedule to the Limitation Act. [p. 945, col. 1.]

Bindraban Behari v. *Jamuna Kunwar*, 25 A. 55; A. W. N. (1902) 191, *Rao Girraj Singh* v. *Rani Raghubir Kunwar*, 2 Ind. Cas. 118; 31 A. 429; 6 A. L. J. 667, *Kalee Kishen Paul* v. *Juggut Tara*, 11 W. R. 76; 2 B. L. R. 139; 1 Ind. Dec. (N. S.) 741, *Gurudas Pyne* v. *Ram Narain Sahu*, 10 C. 860; 11 I. A. 59; 8 Ind. Jur. 322; 4 Sar. P. C. J. 548; 5 Ind. Dec. (N. S.) 575 (P. C.), distinguished.

Rule against the order of the Munsif, First Court, Kishoreganj, exercising the powers of a Court of Small Causes.

FACTS appear from the judgment.

Babu *Hemendra Kumar Das*, for the Petitioners.—The plaintiffs are petitioners. The matter arises out of a suit to recover from the defendant as son and legal representative of the plaintiff's late Pleader a certain sum of money received by the plaintiff's Pleader out of Court for payment to the

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plaintiffs. The facts are shortly these: Lakshmi Babu, the father of the defendants, died on the 18th October 1915 during the Puja holidays. When the Court re-opened in November 1915 the petitioners made enquiries about their various decrees and came to know that the money received by the said Lakshmi Babu on their behalf had not been paid to them. The present suit was instituted on the 19th November 1920. The Pleader was a trustee for his clients. Therefore, under section 10 of the Limitation Act there is no period of limitation for the present suit. Even if it is not so the period of limitation would be that prescribed by Article 120 of the Indian Limitation Act. Article 62 can have no application to a suit of the present nature. Refers to *Bindraban Behari* v. *Jagmuna Kunwar* (1). This case is on all fours with the present case. Refers to *Rao Girraj Singh* v. *Rani Raghubir Kunwar* (2), *Kalee Kishen Paul* v. *Juggut Tara* (3), *Gurudas Pyne* v. *Ram Narain Sahu* (4). The last case clearly supports my contention. Article 89 of the Indian Limitation Act also does not apply to the present case. It has been repeatedly held in this Court that Article 89 has no application to a suit against a legal representative. Refers to *Jhapahanessa Bibee* v. *Bama Sundari Chaudhrani* (5), *Kumeda Charan Bala* v. *Asutosh Chattopadhya* (6). The Court below relied upon the ruling reported as *Lawless* v. *Calcutta Landing & Shipping Co., Ltd.* (7). But that was the decision of a Single Judge and as pointed out by Coxe. J., in *Jhapajhanessa Bibee* v. *Bama Sundari Chaudhrani* (5), it has been dissented from in subsequent cases.

Babu *Annada Charan Karkoon*, for the Opposite Party.—Section 10 of the Indian Limitation Act does not apply. A Pleader is not a trustee for his client. The property does not vest in him for any specific purpose and the present suit is not a suit for following the trust property. In England it has been held that a Solicitor is not, as a rule, express trustee for his client. Refers to *Watson* v. *Woodman* (8), Lightwood's Time-Limit on Actions (1909 Edition) 278. Article 120 is a residuary Article. It can apply if no other article applies. The language of Article 62 is clear and applies to the facts of the present case. The money was received by Lakshmi Babu for the plaintiff's use. The decision in *Bindraban Behari* v. *Jamuna Kunwar* (1), ignores the definition of 'defendant' as given in the Limitation Act. Refers to Mitra's Law of Limitation (Tagore Law Lectures) Volume II, 248, Rustomji's Law of Limitation (2nd Edition) 316.

Babu *Hemendra Kumar Das*, replied in brief.

JUDGMENT.—This Rule was issued at the instance of the plaintiffs. The suit was brought by the plaintiffs to recover from the defendant as son and legal representative of the plaintiffs' late Pleader a certain sum of money received or alleged to have been received by the plaintiffs' Pleader out of Court for payment to the plaintiffs. The learned Small Cause Court Judge states that the Pleader, Lakshmi Kanta Chakravarty, in Kartic 1319 received Rs. 50 on account of a certain decree and that he also received in November 1911 and November 1912 certain other decretal amounts making a total of Rs. 171-8-6. Now, it appears that Lakshmi Babu died in Kartik 1322 without having made over to the plaintiffs these sums of money. The present suit was commenced on the 19th of November 1920. The suit, therefore, is a very belated one. The learned Small Cause Court Judge has stated, for the reasons appearing in his judgment, that it is barred by limitation. It is to attack this finding that the present application has been made under section 25 of the Provincial Small Cause Courts Act.

Now, apart from authority, I should have thought myself that the Article of the Limitation Act applicable was Article 62, this being money received by the Pleader for the plaintiffs' use. I think that that Article would be applicable by virtue of the definition of "defendant" in section 2

(1) 25 A. 55; A. W. N. (1902) 191.
(2) 2 Ind. Cas. 118; 31 A. 429; 6 A. L. J. 667.
(3) 11 W. R. 76; 2 B. L. R. 139; 1 Ind. Dec. (N. S.) 741.
(4) 10 C. 860; 11 I. A. 59; 8 Ind. Jur. 322; 4 Sar. P. C. J. 548; 5 Ind. Dec. (N. S.) 575 (P. C.).
(5) 16 Ind. Cas. 414; 16 C. W. N. 1042; 16 C. L. J. 288.
(6) 16 Ind. Cas. 742; 16 C. L. J. 282; 17 C. W. N. 5.
(7) 7 C. 627; 3 Ind. Dec. (N. S.) 953.
(8) (1875) 20 Eq. 721; 45 L. J. Ch. 57; 24 W. R. 47.

clause 4 of the Limitation Act. But it is said that the Article applicable is 120 and that Article 62 has no application to the facts and circumstances of this case, and I have been referred to the case of *Bindraban Behari* v. *Jamuna Kunwar* (1), in support of that contention. Now, there is no doubt that this case does not support the contention urged before me. But as the learned Small Cause Court Judge points out, the learned Judges there seem to have taken no account of the definition of defendant appearing in section 2, clause (4) of the Limitation Act. I was also referred to the case of *Rao Girraj Singh* v. *Rani Raghubir Kunwar* (2) and to the passage in the judgment at page 437*. But that was a case differing in principle from the one before me and involving the taking of accounts. Then I was further referred to the case of *Kalee Kishen Paul* v. *Juggut Tara* (3). But that, as appears from the judgment of the Chief Justice, was a case of money advanced for the general purposes of a business where an account had been rendered and not the case, as here, of payment of specific sums for a specific purpose. Then, lastly, I was referred to the Privy Council case of *Gurudas Pyne* v. *Ram Narain Sahu* (4). But there, again, it seems to me that the facts are somewhat different. If one looks at the facts as stated at page 863† of the judgment, and as pointed out in the judgment, the suit was to enforce an equitable claim for following the proceeds of timber sold in the lands of the defendant These facts are not such as would bring the decision within the facts of the present case. I do not think that the matter is entirely free from doubt. But, as already stated, I think the limitation applicable is that provided by Article 62. This being so, I do not think that I ought to interfere with the decision of the Small Causes Court Judge in the exercise of my discretion under section 25 of the Provincial Small Cause Courts Act, specially having regard to the fact of the belated nature of the suit.

The application accordingly fails and the Rule must be discharged. I make no order as to costs.

W. C. A. & N. K.

Rule discharged.

*Page of 81 A.—[Ed.]
†Page of 10 C.—[Ed.]

LAHORE HIGH COURT.

CIVIL REVISION No. 892 OF 1919.
February 24, 1921.

Present:—Mr. Justice Abdul Raoof.

RALLA RAM—PLAINTIFF—PETITIONER

versus

Musammat RAJ AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 115, O. IX, r. 2—Revision—Remedy, other, open—High Court, interference by—Process-fee paid late—Dismissal of suit—Illegality.

A High Court generally does not entertain an application for revision when there is another remedy open to a petitioner, but there is nothing in the law which prohibits a High Court from interfering where grave injustice may have been done. [p. 946, col. 2]

Sheo Prasad Singh v. *Kastura Kuar*, 10 A. 119; A. W. N. (1888) 26; 6 Ind. Dec. (N. S.) 80, *Abdul Ghunni* v. *Kundan Lal*, 71 P. R. 1884, *Harjas Rai* v. *Nirmal Singh*, 36 P. R. 1887, referred to.

The date of hearing of a suit was 21st October. Plaintiff deposited the process-fee on 11th October at Gujrat The office did not issue a summons to the defendant at Gujranwala on the ground of the process-fee being paid very late and on the date of the hearing the Court dismissed the suit under O. IX, r. 2 of the Civil Procedure Code:

Held, (1) that O. IX, r. 2, Civil Procedure Code, had no application to the suit inasmuch as process-fees had been deposited by the plaintiff;

(2) that the office acted wrongly in not issuing a summons to the defendant on 11th October;

(3) that the order dismissing the suit must be set aside in revision.

Petition, under section 44 of Act VI of 1918, for revision of the order of the Munsif, First Class, Gujrat, dated the 21st October 1919.

Mr. *Nanak Chand*, for the Petitioner.

Mr. *Mukand Lal Puri*, for the Respondents.

JUDGMENT.—The facts out of which this petition for revision has arisen may be shorty stated as follows:—

On the 19th July 1919, the petitioner, Ralla Ram, filed his suit against *Musammat* Gur Devi. She having died the names of *Musammat* Bhag, *Musammat* Raj and *Musammat* Rukmini were substituted as her legal representatives. The notice issued to *Musammat* Bhag was returned unserved. On the 27th August 1919, the Court ordered fresh process-fee to be paid and fresh particulars of address to be given. The petitioner put in fresh *talbana* on 11th October

1919 but gave the same address of *Musammat* Bhag which he had given before. On the 21st October 1919 when the case came on for hearing, the Court made the following order:—"The plaintiff with Lala Mul Raj Uppal, Pleader, is present. The plaintiff deposited the process-fee on the 11th October 1919. As the payment of process-fee was very late, so the summonses were not issued. This suit is pending in this Court from a very long time and has not been decided owing to such acts of negligence. Now negligence of such sort cannot be allowed. Therefore, the claim of the plaintiff is dismissed under O. IX, rule 2 of the Civil Procedure Code."

O. IX, r. 2 provides that where, on the day so fixed, it is found that the summons has not been served upon the defendant in consequence of the failure of the plaintiff to pay the Court-fee or postal charges (if any) chargeable for such service, the Court may make an order that the suit be dismissed. In this case what happened was, that the plaintiff did deposit the *talbana*, but the office did not issue the summons. Therefore, the case did not come within the law laid down in r. 2. The order, on the face of it, is bad and does not come under the specific rule referred to in the judgment of the Court.

Irrespective of this fact, the judgment further is not justified by the circumstances of this case. The process fee was put in on the 11th October 1919 and the date fixed for the next hearing was the 21st October 1919. *Musammat* Bhag was residing at Gujranwala; at any rate, that was the address given by the plaintiff. It was the duty of the Court to have issued the summons to *Musammat* Bhag. The office was not right in refusing to issue the summons. Gujranwala is not very far from Gujrat where the Court sat. There was sufficient time for the service of summons. Gujranwala is on the main line of the Railway. This order was passed in utter disregard of these facts and cannot be allowed to stand.

Mr. M. L. Puri took a preliminary objection to the hearing of this revision on the ground that there was another remedy provided by r. 4 to O. IX which the petitioner ought to have sought, and that because he did not seek that remedy this Court ought not to interfere. In support of this preliminary objection he has drawn my attention to the following cases:—*Sheo Prasad Singh* v. *Kastura Kuar* (1), *Harjas Rai* v. *Nirmal Singh* (2), *Abdul Ghunni* v. *Kundan Lal* (3) There is no doubt that a High Court generally does not entertain an application for revision when there is another remedy open to a petitioner. But there is nothing in the law or in these rulings which prohibits a High Court from interfering even in cases where grave injustice may have been done. The order impugned in this revision cannot be supported upon any ground. At first I was inclined to give effect to the preliminary objection taken by Mr. Mukand Lal, but when I examined the facts of the case more closely, I came to the conclusion that I would be perpetrating injustice in refusing to interfere with an order of this kind.

I accept this petition for revision and set aside the order of the Court below, and remand the case to that Court under O. XLI, r. 23 with the direction that it be restored to its original number in the register of pending suits and be disposed of according to law. Costs will abide the result.

Z. K.

Petition accepted.

(1) 10 A. 119; A. W. N. (1888) 26; 6 Ind. Dec. (N. S.) 80.
(2) 36 P. R. 1887.
(3) 71 P. R. 1884.

CALCUTTA HIGH COURT.
APPEALS FROM APPELLATE DECREES NOS. 2034 OF 1918, 112, 113, 114, 116, 117 AND 118 OF 1919.
July 5, 1920.

Present:—Sir Asutosh Mookerjee, Kt., Acting Chief Justice and Justice Sir Earnest Fletcher, Kt.

MOHESH DUTTA SUKLA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Sheikh HURMAT—DEFENDANT—RESPONDENT.

Bengal Tenancy Act (VIII of 1885), s. 40—Com-

MOHESH DUTTA SUKLA v. HURMAT.

mutation of rent—Rent payable in kind but fixed sum of money payable on default—Jurisdiction of Civil Courts—Revenue Officer acting without jurisdiction—Civil Court, whether can declare order void.

Where a contract of tenancy provides for the payment of rent in kind but there is a further provision that on failure of the tenant to pay the rent in kind, the same would be leviable at the rate of a fixed sum of money, the rent is only nominally and not in reality payable in kind. In such a case the rent cannot be commuted under section 40 of the Bengal Tenancy Act. [p. 947, col. 2.]

Where the order of a Revenue Officer is made without jurisdiction, a Civil Court is competent to declare it a nullity. [p. 947, col. 2.]

Jadu Nath Manna v. *Pran Krishna Das*, 46 Ind. Cas. 455; 27 C. L. J. 569; 45 C. 769, followed.

Appeals against the decree of the Subordinate Judge, Third Court, Mymensingh, dated the 5th August 1918, modifying the decrees Nos. 2034, 112, 114, 116, 117 and 118 and dismissing the decree No. 113 of the Munsif, Additional Court at Iswergunge, dated the 27th of September 1917.

Babus *Dwarka Nath Chakerbutty* and *Chander Kant Ghose*, for the Appellants.

Babu *Gobind Chandra Roy*, for the Respondent.

JUDGMENT.

MOOKERJEE, ACTG. C. J.—These are appeals by the plaintiffs in suits for recovery of the whole value of crops. The tenant-defendant entered upon the land on the basis of an agreement in the following terms :—"I (the defendant) do execute this *kabuliyat* for 3 years from 1310 to 1313 and promise to cultivate the land in proper time and grow *roa* paddy, and on its being ripe, shall thresh out the paddy and after taking my share for the labour shall deliver you your share—7 maunds—every year in Pous. If I neglect to deliver paddy then I shall pay you the price of paddy Rs. 14 at the rate of Rs. 2 per maund, and shall be liable for damages." It may be a matter for argument, whether this agreement was in reality a contract of tenancy or whether the defendant was only a labourer who undertook to bring the land under cultivation. But we shall assume, in favour of the defendant that he was a tenant. The question is, whether he is liable to pay rent to the landlord at the contract rate or at a rate fixed by the Revenue Authorities in commutation proceedings. The Subordinate Judge has held in favour of the defendant that he is bound to pay rent annually at the commuted rate and he has further expressed the opinion that it is not competent to the Civil Court to consider the legality of the order made by the Revenue Officer. We are of opinion that the view taken by the Subordinate Judge cannot be supported.

An order for commutation of rent can be made only under section 40 of the Bengal Tenancy Act, which provides as follows: "Where an occupancy *raiyat* pays for a holding rent in kind, or on the estimated value of a portion of the crop or at rates varying with the crop, or partly in one of those ways and partly in another, or partly in any of those ways and partly in cash, either the *raiyat* or his landlord may apply to have the rent commuted to a money rent." Consequently, the essence of this provision is that the rent should be in reality payable in kind either wholly or partially. It is further necessary that the tenant should have the status of an occupancy *raiyat*. In the present case, the tenant is not an occupancy *raiyat*. The lands he holds lie in the *khamar* of the landlord; and, consequently, under section 116 of the Bengal Tenancy Act, nothing in Chapter V could confer upon him a right of occupancy, as the land was held under a lease for a term of years. Besides this, the rent is not really payable in kind: although nominally the rent was payable in kind, the parties had contracted that upon failure of the tenant to pay the rent in kind, the rent would be leviable at the rate of Rs. 14 annually. Consequently, there was no room for commutation under section 40; indeed, the parties had already commuted the rent by their contract.

The order of the Settlement Officer must consequently be deemed to have been made without jurisdiction; and if his order was without jurisdiction, the Civil Court is competent to declare that it was a nullity, as was ruled in the case of *Jadu Nath Manna* v. *Pran Krishna Das* (1).

(1) 46 Ind. Cas. 455; 27 C. L. J. 569; 45 C. 769.

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The result is that the appeals are allowed and the decrees of the Subordinate Judge modified: Decrees will be made at the contract rate instead of the commuted rate in respect of the year 1322. The appellants are entitled to their costs in this Court.

The judgment will govern all the appeals. It was faintly suggested that there might be a doubt as to the competency of some of these appeals; but clearly the decree of the Subordinate Judge has decided a question of the rate of rent annually payable, namely, whether rent was payable at the commuted rate or at the contract rate. In each of the appeals, consequently, the same order will be drawn up.

FLETCHER, J.—I agree.

N. H.

Appeals allowed.

LAHORE HIGH COURT.

CIVIL REVISION NO. 421 OF 1919.

February 3, 1920

Present:—Mr. Justice Broadway.

SIDHU—DEFENDANT—PETITIONER

versus

DHANNA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Possession without title—Interest good against all world except true owner.

A person in possession, whether lawful or not, has an interest in the property which is good against all the world except the true owner. [p. 949, col. 1.]

Abdul Hamid v. *Sarbuland Khan*, 78 P. R. 1902; 137 P. L. R. 1902 and *Gobind Prasad* v. *Mohan Lal*, 24 A. 157; A. W. N. (1901) 204, followed.

Petition, under section 44 of Act IV of 1919, for revision of the decree of the Senior Sub-Judge, Kangra at Dharamsala, dated the 24th April 1919, reversing that of the Munsif, Second Class, Kangra at Dharamsala, dated the 28th October 1918.

Lala *Faqir Chand*, for the Petitioner.

Lala *Jagan Nath*, for the Respondents.

JUDGMENT.—The District Board of Kangra sold a *tun* tree to one Sidhu who proceeded to cut it down. Dhanna and others, plaintiffs, instituted a suit against the District Board of Kangra and the said Sidhu claiming Rs. 100 as the value of the tree, alleging that the tree belonged to them, the plaintiffs, and that the District Board had no right whatever to sell it. The Trial Court dismissed the suit, holding that the plaintiffs had failed to prove that the tree belonged to them. The plaintiffs thereupon appealed to the Senior Sub-Judge of Kangra who granted them a decree for Rs. 60 with proportionate costs, holding that sum to be the value of the tree. Against this decision the District Board of Kangra and Sidhu have preferred separate revisions, the former through Mr. Mehr Chand *Mahajan* and the latter through *Lala* Faqir Chand and I have heard *Lala* Jagan Nath on behalf of the plaintiffs-respondents. It appears that this tree was growing a few feet from the side of the road at the corner of two fields bearing *Khasra* Nos. 956 and 957. The lower Appellate Court finds that these two fields were included in a plot of land about 17 *marlas* in area which had originally been *Shamilat*. In the *Jamabandi Ishtamali* of 1887-88 this entire plot was numbered as 304 and recorded as "*maqbooza malikan*" and in the possession of the plaintiffs respondents who continued to be in exclusive possession up to 1891-92. In 1900 on the 12th August a mutation entry shows that 15 *marlas* out of this plot were entered in the names of plaintiffs-respondents and the remaining two *marlas* as being in possession of Hoshnaku and Meda Chamars. The entire plot, however, remained in possession of the plaintiffs-respondents. The lower Appellate Court appointed a Local Commissioner who reported that the tree was about 100 years old and that the plaintiffs-respondents had been in possession of this plot for a considerable period. The Local Commissioner recorded the statement of Hoshnakes who, while stating that in 1900 he and Meda had been given two *marlas* of this land, admitted that the plaintiffs-respondents continued in possession of the said two *marlas* and cultivated them themselves. Now, the plaintiffs are not *owners*

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of that piece of land on which this tree stands but, as stated above, are in possession of it.

Counsel for the two petitioners contended that inasmuch as the plaintiffs-respondents based their claim on their being owners of the land on which the tree stood and as the lower Appellate Court agreed with the Trial Court in holding that the tree was not growing in the land owned by the plaintiffs-respondents, the suit should have been dismissed *in toto*. On the other hand, *Lala* Jagan Nath on behalf of the plaintiffs-respondents claimed that inasmuch as his clients were in actual possession of the land on which the tree grew they were entitled to the produce of the land including the tree as against the whole world and that only the true owner of the land could interfere with their rights. He contended that the District Board and Sidhu must be regarded as trespassers and that they must be held liable to pay the value of the tree. Reliance is placed on *Abdul Hamid* v. *Sarbuland Khan* (1) and *Gobind Prasad* v. *Mohan Lal* (2) in which cases it was held that a person in possession of land without title has an interest in the property which is good against all the world except the true owner. *Lala* Mehr Chand Mahajan referred me to Sir James Lyall's Settlement Report, paragraph 27, and the Gazetteer of the Kangra District, page 20[illegible], and urged that according to what is written therein the tree really belonged to Government. I do not see that this can carry the case very far so far as the District Board is concerned, for it has not been shown that the Government has made over its rights in trees to the District Board. As a matter of fact, the passages referred to by *Lala* Mehr Chand do not, in my opinion, establish his allegation. The land here is admittedly common land and the trees referred to in the Settlement Report and the Gazetteer are trees growing in waste lands.

After a careful examination of the arguments advanced by the learned Counsel and the circumstances of the case, it seems to me that the principle enunciated in *Abdul Hamid* v. *Sarbuland Khan* (1), and *Gobind Prasad* v. *Mohan Lal* (2) is applicable to the present case. The plaintiffs-respondents were undoubtedly in possession of the land in which the tree was growing. Whether possession was lawful or not, they clearly had an interest in the land which interest must be regarded as good against all the world except the true owner. The District Board certainly was not the true owner and, therefore, it does not appear to have been entitled to sell the tree.

Accordingly, I maintain the lower Appellate Court's decree and dismiss both the petitions with costs. In the case of Sidhu's petition I would add that I am unable to agree with *Lala* Faqir Chand that Sidhu was not liable. He may have a claim against the District Board but that is a matter with which the plaintiffs-respondents are not concerned.

R. N.

Petition dismissed.

(1) 78 P. R. 1902; 137 P. L. R. 1902.
(2) 24 A. 157; A. W. N. (1901) 204.

CALCUTTA HIGH COURT.

MATRIMONIAL SUIT No. 8 OF 1918.

April 26, 1921.

Present:—Mr. Justice Greaves.

BIRENDRA KUMAR BISWAS—PETITIONER

versus

HEMLATA BISWAS—RESPONDENT.

Marriage, suit for annulment of—Indian Christians—Court, jurisdiction of—Fraud—Divorce Act (IV of 1869), s. 19—Impotency, meaning of—Consummation, practical impossibility of.

Under section 19 of the Divorce Act, fraud, apart from fraud in obtaining the consent of a party, is not a ground for annulment of marriage. [p. 952, col. 1.]

Where in a suit for the annulment of a marriage under the Divorce Act the only evidence of fraud on the part of the defendant (wife) is that her father knew that, previous to the marriage, she was suffering from syphilis and that he concealed this fact from the plaintiff (husband), this would not amount to 'fraud in obtaining the consent' within the meaning of the words at the end of section 19, and consequently is not a good ground for annulling the marriage. [p. 952, col. 1.]

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Though a party to a suit for the annulment of a marriage may be physically fit to consummate the marriage, yet where the consummation is a practical impossibility the Courts will interfere. [p. 952, col. 2]

Where a husband is unable to consummate his marriage without the very gravest risk to his health and to that of any offspring who might be born of the connection, and this state of things is likely to continue and be permanent, it amounts to impotency on the part of the wife, and the suit of the husband for the annulment of marriage should be decreed. [p. 952, col. 2.]

G. v. *G*, (1871) 2 P. & D. 287 at p. 291; 40 L. J. Mat. 88; 25 L. T. 510; 20 W. R. 103 and *Dickinson* v. *Dickinson*, (1913) P. D. 198 at p. 206; 82 L. J. P. C. 121; 109 L. T. 408; 58 S. J. 32; 29 T. L. R. 765, relied upon.

H. v. *P. falsely called H.*, (1873), 3 P. & D. 126, referred to.

The case was first decided by Mr. Justice Fletcher on 31st March 1919. Then an appeal was preferred to the High Court and the appeal was decided by Sir Ashutosh Mookerjee, Kt., Acting Chief Justice and Justice Sir Asutosh Chaudhri, Kt., on 31st May 1920, when they remanded the case for re-trial. *See* 60 Ind. Cas. 362.

Mr. *A. A. Avetoom* (with him Mr. *M. N. Kanjilal*), for the Petitioner.

Mr. *R. C. Bonnerjee*, for the Respondent.

JUDGMENT.—The petitioner, Birendra Kumar Biswas, asks that his marriage with the respondent, Hemlata Biswas, may be declared null and void on the ground that the respondent had been from before the marriage suffering from a loathsome disease of syphilitic origin alleged to be incurable and contagious, in consequence whereof she is said to be unable to consummate the marriage, and the petitioner alleges that the marriage was brought about fraudulently and that all information with regard to the disease was concealed from him.

The suit was heard by Mr. Justice Fletcher on the 31st March 1919 and he dismissed it with costs; against the decree of the dismissal the plaintiff preferred an appeal and on the 31st May 1920 the case was remanded by the Appeal Court to this Court for re-trial.

It was suggested by Counsel for the parties before me that the evidence taken before Mr. Justice Fletcher should be treated as evidence before me and that the parties would submit themselves for further cross-examination if either Counsel desired to cross-examine further and that either side should be at liberty to adduce any additional evidence if they so desired. I agreed to this course having regard to the extreme poverty of the parties and the great hardship to which they have been exposed by reason of the course which events have taken.

The defendant offered to submit herself to the examination of any Doctor named by the petitioner, the petitioner did not express himself as desirous of any such examination being held, but I thought that it was better that such examination should take place and the respondent was accordingly examined by Dr. Bisseswar Mitter on the morning of the 11th March last.

Two issues were raised before me:

(1) Is the petitioner entitled to have the marriage declared null and void on the ground that the respondent was suffering from syphilis prior to the marriage?

(2) Was the petitioner induced to marry the respondent by any fraudulent allegation or fraudulent concealment on the part of the respondent or on the part of any one on her behalf?

The parties are both Indian Christians and were married at the Baptist Church, Entally, on the 15th February 1918, the respondent then being of the age of 15 years or thereabouts.

The evidence before Mr. Justice Fletcher was to the following effect. Khamutulla Chaudhury, a medical practitioner of 20 years experience, stated that he saw the respondent on the 19th February 1918 and that she was suffering from tertiary syphilis and that if the petitioner had consummated the marriage he would have got the disease himself and that he was doubtful from her condition whether she could be cured. In cross-examination he stated that he only examined her nose and body and not to see if there was malformation or structural defect to prevent consummation. He stated to the Court that the disease might be cured but that it would take time. Dr. Bisseswar Mitter, a Fellow of the Royal College of Surgeons and an L. R. C. P. of London, stated that he examined the respondent on the 6th March 1918 and that she was suffering from a bad type of inherited syphilis, that the disease was in the tertiary stage and that the nasal discharge of which he spoke and from which she was suffering was infectious and that any man living with her could be infected, and that so long as she was suffering from the disease

it would not be safe for the husband to have intercourse with her. Asked if she could be cured, he stated that this was a very controversial question and that after several years and after examining the blood he could say if she was safe but that there were several risks including that of the children getting the disease.

In cross-examination he stated that the girl was capable of sexual intercourse.

The petitioner stated that he never lived with the respondent as his wife, that he discovered she was suffering from this trouble on the 17th February 1918 and that he had never consummated the marriage and did not know before the marriage that she was troubled with the disease and that he never saw her before the marriage. The respondent swore that the petitioner had sexual connection with her and that she slept with him for one week after the marriage.

Raj Krishna Mukerjee, an L. M. S. of Calcutta, stated that he examined the respondent on the 18th March 1918, that she was suffering from syphilis which he considered to be curable, that he examined her again on the 25th November 1918 and expected she would be thoroughly cured within three months and that she could consummate the marriage. In cross-examination he stated that he had been practising in Calcutta for three years, that on March 18th the respondent was suffering from tertiary syphilis and that it would not then have been safe to consummate the marriage.

At the re-trial before me the following further evidence was called on behalf of the petitioner. Hridoy Gopal Banerjee, a Minister of the Baptist Chapel, who married the parties, stated that on the 6th March 1918 the father of the petitioner made a communication to him and that as a result he went to the house and had a talk with the defendant who admitted that before the marriage she was suffering from something which caused a hole in her palate, that her father had her treated for this before the marriage without effect and that it went on increasing. He stated that the respondent said that something happened to her nose and then to her palate.

In cross examination he stated that the respondent did not say that she knew what the disease was. Dr. Bisseswar Mitter, who was examined in the first trial, stated that he examined the respondent on the morning of the 11th March 1921 and that there were signs of hereditary syphilis and he did not think it necessary to examine her private parts as in such cases private parts are never affected unless there was fresh infection during the last few weeks or months. In cross-examination he stated that sexual connection was not impossible, but that any children born of the union were likely to be infected, that if the petitioner had sexual intercourse with the respondent there was no chance of his being infected but that from kissing he might be infected and that the discharge from the nose and mouth was infectious.

I find the following facts on the evidence:—(1) The marriage was never consummated; (2) that the respondent was at the date of the marriage suffering from hereditary tertiary syphilis; (3) that this was not known to the petitioner until after the marriage; (4) that the respondent was treated for syphilis prior to her marriage at the instance of her father who, I must assume in absence of evidence from him on this point and in view of Mr. Hridoy Gopal Banerjee's evidence, knew of the nature of the disease; (5) that sexual intercourse between the petitioner and the respondent is not physically impossible and that her private parts are not diseased; (6) that the disease has not yeilded to treatment, and that even if curable (as to which no positive conclusion is now possible) it could not be taken as cured until after the lapse of several years; (7) that from sexual intercourse alone the petitioner is not likely to become infected with the disease but that there is risk of such infection if the petitioner and respondent live together on ordinary terms as husband and wife; (8) that there is very grave risk that any offspring of the union would be diseased.

I gather from the judgment of the Appeal Court that the case was remanded for re trial on two points, (1) for investigation of the allegation of fraud, and (2) for consideration whether the rule of impotency said to be deduced from the American Authorities to which unfortunately I have no means of access, namely, that the existence of incurable syphilis at the time of marriage in either party forming not an absolute bar to copulation but rendering the act impracticable as endangering both the health and life of

the party not previously infected is such an incapacity as entitles the party not infected to a decree for annulment, is applicable to the facts of this case.

So far as the first of these questions is concerned, I have already stated my finding on the point, that is to say, that I find upon the evidence that the father of the respondent knew prior to the marriage that his daughter, the respondent, was suffering from syphilis, and that this fact was not known to the petitioner but was concealed from him. Whether the father knew or had reason to believe that the disease was incurable I do not know but even assuming that he did know this I do not think that this would be a good ground for annulling the marriage. The jurisdiction of the Court to annul the marriage is contained in section 19 of the Indian Divorce Act (IV of 1869) and fraud, apart from fraud in obtaining the consent, is not a ground, and I do not conceive that fraud of the nature stated above amounts to fraud in obtaining the consent within the meaning of the words at the end of section 19.

The law in England is succinctly stated in Halsbury's Laws of England, Volume XVI, page 278 as follows: "Fraudulent misrepresentation or concealment does not, apart from duress or imbecility of mind amounting to insanity, affect the validity of a marriage to which the parties freely consented with a knowledge of the nature of the contract."

This being so, the only question which remains, apart from the question of the principle deduced by the Appeal Court from the American Authorities, is whether on the facts here the respondent was impotent at the time of the marriage and at the time of the institution of the suit. It is said on behalf of the respondent that impotency means an impossibility of sexual intercourse from physical incapacity and that cases like *G.* v. *G.* (1) and *H.* v. *P. falsely called H.* (2) mark the extreme limit to which the Courts will go, that on the facts here there is no such incapacity and that the Court has no jurisdiction to annul the marriage. On behalf of the petitioner it is said that impotency means anything which prevents cohabitation, a state of things said to exist here on the facts of this case.

(1) (1871) 2 P. & D. 287 at p. 291; 40 L. J. Mat. 89; 25 L. T. 510; 20 W. R. 103.

(2) (1873) 3 P. & D. 126.

The construction put on impotency by counsel for the respondent is, I think, clearly too narrow a construction. Lord Penzance in the case of *G.* v. *G.* (1) says: "but the basis of the interference of the Court is not the structural defect, but the impracticability of consummation. If, therefore, a case presents itself involving the impracticability (although it may not arise from a structural defect) the reason for the interference of the Court arises. The impossibility must be practical. It cannot be necessary to show that the woman is so formed that connection is physically impossible if it can be shown that...connection is practically impossible, or even if it be shown that it is only practicable after a remedy has been applied which the husband cannot enforce, and which the wife, whether wilfully or acting under the influence of hysteria, is determined not to submit to."

In that case the marriage could not be consummated owing to the hysteria or extreme sensibility of the wife, no question of any structural defect arising, and the Court on the facts came to the conclusion that this condition of things would be permanent. The passage which I have quoted from the judgment in *G.* v. *G.* (1) is quoted with approval in *Dickinson* v. *Dickinson* (3). There is no doubt that both in that case and in *G.* v. *G.* (1) the consummation of the marriage was physically possible if force or certain other measures had been used. In the present case consummation is no doubt physically possible and the wife is not unwilling but the question I have got to ask myself is not, I think, concluded by this. Can I say here that consummation is, under the circumstances, a practical impossibility? I think it is. Upon the evidence, having regard to the state of the wife's health, I think consummation is a practical impossibility. I think the husband could not consummate the marriage without the very gravest risk to his health and to that of any offspring who might be born of the connection and I think this state of things is likely to continue and be permanent and, in my opinion, this amounts to impotency on the part of the wife within the meaning of the decided cases. I accordingly declare the marriage null and void.

R. N. *Order accordingly.*

(3) (1913) P. D. 108 at p. 204; 82 L. J. P. C. 121; 109 L. T. 408; 58 S. J. 324; 29 T. L. R. 765.

RAMJI DAS v. MAM CHAND.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1740 of 1921.
June 12, 1922.

Present :—Mr. Justice Scott-Smith.

RAMJI DAS—DEFENDANT—APPELLANT

versus

MAM CHAND—PLAINTIFF AND ANOTHER—DEFENDANT—RESPONDENTS.

Custom—Pre-emption—Pana Chhajan, *Town* Beri, Rohtak *District—Proof of existence of custom in neighbouring* mohallas *only supplementary evidence —Judgment based on compromise, effect of.*

The custom of pre-emption does not obtain in Pana Chhajan of the town of Beri in the Rohtak District. [p. 954, col. 2.]

In suits for pre-emption in respect of property situate in a town, however probable and seeming the plaintiffs' case may be, he should never be relieved from the burden of proving the existence of the alleged custom in the special locality in which the property is situated, proof of its existence in neighbouring *mohallas* being at best only supplementary of the evidence required of the plaintiff. [p. 954, col. 1.]

Natha Singh v. *Billa Singh*, 58 P. R. 1900 and *Saudagar Mal* v. *Aman Singh*, 70 P. R. 1899, relied upon.

Instances of the exercise of the right of pre-emption of which the latest is 40 years' old are insufficient to prove the existence of custom [p. 954, col. 1.]

Obiter.—A judgment based upon a compromise or confession, cannot be placed on the same footing as one in which after contest a custom was held to be proved or negatived. [p. 953, col 2.]

Imperial Oil, Soap and General Mills Co., Limited, Delhi v. *Misbah-ud-din*, 61 Ind. Cas. 325; 2 L. 83, followed.

Second appeal from a decree of the Senior Subordinate Judge, Rohtak, dated the 18th April 1921, affirming that of the Munsif, First Class, District Rohtak, dated the 23rd December 1920.

Mr. *Shamair Chand*, for the Appellant.

Lala *Nawal Kishore*, for the Respondents.

JUDGMENT.—The judgment disposes of the three connected appeals by Ramji Das, the vendee, from three decrees for pre-emption in favour of Mam Chand, plaintiff-respondent. The appeals have been filed upon a certificate granted by the lower Appellate Court, and the only question which I have to decide is, whether the custom of pre-emption prevails in Pana Chhajan of the town of Bari in the Rohtak District. Certain oral evidence was produced on both sides, but the lower Courts have not relied much upon this and have found the custom of pre-emption proved upon the documentary evidence produced by the plaintiff. This consists of several instances which have come before the Courts. These are as follows :—

(1) *Bhola* v. *Bhagwana*. This case was decreed upon a compromise on the 6th December 1916. The property in dispute was one-fourth share in an *ahata* situated in Pana Chhajan. Now, it has been held in *Imperial Oil, Soap and General Mills Co., Limited, Delhi* v. *Misbah-ud-din* (1) and in other cases also that a judgment based upon a compromise or confession, although of some probative force, cannot be placed on the same footing as one in which after contest a custom was held to be proved or negatived. This instance cannot, therefore, be considered to be of much value.

(2) *Jawala Parshad* v. *Koti Ram*. This suit was in respect of a house situate in another Pana of the town. The claim was based on vicinage, and was decreed on the 14th March 1910 but on appeal the decision was reversed as it was found that the suit was for a part only of the property sold, and it was also barred by time. This instance, therefore, cannot be considered.

(3) *Amir Singh* v. *Jivala*. This suit was in respect of a house situated in Pana Chhajan on the ground of vicinage, and the claim was decreed on the 7th December 1871. The lower Appellate Court says that this instance relates to a period when Beri was a village, and so it is not of much value. I do not know where the lower Appellate Court has got this fact from, it does not appear from any thing on the record.

(4) *Ganga Sahai* v. *Dhani Ram* The claim in this case was decreed on a compromise and it does not appear in what Pana the house in dispute is situated. This instance, in my opinion, is of no value.

(5) *Baldeo Sahai* v. *Sat Ram*.—The house in dispute is situated in Pana Chhajan and the claim was decreed on the 21st June 1878.

(6) *Har Dyal* v. *Sat Ram*.—Here also the suit was in respect of a plot in Pana Chhajan in the town of Bari and the plaintiff's suit was based on the allegation that he was the collateral of the vendor. The date of the decree is 23rd May 1878.

(7) *Puran* v. *Har Bhai*.—The house in dispute does not appear to have been situated in Pana Chhajan.

Instances Nos. 1, 3, 5 and 6 relate to houses or plots of land situated in Pana

(1) 61 Ind. Cas. 325; 2 L. 83.

Chhajan, but instanes No. 1 is of very little value, as the suit was sompromised. As regards Nos. 3, 5 and 6 sopies of the decrees only have been put in by the plaintiff, and, therefore, I am unable to say whether the sustom of pre-emption was in dispute or not in those cases, or on what grounds, if any, the custom was held to have been proved. It appears that the lower Appellate Court salled for the records of the cases of whish sopies of decrees were filed without giving any reason for doing so. Its sstion in salling for these records was, it appears to me, contrary to the provisions of the O. XLI, r. 27 of the Civil Prosedure Code. In *Natha Singh* v. *Billa Singh* (2) the following passage was quoted with approval from the sase of *Saudagar Mal* v. *Aman Singh* (3): "In suits for pre-emption in respest of property situate in a town, however probable and fair seeming the plaintiff's claim may be, he should never be relieved from the burden of proving the existense of the alleged custom in the spesial loality in which the property is situate, proof of its existence in neighbouring *mohallas* being at best only supplementary of the evidence required of the plaintiff." I fully agree with these remarks. In my opinion the onus whish lay upon the plaintiff to prove the existense of the custom in the Pana in question was a heavy one and I do not sonsider that the instanses cited by him, the most recent of whish took place more than 40 years ago, are sufficient to prove the existence of the custom. A local Commissioner was appointed to make an enquiry, and his report was that there have been 30 sales of houses in this Pana in the years 1915 to 1918, and that no suit had been brought in respest of any of them, that the general feeling in the loality is against the existence of the sustom. and that no such sustom prevails in the Pana in question. The enquiry was made by *Lala* Lachman Das, a certifieated *Mukhtar*, and his report appears to me to be entitled to weight. I hold that the existence of the custom in Pana Chhajan has nct been affirmatively proved, and I acsept the appeal and, setting aside the orders of the lower Court, dismiss all the suits with costs throughout.

Appeal accepted.

R. N.

(2) 58 P. R. 1900.
(3) 70 P. R. 1899.

PATNA HIGH COURT.

LETTERS PATENT APPEAL No. 7 OF 1921.
May 31, 1922.

Present:—Sir Dawson Miller, KT., Chief Justice, and Mr. Justise Mullick.

Messrs. HENRY HILL AND CO.—PLAINTIFFS—APPELLANTS

versus

SHEORAJ RAI AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908*), ss.* 2 (5), 26, 28, *Sch. I, Art.* 144—*Right of fishery—Easement—Profit* a prendre *—Fishery, right of—Adverse possession.*

A right of fishery, of whatever nature, is not strictly an easement. It is either an interest in immoveable property or a profit *a prendre* which may be either in gross or appurtenant to a dominant tenement. In so far as a right of fishery is a mere profit *a prendre* which is not an exclusive right to the fishing it would clearly come within the provisions of the definition of 'easement' given in section 2 (5) of the Limitation Act. If it is an exclusive right to the fishing, as in the case of a several fishery, it would amount to an interest in immoveable property within Art. 144 of the First Schedule of the Limitation Act, and adverse possession of such a right for 12 years would, by the operation of section 28 of the Act, extinguish the rights of the lawful owners. [p. 956, col. 2; p. 957, col. 1.]

A profit *a prendre* in the nature of an easement, which can be acquired by 20 years' enjoyment must be a right which does not exclude the acquisition of similar rights by others or bar the enjoyment of such rights by the lawful owners of the land. It may be either a personal right which is not transferable or one attached to a dominant tenement, as in the case of an easement properly so-called, which also cannot be transferred apart from the transfer of the dominant tenement. An exclusive right to the fishing in a particular locality, as in the case of a several fishery, is both transferable and heritable and is an interest in immoveable property and one which can be acquired by 12 years' adverse possession as against the lawful owner. [p. 957, col. 1.]

The question of a right of fishery in all cases must be determined by reference to the nature of the right claimed and proved to have been exercised. If it is a mere right to fish not excluding the lawful owner, it would appear to be an easement within the description of the word in the Limitation Act and can be acquired by 20 years' uninterrupted enjoyment. If it is an exclusive right of fishery it is an interest in immoveable property and can be acquired by 12 years' adverse possession involving an ouster of the rightful owner. Such a right contains all the essential elements of property and even if it may properly be described as a profit *a prendre* it has also the distinctive features of an interest in immoveable property. Even if section 26 of the Act should be applicable, this would not bar the operation of Art. 144 and section 28 if the right came under both descriptions. [p. 958, col. 2.]

Chundee Churn Roy v. *Shib Chunder Mundul*, 5 C. 945; 6 C. L. R. 269; 3 Shome L. R. 123; 2 Ind. Dec. (N. S.) 1211, *Bhundal* v. *Pandol Pos Patil*, 12 B. 221; 6 Ind. Dec. (N. S.) 633, *Fadu Jhala* v. *Gour Mohun*

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Jhala, 19 C. 544; 9 Ind. Dec. (N. S.) 806, *Natabar Parue* v. *Kubir Parue*, 18 C. 80; 9 Ind Dec. (N. S.) 54, *Lokenath Bidyadhur Mohapatra* v. *Jahania Bibi*, 12 Ind. Cas. 305; 14 C. L. J. 572, *Baker Husain* v. *Rani Ranjit Koer*, 39 Ind. Cas. 777; 2 P. L. J. 289; 1 P. L. W. 687, referred to.

Letters Patent Appeal against the decision of Mr. Justice Jwala Prasad, in Second Appeal No. 513 of 1919, dated the 21st December 1920.

Messrs. *P. Kennedy* and *Baikuntha Nath Mitter*, for the Appellants.

Messrs. *Kulwant Sahay* and *Sambhu Saran*, for the Respondents.

JUDGMENT.

MILLER, C. J.—This is an appeal under the Letters Patent from a decision of Jwala Prasad, J., which comes before us for final determination after remand to the first Appellate Court for certain findings of fact.

The plaintiffs first party are the tenure-holders of Mauza Madhubani in Champaran under an *istimarari mokurrari* lease granted by the proprietors, the Bettiah Raj. The plaintiffs-second party are the lessees of the *jalkar* rights in the *mauza* under a *ticca* lease granted by the tenure holders. The defendants, who are the tenants in occupation of the land over which the plaintiffs claim the *jalkar* right, have interfered with the exercise of that right by refusing to allow the plaintiffs to erect upon the land *bari* and *chilwan* for the purpose of catching fish. The plaintiffs accordingly instituted this suit claiming a declaration that they have *jalkar* rights over the property from which they have been excluded by the defendants. They claimed that by law and custom the *jalkar* rights with respect to the *chur* lands in the village belong to them and that they are in enjoyment of the entire Zamindary right appertaining to the *mauza* under their *istimrrari mokurrari* settlement which rights did not pass to the tenants of the land. They further claim that in any case they have by long enjoyment acquired a prescriptive right to the fishery. The plaint is not very scientifically drawn. It alleges that the *jalkar* rights over the *chur* lands of the *mauza* belong to the plaintiffs-first party according to law and custom, and that they have for a pretty long time been in enjoyment of the said rights, and in the next paragraph it alleges that the *jalkar* right with respect to the water accumulated on the aforesaid lands has belonged to the plaintiffs-first party for more than several 20 years, and that the *ticcadars* under the plaintiffs-first party have every year for a pretty long time been appropriating the *jalkar* produce of the aforesaid *jalkar* land by means of catching fishes, and, in order to prevent the escape of the fish from the water, every year *bari* and *chilwan* (wire) are put up north and south, east and west, over the aforesaid lands, and in this way the fish of the aforesaid *alkar* has for several periods of 20 years continued to be appropriated and the right of fishery exercised on behalf of the plaintiffs-first party, and their *ticcadars* and that the defendants and their ancestors have had full knowledge of the same. It then alleges that two weeks before the suit the defendants aforesaid prevented the plaintiff-second party from putting up the *bari* and *chilwan*. It further alleges that the suit is based on the right of easement and prescription as also on the custom obtaining in the village. The plaintiffs claim (1) a declaration that the plaintiffs-first party have the *jalkar* right over the land in question, (2) an injunction restraining the defendants from interfering with the exercise of their rights, and (3) damages.

The Munsif who tried the suit held that the fishery rights passed to the tenant, in whom the right of occupation of the land was vested, and found that no custom had been proved whereby the tenure-holder retained the right of fishery. He also found that the plaintiffs had not made out a prescriptive right by 20 years' uninterrupted enjoyment and dismissed the suit.

The plaintiffs appealed from this decision to the District Judge who dismissed the appeal and affirmed the decree of the Munsif. It was contended before him that the right claimed was, in fact, an interest in immoveable property, the adverse possession of which for 12 years would extinguish the right of the lawful owner under section 28 of the Limitation Act and that it was not necessarily an easement which, under section 26 of the Act, could be acquired by 20 years' uninterrupted enjoyment. The plaintiffs also contended that by a custom of the village the *jalkar* rights remained in the tenure-holder. The learned District Judge held that the right of fishery could not, without an express grant, pass either to the tenure-holder or to the *raiyat* in actual occupation of the land

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but remained in the superior landlords, in this case the Bettiah Raj, and that, in the absence of the Bettiah Raj, as parties, he was not competent to determine the question either as to adverse possession or custom, as these were matters which could only be proved as against the superior landlord, there being no evidence of a grant of the fishery to the plaintiffs. The learned District Judge came to certain findings on the question of custom admitted by some of the defence witnesses whereby the tenure-holders let out the *jalkar* to *ticcadars* but his findings on the question were inconclusive.

A second appeal to this Court was heard before Mr. Justice Jwala Prasad sitting singly. He held that the *jalkar* rights were in the occupier and not in the landlord, but agreed with the lower Appellate Court that no declaration of the plaintiffs' rights could be granted in the absence of the Bettiah Raj. He further considered that on the findings 20 years' uninterrupted enjoyment had not been proved. He did not in terms deal with the question as to 12 years' adverse possession raised before the District Judge or with the question of custom.

From this decision an appeal was preferred under the Letters Patent* and heard by my learned brother and Ross, J., who agreed with the opinion of the learned Judge in second appeal that the fishery rights belonged to the occupier and held that the superior landlords were not necessary parties to the suit. They also held that the right of fishery claimed was an interest in immoveable property within the meaning of Art. 144 of the First Schedule to the Limitation Act and that it was not necessary for the plaintiffs to prove enjoyment for 20 years as required by section 26 of the Act but that, under section 28, the right claimed might be acquired by adverse possession for 12 years. As in their opinion no proper findings had been come to by the learned District Judge in first appeal either as to adverse possession or as to custom they remanded the case to the Court of the District Judge for findings on the following questions:—

(1) Whether the plaintiffs have acquired any right by adverse possession, and,

(2) Whether they have acquired title by custom.

*See 64 Ind. Cas. 346.—[Ed.]

The learned District Judge on remand found that it was proved that the *mokurraridars* and their *ticcadars* had since 1899, that is, some 18 years before the suit, regularly exercised fishery rights over the land in question, but not so as to interfere with the crops, and that the fishing rights had been regularly leased to the *ticcadars* by the *mokurraridars*, but that the tenants and their labourers had at harvest time appropriated small fish such as could be caught by hand. He accordingly held that the plaintiffs had acquired the *jalkar* right by 12 years' adverse possession but not so as to interfere with the cultivation of crops or so as to restrain the tenants from catching small fish by hand. He further found that the evidence did not go far enough back to establish a custom but that there was a local usage by which the rights of the parties were as stated above. The case now comes before us with the above findings for final disposal.

The appellants contend that on these findings they are entitled to a decree declaring their right to the fishery. The respondents, on the other hand, say that the right claimed is an easement which can only be acquired by 20 years' uninterrupted enjoyment.

By section 26 of the Limitation Act easements can be acquired by peaceable and open enjoyment as of right and without interruption for 20 years. A right of fishery, of whatever nature, is not strictly an easement. It is either an interest in immoveable property or a profit *a prendre* which may be either in gross or appurtenant to a dominant tenement, but by section 2 (5) of the Limitation Act easement includes a right not arising from contract by which one person is entitled to remove and appropriate for his own profit any part of the soil belonging to another or anything growing on or attached to or subsisting upon the land of another. In so far as, therefore, a right of fishery is a mere profit *a prendre* which is not an exclusive right to the fishing it would, I think, clearly come within the provisions of the definition of the section. If, however, it is an exclusive right to the fishing, as in the case of a several fishery, it would, in my opinion, amount to an interest in immoveable property within Art. 144 of the First Schedule of the Limitation Act, and

adverse possession of such a right for 12 years would, by the operation of section 28 of the Act, extinguish the rights of the lawful owners, in this case the tenants.

Much ingenuity has been expended in determining whether a right of fishery is an easement within the meaning of that word as used in the Limitation Act, or whether it is an interest in immoveable property as contemplated by Art. 144 of the First Schedule of the Act. In *Ohundee Churn Roy* v. *Shib Chunder Mundul* (1) it was held that a prescriptive right of fishery was an easement within the meaning of section 3 of the Limitation Act, and could be acquired by 20 years' uninterrupted enjoyment. The difference between uninterrupted enjoyment referred to in section 26 and adverse possession in Art. 144 was pointed out in that case, and, although the case as reported does not definitely show whether the right claimed was an exclusive right to the fishing or merely a right which might be shared with others, there is no reason to suppose that an exclusive right was there claimed. The distinction just mentioned is an important one. A profit *a prendre* in the nature of an easement, which can be acquired by 20 years' enjoyment must, I think, be a right which does not exclude the acquisition of similar rights by others or bar the enjoyment of such rights by the lawful owners of the land. It may, I think, be either a personal right which is not transferable or one attached to a dominant tenement, as in the case of an easement properly so-called, which also cannot be transferred apart from the transfer of the dominant tenement. An exclusive right to the fishing in a particular locality, as in the case of a several fishery, is both transferable and heritable and is, in my opinion, an interest in immoveable property and one which can be acquired by 12 years' adverse possession as against the lawful owner.

The question has frequently arisen in connection with section 9 of the Specific Relief Act. The High Court at Bombay in *Bhundal* v. *Pandol Pos Patil* (2) held that a right of fishery came within the denomination of immoveable property within the Specific Relief Act. The right there claimed was the exclusive right of fishing in certain tidal waters between high and low water marks, the plaintiffs being the fishermen of the village of Naoghar claiming what in legal phraseology is known as a common of fishery. On the other hand, a majority of a Full Bench of the Calcutta High Court in *Fadu Jhala* v. *Gour Mohun Jhala* (3) held that a suit for possession of a right to fish in a *khal*, the soil of which did not belong to the plaintiff did not come within the provisions of section 9 of the Specific Relief Act. That decision followed an earlier case decided by a Bench of the same Court in *Natabar Parue* v. *Kubir Parus* (4). That case also does not indicate clearly whether the subject of the suit was a several fishery, that is an exclusive right to the fishing, or merely a right to fish which would not exclude the owner of the land or others claiming similar rights. In the later case of *Lokenath Bidyadhar Mohapatara* v. *Jahania Bibi* (5), decided by the Calcutta High Court, the plaintiffs and defendants were respectively proprietors of adjoining properties. The plaintiffs as proprietors of Gopinathpur claimed the exclusive right during certain seasons of the year to the fishery in the waters of the neighbouring estate of Bara Benakula belonging to the defendants. The suit was one in ejectment on the ground that the defendants had prevented the plaintiffs from exercising their rights for some years before the suit. It was contended by the defendants that the right claimed was a prescriptive right to a profit *a prendre* falling under the description of easement in the Limitation Act and that it had not been proved that the right had been exercised within two years of the suit. They also objected that a suit in ejectment would not lie and further contended that the claim was barred by limitation under Art. 120 of the Schedule of the Limitation Act, the period for which was six years. Each of these points was determined in favour

(1) 5 C. 945; 6 C. L. R. 269, 3 Shome L. R. 123; 2 Ind. Dec. (N. S.) 1211.
(2) 12 B. 221; 6 Ind. Dec. (N. S.) 633.
(3) 19 C. 544; 9 Ind. Dec. (N. S.) 806.
(4) 18 C. 80; 9 Ind. Dec. (N. S.) 54.
(5) 12 Ind. Cas. 305; 14 C. L. J. 572.

of the plaintiffs. It was held that a claim to an extra-territorial fishery, annexed to the plaintiffs' estate and exercised over the waters on the defendant's land, was not a claim to an easement within the Limitation Act, but was an interest in immoveable property and that a suit in ejectment would lie in such a case. It was also held that the period of limitation was not six years under Art. 120, but 12 years under Art. 144 of the Limitation Act, and a possessory action could be maintained at any time within 12 years of the date when the defendant's possession became adverse, the claim being one for possession of an interest in immoveable property. In that case the right set up was claimed as being appurtenant to the plaintiffs' land and it was undoubtedly an exclusive right, but I can see no reason why such a right should not be acquired altogether apart from the ownership of property by 12 years' adverse possession against the lawful owner so as to extinguish his title by the operation of section 28 of the Limitation Act. It has been held in this Court that where an owner of land has been completely ousted from the right to fish in the waters of his own land by definite acts of aggression by another, this constitutes in fact dispossession from immoveable property. *Baker Husain* v. *Rani Ranjit Koer* (6). From the proposition so stated I see no reason to differ. It was argued before us that the right claimed in the plaint was dependent upon prescription and that the proof should be limited to such rights as might be so obtained. It is true that in England under the common law rights in gross which are unassignable and unappurtenant cannot be acquired by prescription but require evidence of a grant. Under the Limitation Act, however, rights of this description can be acquired by long enjoyment and if, as in the present case, they amount to an interest in immoveable property they can be acquired by adverse possession without proof of a grant. There is, therefore, in my opinion, no reason why a right claimed as arising by prescription should not aptly describe a right arising by 12 years' adverse possession under the Indian Limitation Act. All the facts necessary to determine this question were before the Court and although the point may not have been definitely raised until the case came before the District Judge in first appeal it is not a case in which the parties were taken by surprise. I agree that isolated acts of trespass, even if extending over a number of years, would not be sufficient to found a claim by adverse possession. The present case, however, is one where the plaintiffs have openly and as of right claimed the fishing as theirs alone and have leased out the rights to *ticcadars*, who have exercised those rights continuously and openly and without opposition for more than 12 years.

In my opinion, the question in all such cases must be determined by reference to the nature of the right claimed and proved to have been exercised. If it is a mere right to fish not excluding the lawful owner, it would appear to be an easement within the description of the word in the Limitation Act and can be acquired by 20 years' uninterrupted enjoyment. If it is an exclusive right of fishery it is, in my opinion, an interest in immoveable property and can be acquired by 12 years' adverse possession involving an ouster of the rightful owner. Such a right, in my opinion, contains all the essential elements of property and even if it may properly be described as a profit *a prendre* it has also the distinctive features of an interest in immoveable property. In my opinion, even if section 26 of the Act should be applicable, this would not bar the operation of Art. 144 and section 28 if the right came under both descriptions.

It was contended, however, that in the present case there was no complete ouster of the defendants as it is found that they have the right of catching small fish by hand at harvest time. This is a matter of such trifling importance that it does not, in my opinion, alter the nature of the right acquired by the plaintiffs. I would admit the appeal, set aside the decree of the Trial Court and the lower Appellate Courts and decree the plaintiffs' suit granting them a declaration of their rights in accordance with the findings of the learned District Judge on remand and issue an injunction upon the defendants restraining them from interfering with the plaintiffs in the exercise of those rights. The appellants are

(6) 39 Ind. Cas. 777; 2 P. L. J. 289; 1 P. L. W. 687.

entitled to their costs here and in each of the lower Courts.

MULLICK, J.—I agree.

S. D.

Appeal admitted.

LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 763 OF 1921.

June 6, 1922.

Present:—Mr. Justice Martineau.

THE FIRM SHIB LAL-RAM LAL—DEFENDANTS—PETITIONERS

versus

THE FIRM HARI RAM-CHHADAMI LAL, OF AMROHA, DISTRICT MORADABAD—PLAINTIFFS—RESPONDENTS.

Badni *contract—Agent, if entitled to be recouped for loss incurred on behalf of principal—Commission agent*—Onus probandi.

An agent is not entitled to be recouped for loss incurred by him on behalf of the principal in a *badni* (wagering) contract.

A commission agent often enters into transactions on his own account and the onus lies on him to prove that in a particular transaction he acted as agent and not as principal. [p. 960, col. 1.]

Petition, under section 44 of Act VI of 1918, for revision of a decree of the Senior Subordinate Judge, Rohtak, dated the 25th May 1921, reversing that of the Munsif, First Class, Rohtak, dated the 2nd November 1920.

Mr. *Shamair Chand*, for the Petitioners.

Mr. *Anant Ram*, for the Respondents.

JUDGMENT.—The plaintiffs allege that they were instructed by the defendants to sell 2 waggon loads of *bajra* as their agents, and that they accordingly contracted to sell the *bajra* to Ram Dial-Gordhan Dass, but as the defendants did not send the *bajra* they (the plaintiffs) had to make good the loss to Ram Dial-Gordhan Dass and paid them Rs. 260-2-9. They sue for the recovery of that amount with commission and interest.

The defendants pleaded that the bargain was made with the plaintiffs as principals and not as agents, and also that it was a "*badni*" transaction, actual delivery of the goods not having been intended and that, therefore, the suit was not maintainable. They also denied that the plaintiffs had incurred any loss.

The first Court found that the transaction was "*badni*," but that the plaintiffs acted as the defendant's agent and would be entitled to be recouped for any loss incurred and that the amount payable on such a transaction would be determined, not by the difference between the rate agreed upon and the market-rate, but the rate fixed by a *panchayat* according to usage. Finding, however, that the payment alleged to have been made to Ram Dial-Gordhan Dass had not been proved the Munsif dismissed the suit.

The Senior Subordinate Judge on appeal agreed with the First Court's findings on all the points except the question of payment. He found that the plaintiffs had proved the payment of Rs. 260-2-9, and accordingly gave them a decree for the amount claimed. The defendants have applied to this Court for revision.

The first point urged is that when it was found that the transaction was a wagering one the suit should have been dismissed. I think this contention is correct and it is supported by a judgment given in Civil Appeal No. 107 of 1889, quoted on page 384 of 80 P. R. 1895 [*Seth Lachman Das* v. *Dhanpat Rai* (1)] in which Plowden, J., held that the plaintiffs, who had claimed as defendants' agents in *bona fide* mercantile transactions, could not be allowed to alter their claim to one for a refund of losses paid upon wagering contracts.

Secondly, the lower Appellate Court committed a material irregularity in passing a decree for an amount calculated according to the rate fixed by a *panchayat*, as the plaintiffs had not claimed to be entitled to recover their losses according to that rate. No question of the losses being calculated at that rate arose on the pleadings, nor was the question of local usage or the competency of a *panchayat* to fix the rate put in issue. It was in fact common ground between the parties that it was the market-rate which had to be ascertained, and accordingly the

(1) 80 P. R. 1895*n*.

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issue framed was what was the market rate at the due date. If the loss be calculated according to the market-rate the amount which the plaintiffs would have had to pay to Ram Dial-Gordhan Dass is very small, and they would not be entitled to claim anything more than that from the defendants.

In the third place the finding as to the plaintiffs having acted as agents of the defendants is not based on any evidence. It is based only on a certain letter which has been neither admitted by the defendants nor proved. It is true that the plaintiffs are commission agents, but commission agents often enter into transactions on their own account, so that it does not follow that in this particular transaction the plaintiffs were acting as agents. The onus was on them and they have not discharged it.

I accept this application, reverse the decree of the lower Appellate Court, and restore the decree of the First Court dismissing the suit. The plaintiffs will pay the defendants' costs in all the Courts.

R. N.

Application accepted.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 190 B OF 1920.
June 23, 1922.

Present:—Mr. Prideaux, A.J.C.

Musammat SUPDI—DEFENDANT No. 3—APPELLANT

versus

MARUTI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Surrender by widow in favour of daughter—Insignificant portion of husband's property not included—Acceleration of daughter's inheritance.

A relinquishment by a Hindu widow in favour of her daughter does not fail to accelerate the inheritance in favour of the latter simply because an insignificant portion of the husband's property is not included in the gift. [p. 962, col. 2.]

Vadlamudi Gopalakrishnayya v. *Vadlamudi Gangayya*, 52 Ind. Cas. 749, *Sureshwar Misser* v. *Maheshrani Misrain*, 57 Ind. Cas. 325; 48 C. 100 at p. 109; (1920) M. W. N. 472; 39 M. L. J. 161; 28 M. L. T. 154; 2 U. P. L. R. (P. C.) 128; 12 L. W. 461; 18 A. L. J. 1069; 47 I. A. 232; 25 C. W. N. 194 (P. C.), followed.

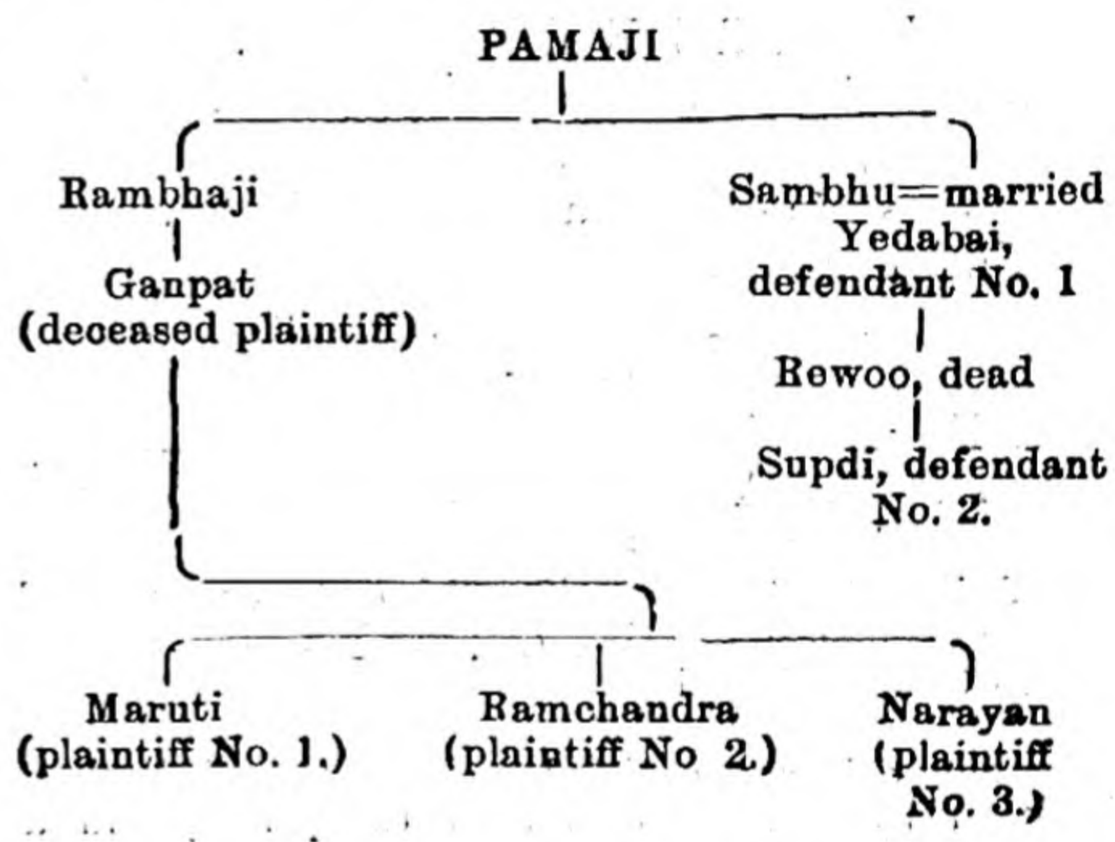
Moti Raiji v. *Laldas Jibhai*, 37 Ind. Cas. 945; 41 B. 93; 18 Bom. L. R. 954, not followed.

Appeal from a decree of the District Judge, Akola, dated the 5th May 1920, in Civil Appeal No. 96 of 1919.

Dr. *H. S. Gour*, for the Appellant.

Messrs. M. *R. Dixit* and M. *B. Niyogi*, for the Respondents.

JUDGMENT.—The following genealogical tree helps to explain the case:—



The plaintiffs state that they are reversioners of Sambhu and sue for a declaration that the transfers of Sambhu's property made by Yedabai are not binding on them on that lady's death. In paragraph 2 of the plaint under headings (*a*) (*b*) and (*c*) the plaintiffs give the property in suit. Plaintiffs also claim the property mentioned in paragraph 2 (*a*) under a Will executed by the deceased Sambhu about 12th January 1896. The property mentioned in paragraph 2 (*b*) was given by that document to the widow to be enjoyed for her life only. The claim for the eastern half of field No. 113 of Wadner Bhatji was given up as the same is said to have been in possession of a person who is not a party to this case. The third defendant, Sayad Saidu, was joined on the ground that he is in possession of field No. 311 and defendant No. 4 Bhagwatdas was joined on the allegation that his predecessor-in-title was given field Survey No. 56 of Wadner Bhatji by defendant No. 1.

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The rest of the property was given by defendant No. 1 to her daughter, Rewoo, by a deed of gift executed in March 1909. The case proceeded *ex parte* against defendants Nos. 1 and 4.

The second defendant denied the Will pleading that it was a forged document. She further pleaded that plaintiffs' claim on the basis of the Will was *res judicata*, as plaintiffs' Suit No. 189 of 1895 brought against the widow in respect of the property mentioned in paragraph 2 (*a*) of the plaint on the strength of the Will in the Court of the Extra Assistant Commissioner was dismissed on 21st September 1898. Further, that the claim on the strength of the Will was now time barred under Art. 120 of the Limitation Act, as Sambhu died in 1896. As regards the gift to her mother, defendant No. 2 pleaded that as it comprised all the property held by the widow as Sambhu's widow and it accelerated succession of Rewoo to Sambhu's estate it could not be impeached. It was she who had sold field No. 311 to defendant No. 3 and gifted field No. 56 to defendant No. 4. The rest of the property the defendant No. 2 came to by inheritance from the sole owner, her mother.

Plaintiffs in reply affirmed the genuineness of the Will and stated that the decision in the former suit was not *res judicata* because that suit was not dismissed on its merits but for technical defects in the frame thereof. Further, that all Sambhu's property now claimed was in the possession of Yedabai as widow's estate and, therefore, the claim by the reversioner was not time barred. It was further contended that the widow had no power to give away the estate and that the property covered by the deed of gift was not delivered to the donee; further, that the deed of gift was not validly attested. It was also denied that that deed comprised the entire estate of the deceased Sambhu. Sambhu is said to have had moveables worth some Rs. 10,000 and these and the two houses described in paragraph 2 (*e*) of the plaint were not included in the property given away. As regards the transfers to defendants Nos. 3 and 4 plaintiffs' case is that the sale was really effected by the widow though nominally in the name of Rewoo.

Defendant No. 2 in reply stated that the moveables and the two *chhappars* did not belong to Sambhu and that when the deed of gift was executed the widow believed that it comprised the entire estate of her deceased husband. The non-inclusion of the moveables would not affect the validity of acceleration of the property given.

Appropriate issues were framed and tried and the result in the Trial Court may be summarised thus. The Will was duly executed by Sambhu and the decision in the former case did not operate as *res judicata*. Plaintiffs' claim for the property given to their father under the Will was time-barred, that document being executed in 1896, the year in which the testator died. Plaintiffs did not take possession of the property nor sued for it in a competent Court on a proper plaint. As 12 years had expired since the death of Sambhu, plaintiffs cannot now claim. Dealing with the 4th issue the Judge finds that the gift deed of 23rd March 1909 (Exhibit 2 D.1) was executed and properly attested. At the time this was executed Rewoo and her mother, namely, the donor and the donee, were living together and Rewoo and her husband were managing the family affairs and were in possession of the property at the time of the gift. After the gift Rewoo exercised actual ownership over the property and sufficient delivery was held established. Dealing with the question whether the gift comprised all the property left by the deceased Sambhaji it was held not proved that the first defendant owned or possessed any moveables at the time of the gift. As regards the two *chhappars* said to belong to Sambhu and not covered by the deed of gift the Judge writes:

"In the Will (Exhibit P-11) they are described as the testator's property but they were given by the Will to Rewoo and Rewoo was owner of these from the death of Sambhu. Defendant No. 1 could not be owner although she says so in her deposition. It is not shown that she was in possession of the *chhappars*. They fell down long ago and the sites were open and uncared for for several years. Nobody took care of these as they were of no value or of insignificant value in the village."

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It was found that not (being held by the widow but belonging to Rewoo after her father's death their absence from the deed of gift did not affect that document's validity. The property covered by that document was found to have passed and the transfers of fields Nos. 56 and 311 were made by Rewoo. It was held that the widow had surrendered all her interest in her husband's estate in favour of the next reversioner, her daughter; and that the acceleration was good. The Judge further finds that the surrender of a widow's estate to the next reversioner would not be invalid merely because an insignificant part was left unsurrendered and holds that in the present case the widow intended to give her husband's estate to the daughter and even if these *chhappars* were not so given and belonged to her it would not affect the case.

The 7th issue in the case runs:

"What relief, if any, are the plaintiffs entitled to?" And the Judge holds that Rewoo could not get the property described in paragraph 2 (*b*) of the plaint. She is not the next reversioner in respect of this property. By the Will plaintiffs' father Ganpat was made the next reversioner of this property and the widow's power of alienation was expressly restrained and Ganpat was to get the property after the widow's death. Plaintiffs were given a declaration that the deed of gift of 23rd March 1909 was void as against the plaintiffs to the extent of Survey No. 80 and two residential *dhabas* and the remaining claim was dismissed.

Both sides appealed to the Court of the District Judge, Akola, who has found that the former civil suit did not constitute *res judicata*. The defendant's Pleader admitted in the lower Appellate Court that the Will is a genuine document. Plaintiffs' claim based on the Will was found to be time-barred but plaintiffs were held competent to fall back on their claim as reversioners. Yedabai did not take any property under the Will but took as a widow. On the findings the Judge holds that the suit of the plaintiffs is liable to be dismissed unless the finding of the Trial Court is disturbed relating to the widow having accelerated inheritance in favour of her daughter. It was held that relinquishment by a widow in favour of her daughter to be effective should be complete and absolute and should comprise the whole property. In the present case the gift did not include field No. 113 and the *chhappar* sites but it was found not proved that the widow ever held and possessed field No. 113 and that she was in possession of the same when she made the gift. But because the two *chhappar* sites were not included in the gift the gift was found invalid and plaintiffs were given a decree for a declaration of having all the property in suit.

The evidence quoted in paragraph 16 of the judgment of the lower Appellate Court does not support the finding as regards the two *chhappars* come to by that Court and it is difficult to see how the witnesses named could have been relied upon. Manaji (P. W. No. 12) says nothing on the question nor does Amrit Rao (P. W. No. 13). Maruti (P. W. No. 18) is a plaintiff; he says nothing; and Mahadu (P. W. No. 19) merely says that the widow used to tie her cattle on the *chhappar* sites but this witness has been living in another village for 10 years and is not likely to know anything about the question. Karim Khan (D. W. No. 6) who has also been relied on merely says that the sites belonged to the widow who had all the property after Sambhu's death. This evidence is certainly insufficient to establish that the widow took the two *chhappar* sites for the *chhappar* themselves had fallen down and was in possession of them at the date of the gift. But these sites have been left to Rewoo by the Will; Rewoo and her mother had been living together; and it seems probable that she may have taken possession under the Will though in the lower Court the Will was denied and fields given to Rewoo by the Will are included in the deed of gift.

It is contended for the appellant that a gift is no less complete because certain insignificant portion of the husband's property is not included therein. In *Vadlamudi Gopalakrishnayya* v. *Vadlamudi Gangayya* (1) it was held that "the fact that a small and inappreciable portion of the estate is not included in the deed of surrender will not invalidate it"; and in *Sureshwar Misser* v.

(1) 52 Ind. Cas. 749.

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Maheshrani Misrain (2) their Lordships of the Privy Council seem to hold the same opinion. There is no question as to the *bona fides* of the transaction. I am aware of the decision in *Moti Raiji* v. *Laldas Jibhai* (3), but prefer to follow the Madras ruling. The two *chhappar* sites in question were of little value, if of any value at all, situated as they are in a village and I think the surrender to the daughter was no less complete because these two sites were not mentioned in it.

The result is that this appeal is allowed. I set aside the decree of the lower Appellate Court and restore that of the First Court. The appellant will get her costs here and in the lower Courts so far as she has been successful.

G. R. D.

Appeal allowed.

(2) 57 Ind. Cas. 325; 48 C. 100 at p. 109; (1920) M. W. N. 472; 39 M. L. J. 161; 28 M. L. T. 154; 2 U. P. L. R. (P. C.) 128; 12 L. W. 461; 18 A. L. J. 1069; 47 I. A. 233; 25 C. W. N. 194 P. C.).

(3) 37 Ind. Cas. 945; 41 B. 93; 18 Bom. L. R. 954.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 37 OF 1921.

December 19, 1921.

Present:—Pandit Kanhaiya Lal, J. C.

NAJM-UN-NISA AND ANOTHER—DEFENDANTS—APPELLANTS

versus

RAGHUNATH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Mortgage—Interest, general stipulation regarding payment of—Stipulation applicable till payment of mortgage-money.

A general stipulation in a mortgage-deed that the mortgage-money shall bear interest at a certain rate without any limitation as to its currency should be treated as applicable to the entire period for which the mortgage-money might remain unpaid. [p. 964, col. 1.]

Rahas Behari Lal v. *Bachchu Singh*, 23 Ind. Cas. 871; 1 O. L. J. 50, *Bindesri Naik* v. *Ganga Saran Sahu*, 20 A. 171; 2 C. W. N. 129; 25 I. A. 9; 7 Sar. P. C. J. 273; 9 Ind. Dec. (N. S.) 471 (P. C.), *Rameshar Bakhsh Singh* v. *Prabhu Dayal*, 57 Ind. Cas. 533; 7 O. L. J. 348, referred to.

Appeal against the decree of the Subordinate Judge, Biswan, Sitapur District, dated the 12th March 1921.

Mr. *Salig Ram*, for the Appellants.

Messrs. *Ram Adhin Agnihotri* and *Daya Kishen Seth*, for the Respondents.

JUDGMENT.—This was a suit for the recovery of money by the foreclosure of a mortgage. The deed of mortgage provided that the mortgagor shall pay the principal money secured by the mortgage with interest at 7 annas per cent. per mensem within 7 years. It further provided that the interest due shall be paid half-yearly and that if the interest for any half year remained unpaid it shall be added to the principal and shall carry compound interest at the same rate. The Court below found that this covenant was enforceable and applied to the entire period for which the money remained unpaid. One of the defendants has filed this appeal against that decision but there is no force in it.

The decision in *Rahas Behari Lal* v. *Bachchu Singh* (1), on which the Court below has relied, applies. In *Bindesri Naik* v. *Ganga Saran Sahu* (2) where a deed of mortgage stipulated in general terms that interest was to run upon the principal sum advanced, without any limitation as to the period of its currency; and also stipulated that, in default of punctual payment at the end of each year, the mortgagees were to be at liberty to treat unpaid interest as principal and to recover it from the mortgaged property, their Lordships of the Privy Council held that the true construction to be placed on the deed was that the capital sum was to bear interest at the contract rate till

(1) 23 Ind. Cas. 871; 1 O. L. J. 50.

(2) 20 A. 171; 2 C. W. N. 129; 25 I. A. 9; 7 Sar. P. C. J. 273; 9 Ind. Dec. (N. S.) 471 (P. C.).

payment. In *Rameshar Bakhsh Singh* v. *Prabhu Dayal* (3) it was similarly held that a general stipulation in a mortgage-deed that the mortgage money shall bear interest at a certain rate without any limitation as to its currency should be treated as applicable to the entire period for which the mortgage-money might remain unpaid. No mistake in the mode of calculation is pointed out.

The appeal is, therefore, dismissed with costs.

N. N.

Appeal dismissed.

(3) 57 Ind. Cas. 533; 7 O. L. J. 348.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1329 OF 1917.

November 16, 1921.

Present:—Mr. Justice Abdul Raoof and Mr. Justice Martineau.

SHER JANG—DEFENDANT—APPELLANT

versus

MUNSHI RAM—PLAINTIFF—RESPONDENT.

Custom—Succession to non-proprietor—Collateral in fourth degree.

In the case of succession to a proprietor any collateral, however remote, would be entitled to succeed in default of a nearer heir, but where the question is one of succession to a non-proprietor remote collaterals are excluded. [p. 964, col. 2.]

Where a collateral of a deceased non-proprietor in the fourth degree claims to succeed to his immoveable property, the *onus* lies on him to prove that he is entitled to do so by custom. [p. 965, col. 1.]

Attra v. *Moda*, 37 P. R. 1887, followed.

Second appeal from the decree of the District Judge, Hoshiarpur, dated the 9th February 1917, affirming that of the Munsif, First Class, Garhshankar, District Hoshiarpur, dated the 22nd May 1916.

Bakshi *Tek Chand*, for the Appellant.

Lala *Faqir Chand*, for the Respondent.

JUDGMENT.—The plaintiff sued for possession of a shop, situate at the village of Simli, in the Hoshiarpur District, which was left by one Mela, who died about 10 years before suit and was, as has been found by the lower Appellate Court, a non-proprietor in the village. The shop adjoins the house of the defendant, who is a proprietor. The plaintiff contends that he is entitled to the shop as the heir of Mela, who was his second cousin, and the Courts below have found in his favour. The defendant has preferred a second appeal, having obtained a certificate from the District Judge under section 41 (3) of the Punjab Courts Act.

In paragraph 238A of Rattigan's Digest of Customary Law it is laid down that a remote collateral is not entitled to succeed to a non-proprietor, and it is not disputed that this is a correct statement of the custom, the question being only whether or not a second cousin, that is, a collateral of the fourth degree, is to be regarded as a remote collateral. We are unable to agree with the learned District Judge in applying by analogy in the present case the rule under which, where the question is one of succession to proprietary rights in land, the descendants of a common great-grandfather are regarded as near collaterals.

In the case of succession to a proprietor any collateral, however remote, would be entitled to succeed in default of a nearer heir, but where the question is one of succession to a non-proprietor remote collaterals are excluded, and what has to be determined in the present case is whether the plaintiff has proved the existence of a custom by which a collateral in the fourth degree can succeed to a non-proprietor.

There is no instance on the record of the succession of a collateral in that degree, and the cases mentioned in Rattigan's Digest of Customary Law do not show that collaterals more distantly related than first cousins have ever succeeded. *Attra* v. *Moda* (1) is a case in

(1) 37 P. R. 1887.

point. It related to a village in the Hoshiarpur District, and the plaintiff was, as in the present case, a collateral of the deceased non-proprietor in the fourth degree. It was held that it lay on him to prove that collaterals more distantly related than a nephew were by custom entitled to succeed, and that he had failed to discharge the *onus*.

We find, therefore, in the present case that the plaintiff, on whom the *onus* lay, has failed to prove that he is by custom entitled to succeed to the shop left by his second cousin, a non proprietor of the village.

We accept the appeal, reverse the decrees of the Courts below, and dismiss the suit with costs throughout.

Z. K. & R. N.

Appeal accepted.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL No. 2 OF 1922; SUIT No. 3685 OF 1919.

June 19, 1922.

Present:—Sir Lallubhai Shah, Kt., Acting Chief Justice, and Mr. Justice Crump.

TRICAMJI DAMJI & Co.—PLAINTIFFS—APPELLANTS

versus

VIRJI KANJI AND OTHERS—DEFENDANTS—RESPONDENTS.

Stamp Act (II of 1899), ss. 2 (20), 7 (3), 35 (a) Sch. I, Art. 47—Document, construction of—Protection Note—Policy of Sea Insurance—Unstamped policy of Sea Insurance, if admissible in evidence.

The nature of a document must really be determined with reference to its terms and no general test can be laid down for distinguishing a Protection Note from a formal 'Policy of Sea Insurance.' [p. 966, col. 2.]

It may be that a document may in form appear to be a Protection Note, still if in terms it satisfies the requirements of the definition of "Policy of Sea Insurance" within the meaning of the Stamp Act, it would, for the purposes of that Act, be open to a party to contend that it is a Policy of Sea Insurance. [p. 966, col. 2; p. 967, col. 1.]

Marine Insurance Certificate, In re, 19 B. 130; 10 Ind. Dec (N. S.) 87 (F. B), referred to.

Home Marine Insurance Co v. *Smith*, (1898) 1 Q. B. 829; 8 Asp. M. L. C. 386; 3 Com. Cas. 172; 67 L. J. Q. B. 554; 78 L. T. 465; 14 T. L. R. 363, distinguished.

An unstamped document which otherwise fulfils all the conditions of a 'Policy of Sea Insurance' is admissible in evidence upon payment of the necessary stamp and the penalty prescribed in section 35 (*a*) of the Stamp Act. [p. 966, col. 2.]

The defendants executed and passed an unstamped document to the plaintiffs in respect of a cargo shipped from Muscat to Bombay in the following terms:—

"Given in writing by the undersigned persons. To wit: That we accept the liability on goods shipped from the Port of Muscat in the boat "*Jeramprasad Tandel Ibram*" for Bombay Bunder. That liability is to exist up to the time the said goods have been discharged on the Bombay Bunder having passed any intermediate Ports. The insurance is accepted in accordance with the usage of English Policies without damage. The amount is to be paid within six months from the date of the loss deducting therefrom discount at the rate of 20 per cent. Through broker Tha: Dewkaran. The signatures are to be duly affixed to the stamped *pakka* (*i.e.*, formal) policy:"

Held, that the document in question was a Policy of Sea Insurance within the meaning of section 2 (20) of the Indian Stamp Act, provided the contract embodied therein was for consideration of a premium. [p. 966, col. 2.]

Obiter.—Mere initialling a Policy of Sea Insurance is sufficient to indicate the names within the meaning of section 7 (3) of the Stamp Act. [p. 967, col. 2.]

Home Marine Insurance Co v. *Smith*, (1898) 1 Q. B. 829; 8 Asp. M. L. C. 386; 3 Com Cas. 172; 67 L. J. Q. B. 554; 78 L. T. 465; 14 T. L. R. 366, referred to.

Appeal against the judgment of Mr. Justice Marten.

Messrs. *Kanga*, Advocate-General and *Ghaswalla*, for the Appellants.

Messrs. *Desai*, *Campbell* and *Setalvad*, for the Respondents.

JUDGMENT.

SHAH, ACTG. C. J.—The plaintiffs sued the defendants in this case on what was described in the plaint as a Protection Note, Exhibit X.1 in the case. The defendants contested their liability under this document; and among the various defences the preliminary defence raised was that the document upon which the plaintiffs sued being unstamped, the suit was not maintainable. Upon the preliminary issue the Trial Court

decided in favour of the defendants, and dismissed the suit.

The question in this appeal from the judgment of Mr. Justice Marten is whether the document in question is a 'Policy of Sea Insurance' within the meaning of the Indian Stamp Act (II of 1899) or it is merely a "letter of cover or engagement to issue a Policy of Insurance" within the meaning of the "General Exemptions" relating to Policies of Insurance in Art. 47 of Schedule I of the Indian Stamp Act. The learned Trial Judge is of opinion that the unstamped memorandum, Exhibit X-1, falls within the exemption; and if that view is right, it is clear that, as it is not stamped, and as no stamp can be now received in respect of it, the suit will be unmaintainable.

The whole question is whether the document in question satisfies the requirements of the definition of "Policy of Sea Insurance" within the meaning of the Indian Stamp Act. The document is worded thus: —

"Given in writing by the undersigned persons. To wit: That we accept the liability on goods shipped from the Port of Muscat in the boat Jeramprasad Tandel Ibram for Bombay Bunder. That liability is to exist up to the time the said goods have been discharged on the Bombay Bunder having passed any intermediate Ports. The insurance is accepted in accordance with the usage of English Policies without damage. The amount is to be paid within six months from the date of the loss deducting therefrom discount at the rate of 20 per cent. Through brcker Tha: Dewkaran. The signatures are to be duly affixed to the stamped *pakka* (*i. e.*, formal) policy.

The risk undertaken by each of the executants is stated to be Rs. 3,750. The document is initialled by defendant No. 1 and another person whose legal representatives are on the record as defendants Nos. 2 to 4. This document definitely renders the executants liable for a certain sum for the insurance of the goods shipped by a particular boat and the period is definitely stated.

Under section 2, clause (20) of the Indian Stmp Act, a Policy of Sea Insurance means "any insurance made...upon any goods, merchandise or property of any description whatever on board of any ship or vessel..." The expression "Policy of Insurance" in the preceding clause is defined as including "any instrument by which one person, in consideration of a premium engages to indemnify another against loss, damage or liability arising from an unknown or contingent event." Assuming, without deciding, that the contract in question was entered into in consideration of a premium, it would be a Policy of Sea Insurance within the meaning of section 2 (20).

It is urged, however, on behalf of the respondents that in form it is only a Protection Note or a letter of cover and that the executants contemplated a formal policy to be drawn up later. It is, no doubt, true that the document does refer to a formal policy duly stamped to be prepared; and it may be said that in form it is not a Policy of Sea Insurance. But these considerations, in my opinion, are not decisive of the question as to whether the document in substance can be treated as a 'Policy of Sea Insurance' within the meaning of the Indian Stamp Act. It may be that some Protection Notes may in terms cover a period only up to a time when the formal policy should be drawn and in some cases it may be open to an insurer to refuse to issue the policy according to the terms of the Note. Such Protection Notes would clearly be within the scope of the General Exemption under Art. 47. It may also be that a document such as we have in the present case may be in form a letter of that nature; but if in substance and in terms it satisfies all the essential conditions of a 'Policy of Sea Insurance,' I do not see any reason why the plaintiffs should not get the benefit of that view of the document. If it is a Policy of Sea Insurance, it is open to the plaintiffs under section 35 (*a*) of the Indian Stamp Act to pay the necessary stamp with the prescribed penalty and to ask the Court to admit the document in evidence. If it is merely a letter of cover or engagement to issue a Policy of Insurance within the meaning of the exemption, he cannot do so, and the suit must undoubtedly fail. The nature of the document must really be determined with reference to the terms of a particular document without attempting to lay down any general test for distinguishing a Protection Note from a formal policy. It may be that the docu-

ment may in form appear to be a Protection Note; still, if in terms it satisfies the requirements of the definition of "Policy of Sea Insurance" within the meaning of the Indian Stamp Act, for the purpose of the Stamp Act it would be open to the party to contend that it is a Policy of Sea Insurance, and, as such, capable of being received in evidence subject to the payment of the stamp with the necessary penalty.

It is urged on behalf of the respondents that this document is merely a "contract for sea insurance," and that under section 7, sub-section (1), it cannot be valid unless it is expressed in a Sea Policy. But the "Sea Policy" or Policy of Sea Insurance is defined under section 2 (20), and if this document satisfies the requirements of that definition, I do not see why it should not be so treated. The essentials of a 'Sea Policy,' as indicated in section 7, sub-section (3), are present in this case. That being my view of the particular document, I think that it is admissible in evidence on payment of the necessary stamp and penalty.

I may refer to the case of *Marine Insurance Certificate, In re* (1). It was a decision under the Stamp Act of 1879. The provisions of that Act were different from those of the Act of 1891 bearing on this point. It is, however, an instance in which the certificate of insurance, which contemplated in terms an exchange for a duly stamped policy, was treated as a Policy of Insurance within the meaning of the Indian Stamp Act of 1879.

On behalf of the respondents reliance is placed upon the decision in *Home Marine Insurance Co.* v. *Smith* (2). That case went up in appeal and the judgment of the Court of Appeal is reported as *Home Marine Insurance Co.* v. *Smith*(3). It would appear that in that particular case the document was held to be invalid as a policy, not because a letter of cover could never be a policy, but that the particular document lacked one of the essentials mentioned in section 95 (3) of the Statute of 1891 (54 & 55 Vic. c. 39). It is true that no opinion was expressed that but for that defect it would be a Policy of Sea Insurance. But the *ratio decidendi* in that case suggests that if it otherwise satisfied the requirements of sub-section (3) of section 95 of that Statute to which section 7, sub-section (3), of the Indian Stamp Act of 1879 corresponds, it might have been held to be a Sea Policy. At any rate, the weight to be attached to the judgment of Mathew, J., in that case is very much reduced by the line of reasoning adopted by the Court of Appeal.

The document before us is not subject to any such infirmity.

I think that initialling is sufficient to indicate the names within the meaning of section 7 (3). At any rate, it is not suggested in this case that the initialling is not sufficient. In the case of *Home Marine Insurance Company* v. *Smith* (2) the document was merely initialled, and though in the arguments in the Appeal Court this circumstance was mentioned, there is no reference to it in the judgments. Personally I see no reason in this case why it should not be held to satisfy the requirements of section 7 (3). The document in question, it seems to me, satisfies, though not in form but in substance, the requirements of the definition of the Policy of Sea Insurance. Therefore, it is open to the plaintiffs, on payment of the necessary penalty, to tender the document in evidence. I may add that the scheme of the provisions on this point in the Indian Stamp Act appears to correspond to a large extent to the scheme in the English Statute of 1891; and it may be that the intention of the Legislature was to render such documents inadmissible unless expressed in the form of a regular policy except for the limited purpose of obtaining a proper policy. But, in my opinion, the definition in the Act leaves room for the view which I have taken; and unless the definition of section 7 is amended, I do not see how such a document could be excluded from its scope.

In this view of the matter, I would allow the appeal, reverse the decree of the Trial Court and remand the case for decision on the remaining issues subject to

(1) 19 B. 130; 10 Ind. Dec. (N. S.) 87 (F. B.).

(2) (1898) 1 Q. B. 829; 8 Asp. M. L. C. 386; 3 Com. Cas. 172; 67 L. J. Q. B. 554; 78 L. T. 465; 14 T. L. R. 366.

(3) (1898) 2 Q. B. 351; 67 L. J. Q. B. 777; 78 L. T. 734; 14 T. L. R. 459; 46 W. R. 661; 8 Asp. M. L. C. 408.

the plaintiffs' paying the necessary stamp and penalty in respect of this document. I may add that for the purpose of this judgment we have assumed that there was a payment of premium by the plaintiffs as alleged by them. That is a point in dispute between the parties. It will be open to the Trial Court to consider this question of fact as also to consider its effect upon the contract in question.

Respondents to pay the costs of this appeal.

Costs in the Trial Court to be costs in the suit.

CRUMP, J.—I concur.

R. M.

Appeal allowed.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 5 OF 1921.

April 1, 1921.

Present:—Mr. Daniels, A. J. C., and Mr. Lyle, A. J. C.

SANGAT BAKHSH SINGH—DEFENDANT—APPELLANT

versus

RAWAT DIJDEO BAKHSH SINGH—PLAINTIFF—RESPONDENT.

Appeal—Court Fees Act (VII of 1870), s. 7 cl. (ix), Sch. I, Art. 1—'Suit,' whether excludes "appeal"—Mortgage—Foreclosure and redemption suits—Court-fee payable on memorandum of appeal.

Court-fees are payable not on suits or on appeals but on documents which are filed, exhibited or recorded in Courts in accordance with section 6 of the Court Fees Act. [p. 969, col 2.]

The provisions of section 7 of the Court Fees Act are applicable equally to appeals as to original suits and the word 'suit' in section 7 of the Act is not used in contradistinction to the word 'appeal.' [p. 969, col. 2.]

A reference to section 17 of the Court Fees Act shows that the word "suit" is not used in the Act in contradistinction to "appeal." [p. 969, col. 2.]

Gumani v. *Banwari*, 54 Ind. Cas. 733; 22 O. C. 280; 7 O. L. J. 176, followed.

Neipal Rai v. *Debi Prasad*, 27 A. 447; 2 A. L. J. 105; A. W. N. (1905) 40, dissented from.

It does not, however, follow from this view of the law that where plaints are chargeable under clause (*ix*) of section 7 read with Art. 1 of the First Schedule of the Court Fees Act the memoranda of appeal filed against decrees passed in such suits are invariably chargeable in the same manner. [p. 969, col. 2.]

A suit may change its nature in appeal and though the original suit may be for redemption or foreclosure there may be no question raised in appeal as to the right to redeem or foreclose and the appeal may be merely in respect of the amount which the Court of first instance has held to be payable. In such a case the suit in appeal would clearly not be a suit falling within the provisions of clause (*ix*) of section 7 and the amount or value of the subject-matter in dispute would not be computed in accordance with the provisions of that clause but would be a specified sum, the Court-fee payable on which would be *ad valorem* in accordance with the provisions of Art. 1 of Schedule I of the Act. [p. 970, col. 1.]

Ram Lakhan Rai v. *Bandan Rai*, Legal Remembrancer, Vol. I, p. 162, referred to.

If a suit for redemption or foreclosure is dismissed, the Court-fee payable by the plaintiff-appellant on his memorandum of appeal ought to be computed in accordance with the provisions of clause (*ix*) of section 7 of the Court Fees Act, that is, according to the principal money expressed to be secured by the instrument of mortgage. [p. 970, col. 2.]

If a suit to redeem is decreed and the defendant-appellant merely challenges the right to redeem, the Court-fee payable on the memorandum of appeal ought also to be computed in accordance with the provisions of clause (*ix*) of section 7 of the Court Fees Act. [p. 970, col. 2.]

If a suit to redeem or foreclose is decreed and the plaintiff or the defendant in appeal merely challenges the amount to be paid or received without questioning the right to redeem or foreclose, the Court-fee payable on the memorandum of appeal will be on the subject-matter in dispute, that is, on the additional amount claimed or the amount in respect of which the appellant seeks to avoid liability. [p 970, col. 2.]

Where in a foreclosure suit a decree is passed for a certain sum in default of payment of which within a fixed time the property shall be foreclosed and the defendant in appeal denies the plaintiff's right to foreclose on the ground that he is not liable to pay any portion of the sum decreed, the Court-fee payable on the memorandum of appeal ought to be calculated *ad valorem* on the subject-matter in dispute according to Art. 1 of Schedule I, that is, on the amount of the decree the payment of which the defendant by his appeal seeks to avoid. [p 970, col. 2.]

Where a decree is passed for redemption on payment of a certain sum and in appeal the defendant not only denies the plaintiff's right to redeem but in the alternative claims that if he be entitled to redeem he can do so only on payment

of a larger sum than that fixed by the Court of first instance, the Court-fee ought to be paid on the relief which is liable to pay the higher fee; on the former the fee would be computed in accordance with the provisions of clause (*ix*) of section 7 read with Art. 1 of Schedule I and on the latter, the Court-fee would be *ad valorem* on the difference between the amount found due by the lower Court and that claimed by the appellant. [p. 971, col. 1.]

Kashinath Narayan v. *Govinda*, 15 B. 82; 8 Ind. Dec. (N. S.) 56 and *Lachhman Singh* v. *Bahadur Singh*, 22 Ind. Cas. 642; 16 O. C. 354, referred to.

Appeal against a decree of the Subordinate Judge, Rai Bareli, dated the 31st August 1920.

Mr. *Rajeshwari Prasad*, for the Appellant.

Mr. *Ali Mohammad*, for the Respondent.

JUDGMENT.—This is an appeal in a foreclosure suit. The plaintiff claimed Rs. 29,319-11-4 on the basis of two mortgage-deeds and two deeds of further charge. He was given a decree for Rs. 14,684 13 8 under O. XXXIV, r. 2 of the First Schedule to the Code of Civil Procedure, the amount due on the two mortgage-deeds and one of the deeds of further charge. The defendant is the appellant in this Court. In his grounds of appeal he claims that the suit is barred by limitation, challenges the validity of the deed of further charge and alleges that the entire mortgage-debt has been paid off from the usufruct of the property. He has paid Court fee only on the principal amount secured by the mortgage-deeds. The office has reported that the fee paid is insufficient and that it should have been paid on the whole amount in respect of which the appellant seeks to avoid liability.

The question as to the Court-fees payable in appeals in redemption or foreclosure suits has been the subject of much discussion. It has been held in the case of *Nepal Rai* v. *Debi Prasad* (1) that clause (*ix*) of section 7 of the Court Fees Act is applicable to suits only and not to appeals and this ruling was accepted as good law in *Reference under the Court Fees Act*, 1870 (2). In the latter ruling the learned Chief Justice based his opinion on the fact that sub section (*e*) of clause (*iv*) of section 7 specially provides for a memorandum of appeal while there is no such provision in clause (*ix*) of that section and also on the fact that section 16 which has since been repealed seemed to show that the general policy of the Legislature was to make the value of the subject-matter in dispute in appeal the criterion for the purpose of computing the fee. With the greatest respect we find ourselves unable to accept this view of the law. The question has already been discussed by a Single Judge of this Court in *Gumani* v. *Banwari* (3), and we are in full agreement with the view taken by the learned Judge in that case that the provisions of section 7 of the Court Fees Act are applicable equally to appeals as to original suits and that the word suit in section 7 of the Act is not used in contradistinction to the word appeal. Court-fees are payable not on suits or on appeals but on documents which are filed, exhibited or recorded in Courts in accordance with section 6 of the Court Fees Act. Section 7 of the Court Fees Act merely provides that the fees payable in suits of the nature specified in the section shall be computed in the manner prescribed. But in order to determine the actual amount of the fees payable on any plaint or memorandum of appeal in any such suit it is necessary to refer to Art. 1 of Schedule I of the Act. The words "not otherwise provided for in this Act" in that Article seem to apply to special provisions for plaints or memoranda of appeal made in other Articles of the Schedule. A reference to section 17 of the Act shows clearly that the word "suit" is not used in the Act in contradistinction to "appeal." Section 17 provides that where a suit embraces two or more distinct subjects the plaint or memorandum of appeal shall be chargeable with the aggregate amount of the fees to which the plaints or memoranda of appeal in suits embracing separately each of such subject would be liable under the Act. It does not, however, follow from this view of the law that where plaints are chargeable under clause (*ix*) of section 7 read with Art. 1 of the First Schedule of the Court Fees Act the memoranda of appeal filed against decrees passed in such suits are invariably chargeable in the same manner.

(1) 27 A. 447; 2 A. L. J. 105; A. W. N. (1905) 40.
(2) 29 M. 367; 16 M. L. J. 287.
(3) 54 Ind. Cas. 783; 22 O. C. 289; 7 O. L. J. 176.

As has been pointed out in the case of *Ram Lakhan Rai* v. *Bandan Rai* (4) and in *Mohammad Husain* v. *Syed Jahan Begam* (5) a suit may change its nature in appeal and though the original suit may be for redemption or foreclosure there may be no question raised in appeal as to the right to redeem or foreclose and the appeal may be merely in respect of the amount which the Court of first instance has held to be payable. In such a case the suit in appeal would clearly not be a suit falling within the provisions of clause (*ix*) of section 7, and the amount or value of the subject matter in dispute would not be computed in accordance with the provisions of that clause but would be a specified sum, the Court-fee payable on which would be *ad valorem* in accordance with the provisions of Art. 1 of Schedule I of the Act. And in a suit on a mortgage for foreclosure the decree granted to the plaintiff is a decree for the payment of a specific sum in default of payment of which within a certain time the mortgaged property will be foreclosed. If the defendant in appeal denies the plaintiff's right to a decree on the ground that he is not liable to pay any portion of the amount decreed the suit in appeal becomes in effect a suit to avoid the payment of a specific sum and the Court-fee payable on the memorandum of appeal would, therefore, be calculated *ad valorem* on the subject-matter in dispute according to Art. 1 of Schedule I.

Again an appeal against a decree for redemption may not only deny the plaintiff's right to redeem at all but may also in the alternative claim that he is entitled to redeem only on the payment of a much higher sum than that found by the lower Court. In such a case the memorandum of appeal asks for two alternative reliefs on one of which the Court-fee would be computed according to the principal money expressed to be secured by the instrument of mortgage and on the other would be an *ad valorem* fee in accordance with the povisions of Art. 1 of Schedule I of the Act and the Court-fee payable on the memorandum of appeal would be on the higher of the two alternative reliefs as held in *Kashinath Narayan* v. *Govinda* (6), which was followed by a Single Judge of this Court in *Lachhman Singh* v. *Bahadur Singh* (7). These considerations lead us to conclusions which may be tabulated as follows:—

(1) If a suit for redemption or foreclosure has been dismissed the Court-fee payable by the palintiff-appellant on his memorandum of appeal will be computed in accordance with the provisions of clause (*ix*) of section 7 of the Court Fees Act, that is, according to the principal money expressed to be secured by the instrument of mortgage. In such a case clearly the suit has not changed its nature in appeal.

(2) If a suit to redeem has been decreed and the defendant-appellant merely challenges the right to redeem, the Court-fee payable on the memorandum of appeal will be computed in accordance with the provisions of clause (*ix*) of section 7 of the Court Fees Act. Here again there is no change in the nature of the suit.

(3) If a suit to redeem or foreclose has been decreed and the plaintiff or the defendant in appeal merely challenges the amount to be paid or received without questioning the right to redeem or foreclose, the Court-fee payable on the memorandum of appeal will be on the subject-matter in dispute, that is, on the additional amount claimed or the amount in respect of which the appellant seeks to avoid liability. In this case the suit has clearly changed its nature in appeal, and is no longer a suit falling within the provisions of clause (*ix*) of section 7 of the Act.

(4) Where in a foreclosure suit a decree has been passed for a certain sum in default of payment of which within a fixed time the property shall be foreclosed and the defendant in appeal denies the plaintiff's right to foreclose on the ground that he is not liable to pay any portion of the sum decreed, the Court-fee payable on the memorandum of appeal will be calculated *ad valorem* on the subject-matter in dispute according to Art. 1 of Schedule I, that is, on the amount of the decree the payment of which the defendant by his appeal seeks to avoid. In this case the suit has clearly changed its nature in appeal and has become a suit to avoid the payment of a specific sum.

(4) Legal Remembrancer, Vol. I, p. 162.
(5) 2 O. C. 87.
(6) 15 B. 52; 8 Ind. Dec. (N. S.) 56.
(7) 22 Ind. Cas. 642; 16 O. C. 254.

(5) Where a decree has been passed for redemption on payment of a certain sum and in appeal the defendant not only denies the plaintiff's right to redeem but in the alternative claims that if he be entitled to redeem he can do so only on payment of a larger sum than that fixed by the Court of first instance, the Court-fee will be paid on the relief which is liable to pay the higher fee; on the former the fee would be computed in accordance with the provisions of clause (*ix*) of section 7 read with Art. 1 of Schedule I, and on the latter the Court-fee would be *ad valorem* on the difference between the amount found due by the lower Court and that claimed by the appellant.

Though the reasoning in some cases is different this construction of the Act does not appear to be in conflict with any of the reported rulings of this Court or indeed with the view now accepted in the Allahabad, Madras and Bombay Courts. The case before us falls within the fourth class of the cases mentioned above and the defendant is, therefore, liable to pay Court-fees on the amount the payment of which he seeks to avoid.

We accordingly direct that the appellant make good the deficiency of Rs. 250 within three weeks. If the deficiency is made good a date will be fixed for hearing. If it is not made good the appeal will be put up for orders on the 25th April.

N. H. *Order accordingly.*

MADRAS HIGH COURT.
FULL BENCH.
SECOND CIVIL APPEAL No. 15 OF 1920.
May 9, 1921.
Present:—Sir John Wallis, KT., Chief Justice, Mr. Justice Spencer and Mr. Justice Kumaraswami Sastri.
THE SECRETARY OF STATE FOR INDIA IN COUNCIL, REPRESENTED BY THE COLLECTOR OF NORTH ARCOT—DEFENDANT—APPELLANT
versus
Syed AHMED BADSHA SAHIB BAHADUR—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 11—Evidence Act (I of 1872), ss. 40, 41, 42, 43—Judgment not inter partes, *plea of, in bar to subsequent suit—Judgments* in rem *and* in personam, *scope and effect of—Succession to hereditary office, how determined in absence of special usage.*

Plaintiff sued his brother and brother's son for a declaration that he was entitled to the *Asari Sheriff* office and its emoluments and for an injunction restraining the defendants from interfering with his enjoyment of the office. The suit was dismissed owing to the plaintiff's failure to prove his title. In the present suit by plaintiff against the Government for recovery of a specific amount due to him as the holder of the office:

Held, that it was open to the plaintiff to re-assert his title although the same was definitely negatived in the previous suit. [p. 977, col. 1.]

Srinivasa Aiyangar v. *Arayar Srinivasa Aiyangar*, 6 Ind. Cas. 229; 33 M. 483; 8 M. L. T. 33; 20 M. L. J. 546; (1910) M. W. N. 479 and *Sayam Ramamoorthi Dhora* v. *Secretary of State for India in Council*, 19 Ind. Cas. 656; 36 M. 141; 24 M. L. J. 469, overruled.

Authorities reviewed.

Distinction between judgments *in rem* and *in personam*, their scope and effect discussed.

Per *Wallis, C. J.*—The effect of section 11 read with section 9, Civil Procedure Code, is to preclude the Court from refusing to try a suit or issue which was not between the same parties but between one of such parties and a third person. [p 976, col 1.]

Per *Kumarasumi Sastri, J.*—In cases where there is no bar under section 11, Civil Procedure Code, the Court has to try the issue and if the judgment in the prior suit is filed for the purpose of proving the plaintiff's claim or for the purpose of proving the defence to the action, it is only relevant as a piece of evidence, the probative value of which is regulated by the provisions of the Evidence Act. [p 978, col. 2.]

It is not permissible to travel outside the provision of section 11, Civil Procedure Code, and apply the rule of *res judicata* to cases falling outside the limitation imposed by the section [p. 980, col. 1.]

Where a judgment *in personam* is pleaded, its legal effect and probative force will depend on the facts of each case:

Held, by the Divisional Bench (per *Wallis, C. J.* and *Krishnan, J.*)—In the absence of evidence to the contrary or a special usage, succession to a hereditary office which cannot be enjoyed by several heirs in common, is by lineal primogeniture. [p. 982, col. 1.]

Second appeal against a decree of the Court of the Subordinate Judge, North Arcot, in Appeal Suit No. 186 of 1917, preferred against the decree of the Court of the District Munsif of Ranipet in Original Suit No. 217 of 1916.

ORDER OF REFERENCE TO A FULL BENCH.

NAPIER, J.—(*October* 13, 1920).—The question which arises in this appeal is one of estoppel by a previous judgment. The suit was by one Syed Ahmad against the Secretary of State to recover a sum of Rs. 394 alleged to be due to the plaintiff as a person entitled to possess the Asari Sheriff and

perform the services connected therewith and to receive from Government the emoluments granted by Government to the person so entitled. The defendant pleaded that the plaintiff was not entitled to the office, his claim having been negatived by the judgment of the High Court in Second Appeal No. 726 of 1913 and also that the suit was barred by the rule of *res judicata*.

The issue framed was : "whether the plaintiff's right to the office in question is concluded by reason of the decree in Second Appeal No. 726 of 1913 on the file of the High Court." The suit in that case was by the present plaintiff against two other persons alleging that the plaintiff was entitled to perform the Asari Shariff services and to recover annually the emoluments of Rs. 394 from Government without any objection by the defendants. The 2nd defendant was recognised by Government as the person entitled to the emoluments. The Court of the Subordinate Judge of North Arcot on appeal from the District Munsif in that suit held against the plaintiff's right. It pointed out that the plaintiff did not claim the office by appointment either by Government or by the last holder of the office but only according to the Muhammadan Law of Succession to private property, and held that that law did not apply and that, therefore, the plaintiff had no title. In the second appeal to the High Court the judgment states as follows :—It being clear that the plaintiff has no title to the office, the declaration of title which was the principal relief claimed in the suit, his suit brought for that relief and other subsidiary relief was rightly dismissed by the lower Appellate Court."

Dealing with the second issue in this case the District Munsif held that it was no longer open to him now to sue to recover the emoluments appertaining to the office, he being concluded by reason of the prior judgment. The lower Appellate Court, however, held that the decision in the former suit did not operate as *res judicata*.

It must first be pointed out that no suggestion is made in this suit that the plaintiff's suit was barred under section 11, Code of Civil Procedure. This contention could not have been raised as the defendants in the prior suit were different. But the lower Appellate Court is in error in supposing that this disposes of the question. It is contended that the judgment in the prior suit disposed of his claim and that the plaintiff cannot raise this question in another form. This proposition is established in the case of *Srinivasa Aiyangar* v. *Arayar Srinivasa Aiyangar* (1) entirely apart from any question of section 11. The Bench there accepted the proposition that the relation established between the parties by a judgment is conclusive against third persons in the absence of fraud upon them. The prior suit having been between a person put forward by Government and the plaintiff, the decision as to title between them is binding on the defendant in this suit and must, therefore, be binding on the plaintiff on the well-known principle that estoppels must be mutual assuming always that the case in *Srinivasa Aiyangar* v. *Arayar Srinivasa Aiyangar* (1) is rightly decided.

The same proposition was laid down in the case of *Snyam Ramamoorthi Dhora* v. *Secretary of State for India in Council* (2). There, the Bench adopted the view expressed in an unreported case, Second Appeal No. 574 of 1909, and re-stated the same proposition as was there laid down. On page 144* the learned Judges say : "The question does not depend on the application of the doctrine of *res judicata* between the parties as expounded in section 13, Code of Civil Procedure (old Code). That section does not cover all cases of estoppel by judgment." On page 143* they say : "The question relating to the ownership of the land was one entirely between the plaintiffs and the Barikis ; and the Barikis having obtained judgment against the plaintiffs, third parties having no interest in the land at the time of the litigation cannot dispute the settlement of the dispute between them as to title, and it appears to us to be equally true that neither of the parties to the litigation can be permitted to aver as against third persons in the like position that the land belongs to himself and not to his opponent in the litigation." This judgment, again, if correct, is conclusive of the plaintiff's claim.

It is suggested that these cases were wrongly decided and reliance is placed on

(1) 6 Ind. Cas. 229; 33 M. 483; 8 M. L. T. 33; 20 M. L. J. 546; (1910) M. W. N. 479.

(2) 19 Ind. Cas. 656; 36 M. 141; 21 M. L. J. 463.

*Page of 36 M.—[*Ed.*].

the judgment of the learned Chief Justice and another learned Judge in Second Appeal No. 1747 of 191 . The Court there says that the grounds on which *Sayam Ramamoorthi Dhora* v. *Secretary of State for India in Council* (2) was decided were questioned in a judgment of the Calcutta High Court in *Peari Mohan Shaha* v. *Durlavi Dassya* (3) and the Court agreed with the view therein taken. The Court also refers to the judgment of the Privy Council in *Gokul Mandar* v. *Pudmanund Singh* (4) as laying down that the provisions of section 11, Civil Procedure Code, are exhaustive. With the greatest deference to the learned Chief Justice and the other learned Judge, I think that the language of the Board has been misconstrued. I do not think the Board ever intended to lay down that there was no such thing as an estoppel by judgment outside the Civil Procedure Code. I have elsewhere in *Raja of Ramnad* v. *Ramanathaswami* (5) expressed my opinion that under the Civil Procedure Code the question is not strictly one of estoppel and that therein lies the distinction between *res judicata* in India and before the Courts in England. Under the Code the Court is prohibited from trying any issue in which the matter directly and substantially in issue has been heard and finally decided by a previous Court. The section operates to bar the jurisdiction of the Court to try and goes far further than the principle under which a party is estopped from offering evidence on an issue. Dealing with this question of want of jurisdiction to try a case the Board pointed out that the first Court must have jurisdiction to try the suit in which the issue is subsequently raised and that the words of the section could not be extended beyond their provision. I cannot read the words of the Board as meaning to lay down that consent decrees, decrees by default and other judgment in which the question at issue has not been heard and decided cannot be pleaded as estoppels. In *South American, Mexican Co., In re, Bank of England, Ex parte* (6) Lord Herschell delivering the judgment of the Court of Appeal stated with regard to a judgment by consent that it "is intended to put a stop to litigation between the parties just as much as a judgment which results from the decision of the Court after the matter has been fought out to the end." Therefore, I cannot think that the Board intended to lay down that there can be no estoppel by judgment outside the Civil Procedure Code.

In *Peari Mohan Shaha* v. *Durlavi Dassya* (3) Jenkins, C. J., and Mockerjee, J. seem to have thought that they were bound by the decision of the Privy Council in *Gokul Mandar* v. *Pudmamund Singh* (4), on the subject of *res judicata* to hold that no estoppel by judgment could be pleaded. But they held that the previous judgment was cogent evidence against an assignor of one of the parties to the previous suit. In this case the person whom it is sought to bind is not an assignee who would of course be bound by section 11 or an assignor, but the actual party himself. I cannot, therefore, agree that what was decided in that case is any authority against the weight of the decisions in *Srinivasa Aiyangar* v. *Arayar Srinivasa Aiyangar* ( ) and *Sayam Ramamoorthi Dhora* v. *Secretary of State for India in Council* (2).

Reliance was placed by the respondent on *Arumugha Mudaliar* v. *Krishnasami Naicken* (7). In that case the correctness of the doctrine laid down in *Suppa Bhattar* v. *Suppu Sokkaya Bhattar* (8), was considered. But that seems to me to have no bearing on the question raised here. It seems to me that the only answer to the reported decisions in *Srinivasa Aiyangar* v. *Arayar Srinivasa Aiyangar* (1), *Sayam Ramamurthi Dhora* v. *Secretary of State for India in Council* (2) is the suggested effect of dictum of the Privy Council referred to by the learned Chief Justice. I venture to think that it in no way lays down anything at variance with the effect of estoppel by judgment outside *res judicata*. But as it has been doubted and as the question is, in my opinion, one of great importance, I would refer the matter to a Full Bench, the question referred being whether, in the circumstances

(3) 20 Ind. Cas. 815; 18 C. W. N. 954; 19 C. L. J. 441.

(4) 29 C. 707; 29 I. A. 196; 6 C. W. N. 825; 4 Bom. L. R. 793; 8 Sar. P. C. J. 323 (P. C.).

(5) 63 Ind. Cas. 205; 29 M. L. T. 322; 44 M. 514; 41 M. L. J. 288.

(6) (1895) 1 Ch. 37; 12 R. 1; 71 L. T. 594; 43 W. R. 131; 63 L. J. Ch. 803.

(7) 42 Ind. Cas. 498.

(8) 30 Ind. Cas. 962; (1915) M. W. N. 829; 2 L. W. 1005; 29 M. L. J. 658; 18 M. L. T. 402.

of this case, it is open to the plaintiff to re-assert a title which was definitely negatived in a previous suit against a contesting claimant.

KRISHNAN, J.—The first question argued before us is the one raised in issue No. 3 whether the plaintiff's right to the office of Asari Sheriff and its emoluments is concluded against him by reason of the decision in the prior litigation between him and his nephew, Syed Kadir Badsha Sahib, which ended in Second Appeal No. 726 of 1913. In that second appeal it was decided that plaintiff had no title to the office. The Government contend in this suit that Badsha Sahib is the proper office-holder entitled to the Yeomiah allowance attached to the office and not the plaintiff, and that the question of title to the office is *res judicata* between him and the plaintiff and that they are entitled to rely on the plea in this suit and the plaintiff cannot re-open the question.

For this contention of the Government reliance is placed by the learned Government Pleader on the rulings in *Srinivasa Aiyangar* v. *Arayar Srinivasa Aiyangar* (1), *Boyinapalli Venugopal Rao Garu* v. *Nekkalapudi Venkatrayudu* (9), *Sayam Ramamoorthi Dhora* v. *Secretary of State for India in Council* (2) and *Suppu Bhattar* v. *Suppu Sakkaya Battar* (8) which are in his favour. But on the other side our attention has been drawn to the case in *Peari Mohon Shaha* v. *Durlavi Dasiya* (3) and the unreported judgment of the learned Chief Justice and Seshagiri Aiyar, J. in Second Appeal No. 1747 of 1919, both of which dissent from the view expressed on the point in the case cited by the Government Pleader. In this state of conflict of authorities, I agree to the reference of the question to a Full Bench.

In doing so, I would point out that the plea raised here is, in my opinion, not really that the issue as to plaintiff's title is *directly res judicata* between him and the Government but that it is *res judicata* between him and the person whose title the Government is setting up and that the Government is entitled to rely on that plea in establishing that title and defeating the plaintiff's claim. In other words, we have here a plea of *jus tertii* and when such a plea is raised the question of title or the *jus* set up has to be decided as if it arose between the party against whom it is set up and the *tertius* or third party. In such a case, it seems to me that the person setting up the *jus tertii* is entitled to rely on all pleas that would have been available to the third party to prove his title whether it be one of estoppel by *res judicata* or otherwise. Similarly, he will also be bound by all pleas available against that third party. Even admissions made by that party could be relied on against him.

The question, therefore, in cases like the present is not in the first instance a question of *res judicata* between the parties to the subsequent suit but a question of what pleas a party is entitled to set up when he pleads *jus tertii*. On raising the plea of *res judicata* between the *tertius* and the opposite party he must show that the plea is well founded between them under section 11, Code of Civil Procedure, before he can succeed. I do not think it is necessary to pray in aid any principle of *res judicata* outside the scope of section 11, Code of Civil Procedure, in this case. To do so would be against the opinion expressed by the Privy Council in *Gokul Mandar* v. *Pudmanund Singh* (4) and is not justifiable. So far as the plea involves the question of *res judicata* between plaintiff and Badsha that question must be decided under section 11 itself. If the *res udicata* pleaded is established under section 11 the next question will be whether the defendant can rely on it against the plaintiff; and that is not a question governed by section 11 at all but by considerations of what pleas are available to a person setting up a *jus tertii* under the general law. It seems to me that confusion arises in not keeping the two parts of the question distinct and separate. If the Government were not setting up a *jus tertii* but were only pleading that the finding in the former suit was *res judicata directly* between them and the plaintiff against the plaintiff's title without admitting and setting up Badsha's title it would be difficult to support their contention as they were not parties to the previous litigation nor can they be said to claim under any of those parties. The finding clearly does not bind them of its own force and they cannot take advantage of it *simpliciter*. It is only so far as they set up

(9) 12 Ind. Cas. 715; 19 M. L. T. 450.

the third party's title that the plea of *res judicata* is available for or against them.

As the matter will be fully argued before the Full Bench, I have only briefly indicated my view; it will reconcile the earlier rulings of this Court with the dictum of the Privy Council.

Mr. *C. Madhavan Nair*, the Government Pleader, for the Appellant.—The right to the office now set up by the plaintiff and in respect of which he claims emoluments from Government was distinctly negatived in a prior suit that he instituted for the office against his brother and brother's son. The present claim is barred. Reference was made to *Srinivasa Aiyangar* v. *Arayar Srinivasa Aiyangar* (1) and *Sayam Ramamoorthi Dhora* v. *Secretary of State for India in Council* (2).

Messrs. *C. Varadachariar* and Mr. *S. Rangachariar*, for the Respondent.—The Government was not a party to the previous suit. The statutory bar of *res judicata* is contained in section 11, Civil Procedure Code. It is not permissible to introduce any other bar not covered by the Statute. Though the prior judgment might be used in evidence, it is certainly not conclusive. The cases in *Srinivasa Aiyangar* v. *Arayar Srinivasa Aiyangar* (1) and *Sayam Ramamoorthi Dhora* v. *Secretary of State for India in Council* (2) have been wrongly decided and require re-consideration. See Second Appeal No. 1747 of 1919 (unreported) and *Peari Mohan Shaha* v. *Durlavi Dassya* (3).

OPINION.

WALLIS, C. J.—The question is whether the plaintiff is estopped from bringing this suit against Government to recover the emoluments attached to the office of *mutawalli* of the suit Wakf, an office which he now alleges to be descendible by usage to the nearest qualified male heir of the last holder of the office, by reason of the dismissal of the previous suit instituted by him against his elder brother, the then first defendant, and that brother's son, the then second defendant, for a declaration that their father's Will nominating such second defendant and the plaintiff's own son to succeed him in the office was invalid, and that the plaintiff by reason of his elder brother's insanity was entitled to succeed to the office and its emoluments and for an injunction restraining them from interfering with him. The suit was dismissed in second appeal by the High Court which held that the plaintiff had clearly no title to the office and that the appeal had been rightly dismissed by the lower Appellate Court. The lower Appellate Court held that, in the absence of any special provision or usage, the office devolved on the nominee of the last *mutawalli*, and declined to allow the plaintiff to set up a case of usage which had been abandoned in the lower Court and which was not proved. In the present case the plaintiff has pleaded that he is entitled to succeed by the usage of the institution, and the defendant, whilst admitting that the plaintiff's father was "an hereditary holder of the Yeomiah allowance," has denied the plaintiff's right and also relied on the decree in the previous suit as barring the present suit.

As regards the general question, our decision should, in my opinion, be based on the provisions of the Civil Procedure Code and the Evidence Act and on the English Law on which they are founded. The Privy Council in *Imambandi* v. *Mutsaddi* (10) has deprecated the practice of referring to foreign decisions and observed that the judgments of foreign Courts based often on considerations and conditions totally differing from those applicable or prevailing in India are only likely to confuse the administration of justice, and the warning is specially applicable with regard to subjects which are dealt with in Indian Codes based on English precedents.

In England, as observed in Roscoe's Nisi Prius, page 190 "the judgment of a Court of concurrent jurisdiction directly upon a point is, as a plea, a bar, and, as evidence, conclusive upon the same matter between the same parties," and he goes on to explain that it is conclusive (as an estoppel) where there is an opportunity of pleading it; but that, where there is no such opportunity it is conclusive as evidence. In India section 40 of the Evidence Act makes a previous judgment relevant on the question whether it by law prevents the Court from taking cognizance of a suit or holding a trial. The law which prevents the Court from

(10) 47 Ind. Cas. 513; 45 C. 878; 35 M. L. J. 422; 16 A. L. J. 800; 24 M. L. T. 330; 28 C. L. J. 409; 23 C. W. N. 50; 5 P. L. W. 276; 20 Bom. L. R. 1022; (1919) M. W. N. 91; 9 L. W. 518; 45 I. A. 73 (P. C.).

taking cognizance of a suit or holding a trial is to be found in section 11 of the Code of Civil Procedure, which only prohibits the trial of a suit or issue which has been directly and substantialy in issue in a former suit between the same parties or "between parties under whom they or any of them claim, litigating under the same title." Now, the effect of this section read with section 9, in my opinion, is to preclude the Court from refusing to try a suit or issue which was not between the same parties but between one of such parties and a third person, because, as observed by the Privy Council in *Gokul Mandar* v. *Padmanund Singh* (4) "the essence of a Code is to be exhaustive on matters in respect of which it declares the law, and it is not the province of a Judge to disregard or to go outside the letter of the enactment according to its true construction." It is true that, as held by the Privy Council in *Ram Kirpal* v. *Rup Kuari* (11) and in a very recent case of *George Henry Hook* v. *Administrator General of Bengal* (12), this section is not to be read as entitling a party to re-agitate a matter decided at an earlier stage of the same suit; and it is also true that it does not prevent consent decrees from operating as an estoppel; but it does, in my opinion, prevent the Court from refusing to try suits or issues by reason of previous judgments not between the same parties, a sort of estoppel unknown to English Law especially as the Evidence Act closely following the English Law contains express provisions as to the general effect of previous judgments in evidence. Section 41 makes certain judgments of a Court in the exercise of a Probate, Matrimonial, Admiralty or Insolvency jurisdiction not only relevant but conclusive evidence of certain matters. Having dealt with such judgments, which are usually known as judgments *in rem*, the Act goes on to deal with other judgments generally known as judgments *in personam*, and provides in section 42 that they are "relevant if they relate to matters of a public nature relevant to the inquiry," but are not conclusive proof of what they state, and in section, 43 that all other judgments are irrelevant unless the existence of such judgment is a fact in issue or relevant under some other provision of this Act, and under those other provisions the judgment may be relevant but cannot be conclusive in law though it may in fact. Thus in *Brew* v. *Haren* (13) and *Brew* v. *Haren* (14) where the question was whether the plaintiff was the owner of the foreshore, the facts that he had successfully prevented people from taking seaweed from the shore and that he had instituted a suit for trespass in which there was a reference to arbitration and an award in his favour were held evidence of ownership. Similarly, if in a suit where the previous judgment is not *res judicata* under section 11, Civil Procedure Code, a question should arise whether certain property belonged to *A* or *B* a judgment by which *A* had recovered possession on his title from *B* by a decree which had become final might be just as conclusive evidence as a conveyance from *B* to *A* irrespective of the question whether the previous judgment was right or wrong. A previous judgment between altogether different parties might even be conclusive in the same way as in *Rex* v. *Hebden* (15), the report of which in Selwyn's Nisi Prius Volume II, page 1136 is referred to both by Taylor and Roscoe. That was a *quo warranto* to try the defendant's right to be a bailiff of Scarborough. He relied on his election under two former bailiffs. The prosecution denied that they were bailiffs, and on this issue, tendered a judgment of ouster against the two bailiffs in question. On a motion for a new trial, it was held that the evidence was rightly admitted, the Court observing: "The defendant has made the title of Batty and Armstrong (the previous bailiffs) part of his right, and if he gives evidence of the right of their election, can that better be disproved than by a judgment of ouster wherein such election is declared to be void?" Reference may also be made to the provisions of the Specific Relief Act which expressly provides in section 43, that declaratory decrees made under section 42 shall not be binding except on the parties to the suit and those claiming under them.

(11) 6 A. 269; 11 I. A. 37; 4 Sar. P. C. J. 489; 3 Ind. Dec. (N. S.) 718 (P. C.).

(12) 60 Ind. Cas. 631; 48 I. A. 187; (1921) M. W. N. 312; 19 A. L. J. 366; 40 M. L. J. 423; 29 M. L. T. 336; 33 C. L. J. 405; 3 U. P. L. R. (P. C.) 17; 23 Bom. L. R. 618; 25 C. W. N. 915; 14 L. W. 221; 48 C. 499 (P. C.).

(13) (1874) 9 Ir. Com. L. R. 29.

(14) (1877) 11 Ir. Com. L. R. 198.

(15) (1738) Andr. 388; 95 E. R. 447.

As regards the present case, all that was decided in the previous suit was that the present plaintiff had not pleaded or proved in that suit that there was any special usage as to the descent of the office in question which would render the ordinary Muhammadan Law inapplicable. The previous judgment not being between the same parties does not, in my opinion, estop them from setting up such a special usage in the present suit against the present defendant who was no party to the suit. In *Srinivasa Aiyangar* v. *Arayar Srinivasa Aiyangar* (1) the learned Judges, relying on a passage in Mr. Bigelow's Treatise on the Law of Estoppel, adopt the rule that judgments *in personam* establishing the relations between parties are an exception to the general rule that judgment *in personam* bind only parties and their privies.

The judgment in *Sayam Ramamoorthi Dhora* v. *Secretary of State for India in Council* (2), after referring to some dicta of Lord Coke, which it is now admitted apply to judgments *in rem*, quotes the following extract from Bigelow: "If all who have a right to appear and be heard in a cause have been duly made parties, the judgment establishes a perfect and complete right against all as much as would a conveyance of a joint estate by all the parties interested. Judgment in an action strictly *in personam*, indeed, binds third persons in that way; all that is necessary is that all those who have the exclusive right to litigate the cause are proper parties to it, and that the question should be determined without collusion. Judgment that *A* is debtor of *B* is an example..... Indeed, the difference between judgments *in rem* and judgments *in personam* in our law, as regards their effect, appears at bottom to be only a difference of degree." However attractive this doctrine may appear to be, it is, in my opinion, opposed to the provisions of the Indian Evidence Act, which was not referred to either in this or the earlier decision, and, in my opinion, precludes the reception of the American rule in India. That rule is, in my opinion, in conflict with the provisions of our Statute Law. This is in effect the view taken by Jenkins, C. J., and Mookerjee, J., in *Peari Mohan Shaha* v. *Durlavi Dassya* (3).

I would, therefore, answer the question in the affirmative and overrule *Srinivasa Aiyangar* v. *Arayar Srinivasa Aiyangar* (1) and *Sayam Ramamoorthi Dhora* v. *Secretary of State for India in Council* (2).

SPENCER, J.—At the very commencement of the arguments I drew attention to sections 40, 41, 42 and 43 of the Indian Evidence Act which appeared to me to be exhaustive of the question of the relevancy of judgments other than those which operate as a bar to the trial of a suit or issue between the same parties or their privies under the law of *res judicata* contained in section 11 of the Civil Procedure Code. These sections of the Evidence Act have not been referred to in the Order of Reference or in the judgments of the two Courts below in dealing with the effect of the judgment in the prior suit (Original Suit No. 274 of 1911).

As regards the decisions in *Srinivasa Aiyangar* v. *Arayar Srinivasa Aiyangar* (1) and *Sayam Ramamoorthi Dhora* v. *Secretary of State for India in Council* (2) I agree with my Lord in thinking that they went too far in extending the principle of estoppel by judgment beyond the limits of our Codes of Procedure and Evidence, and that they should be overruled as being in contravention of the principles laid down by the Privy Council in *Gokul Mandar* v. *Pudmanund Singh* (4) for the interpretation of codified law and as being examples of the tendency, since deprecated by their Lordships in *Imambandi* v. *Mutsaddi* (10), of referring to foreign decisions.

With the exception of the above two decisions of this Court and the case in *Boyinapalli Venugopala Rao Garu* v. *Nekkalapudi Venkatrayudu* (9), which followed the earlier of them, and the cases in *Suppa Bhattar* v. *Suppu Sokkayi Bhattar* (8) and *Rahim un-nissa* v. *Srinivasa Ayyangar* (16) which were cases of privity of estate, our attention has not been called to any authoritative ruling of a High Court in this country which would support the return of any other answer but an affirmative one to the question referred to us.

KUMARASWAMI SASTRI, J.—The question raised by the reference is, whether it is open to a party to re assert as against a third person a title which has been definitely negatived in a previous suit against a contesting claimant. The judgment which is pleaded in bar is a judgment in a previous suit filed by the present plaintiff against two other persons for a declaration that he was entitled to the

(16) 54 Ind. Cas. 565; 38 M. L. J. 266; 11 L. W. 139.

Asari Sheriff and to recover from the Government the emoluments of the office. It was held in that suit that the plaintiff did not prove title to the office and the suit was dismissed. The present suit is filed by the plaintiff against the Government to recover a sum of Rs. 394 alleged to be due to him as the person entitled to the Asari Sheriff and to perform the services connected therewith. The Government was paying the sums to the successful party in the previous litigation and sets up the judgment negativing the plaintiff's right as a bar to the suit.

The question is, how far, and under what circumstances, can a judgment *in personam* be given the force of a judgment *in rem* or be pleaded as a bar under section 11, Civil Procedure Code, in cases where it is pleaded as a defence to an action by third parties who do not claim under, or were not represented by, the parties to the original action.

So far as the Statute Law in this country is concerned, the case is governed by section 11 of the Civil Procedure Code which deals with *res judicata*, sections 40 to 44 of the Evidence Act, which deal with the relevancy of judgments of competent Courts, and section 43 of the Specific Relief Act which deals with declaratory decrees.

Under section 11 of the Civil Procedure Code one of the conditions precedent to its application is, that the former suit should be "between the same parties or between parties under whom they or any of them claim" and the section is a bar to the trial of a suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in the previous suit. The section codifies the law in British India as regards the plea of *res judicata* and, though the principle has been applied to proceedings other than suits, (*e.g.*, execution proceedings), the essentials required by the section as to identity of the questions involved and parties has not been lost sight of. Section 43 of the Specific Relief Act enacts that a declaratory decree passed under the Act is binding only on the parties to the suit, persons claiming through them respectively, and, where any of the parties are trustees, on the persons for whom, if in existence at the date of the declaration, such parties would be trustees. Sections 40 to 44 of the Evidence Act deal with the relevancy of judgments of Courts of Justice. Section 40 enacts that the existence of any judgment, order or decree, which by law prevents any Court from taking cognizance of a suit or holding a trial, is a relevant fact when the question is whether such Court ought to take cognizance of such suit or to hold such trial. Section 41 deals with final judgments, orders or decrees of competent Courts in the exercise of Probate, Matrimonial, Admiralty or Insolvency jurisdiction, or what is known as judgments *in rem*, and it states that such judgments, orders or decrees are conclusive proof of the matters specified in the section; and, by virtue of section 4 of the Evidence Act, evidence cannot be allowed to disprove the facts established by such judgments. Section 42 refers to judgments relating to matters of a public nature relevant to the enquiry and the section states that such judgments, though evidence, are not conclusive proof of that which they state, thus allowing evidence to be given to disprove the facts found in the judgments. Section 43 says that judgments, orders or decrees, other than those mentioned in sections 40, 41 and 42, are irrelevant, unless the existence of such judgment, order or decree, is a fact in issue, or is relevant under some other provision of the Act, (*e. g.*, section 13). Section 44 enables a party to show that any judgment, order or decree which is relevant under sections 40, 41 or 42, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion.

In dealing with this question, I think the distinction between the effect of a judgment as preventing the Court from trying the same matter in issue in subsequent proceedings and as simply affording evidence of the truth or falsity of the claim under consideration should be borne in mind. In the former case section 11 declares that the Court shall not try the suit or issue and the plea is one in bar to the maintainability of the action. In cases where there is no bar under section 11, the Court has to try the issue and if the judgment is filed for the purpose of proving the plaintiff's claim or for the purpose of proving the defence to the action, it is relevant only as a piece of evidence, the probative value of which is regulated by the provisions of the Evidence Act. If it is a judgment *in rem*, the Court, under section 41 of the Evidence Act, will treat it as conclusive proof of the matters stated in that section and under section 4 it

will prevent evidence from being given for the purpose of disproving the facts established by the judgment *in rem*. One has only to file the judgment and the Court has no option but to decide the matter covered by it in accordance with the declaration in that judgment, even though the other party may be in a position to prove facts to the contrary. So far as judgments *in rem* are concerned, I think the matter is codified by section 41 of the Evidence Act which states what judgments would be judgments *in rem* so as to make them conclusive proof of the declarations granted by them. It seems to me that it is not open to us, in the face of the sections of the Civil Procedure Code, the Evidence Act and the Specific Relief Act, to hold that judgments not falling within those sections would still be a bar to an action or afford conclusive proof. This, in effect, would be to create new kinds of *res judicata* and to destroy the distinction between judgments *in rem* and judgments *in personam* which has been laid down in sections 41 and 42 of the Evidence Act.

In *Sayam Ramamoorthi Dhora* v. *Secretary of State for India in Council* (2) it was held that the provisions of section 13 of the Code of 1882 were not exhaustive, and a judgment was held to be binding on a person who was no party to it on the ground that third parties having no interest in the property at the time of the litigation cannot, in the absence of any fraud or collusion, question the validity of a judgment passed in a suit between the only parties interested in the property at the date of the previous suit. Reference was made to Bigelow on Estoppel, 5th Edition, page 44, where the learned author observes: "If all who have a right to appear and be heard in a cause have been duly made parties, the judgment establishes a perfect and complete right against all, as much as would a conveyance of a joint estate by all the parties interested. Judgment in an action strictly *in personam*, indeed, binds third persons in that way; all that is necessary is that all those who have the exclusive right to litigate the cause are proper parties to it, and that the question should be determined without collusion. ...Indeed, the difference between judgments *in rem* and judgments *in personam* in our law, as regards their effect, appears at bottom to be only a difference of degree." When a judgment is *in personam* I can find no authority either in English decisions or recognised works by English jurists for holding that it can prevent persons, not parties or privies, from agitating the question except in cases of joint liability and covenants for indemnity. In *Natal Land & Colonization Co.* v. *Good* (17), it was sought to use a judgment between the mortgagor and the person from whom he purchased the property which found that the sale was vitiated by fraud against a mortgagee who was no party to the suit. Their Lordships of the Privy Council observed: "Now, the first observation which occurs is, that this judgment was not admissible in evidence. It is the only proof of the fraud; but if it were ample and sufficient proof of the fraud, it is *res inter alios acta*, and in no Court of Law or Equity in this country would it have been admitted at all, except as between the parties to it, the respondents and Crowly, or if a foundation for it had been laid by evidence of some fraud having been committed by which the plaintiffs could be affected." In *Anderson* v. *Collinson* (18), it was held that a judgment in affiliation proceedings taken by the daughter of the plaintiff holding that it was not proved that the defendant was the father, was not final and conclusive in an action for seduction filed by the mother so as to estop the defendant from denying that he was the father of the child, as the parties to the two proceedings were different. In *Spencer* v. *Williams* (19), Lord Penzance observed: "It is proper, therefore, where the question is raised between the same parties, or those claiming under them, that they should be estopped; but the decisions give no authority for a proposition of a wider character—that a party who was not a party in the original litigation shall be bound by the result." The rule was held to apply, though the interest of the parties was identical and the same question was involved, namely, whether a person was next-of-kin and entitled to distribution of assets of the deceased. In *Wenman* v. *Mackenzie* (20), the plaintiff sued for injury

(17) (1868) 2 P. C. 121; 5 Moo. P. C. (N. S.) 132; 16 W. R. 1086; 16 E. R. 465.

(18) (1901) 2 K. B. 107; 70 L. J. K. B. 620; 84 L. T. 465; 49 W. R. 623; 17 T. L. R. 465.

(19) (1871) 2 P. & D. 230; 40 L. J. P. 45; 24 L. T. 513; 19 W. R. 703.

(20) (1855) 5 El. & Bl. 447; 25 L. J. Q. B. 44; 3 W. R. 626; 119 E. R. 547; 1 Jur. (N. S.) 1015; 103 R. R. 568.

to her reversionary right alleging that she was entitled to a fishery in an arm of the sea and was in possession through her tenant, Fairman, and that the defendant who held the neighbouring property under one Gipps infringed her right. Fairman, her tenant, had filed an action to recover damages for a similar injury against Gipps and the suit was referred to arbitration, and an award made in favour of Fairman. It was held that the proceedings were not evidence as plaintiff "did not claim by, through or under Fairman and, so far as she was concerned, the action of *Fairman* v. *Gipps* was *res inter alios acta*" and as the proceedings and award could not have been admitted as evidence against her, they are not admissible for her. In *Petrie* v. *Nuttall* (21), it was held that the conviction of a person for barring a highway would not bar a suit by the same person against another for stopping up the road on the ground that the Crown and subject were the parties to the indictment and, therefore, it was not between the two parties to the action and that the judgment in the indictment may be given as evidence upon the trial of the issue as to whether the *locus in quo* is a public highway; though it cannot be pleaded as an estoppel.

Estoppel must be mutual and it is difficult to see how a party not bound by a judgment can set it up in bar against a party to it.

Turning to the question as to whether a judgment *in personam* can acquire the force of a judgment *in rem* under any given set of facts, the only authority which I can find for such a view is the passage from Bigelow already referred to and the decision of *Candee* v. *Lord* (22), referred to in *Srinivasa Aiyanger* v. *Arayar Srinivasa Aiyangar* (1), as authority for the view taken in that case.

With all respect it seems to me that we cannot travel outside the provision of section 11 of the Code of Civil Procedure and apply the rule of *res judicata* to cases falling outside the limitation imposed by the section. In *Gokul Mandar* v. *Jendmanund Singh* (4), their Lordships of the Privy Council observe: "They will further observe that the essence of a Code is to be exhaustive on the matters in respect of which it declares the law, and it is not the province of a Judge to disregard or go outside the letter of the enactment according to its true construction." In *Peari Mohan Shaha* v. *Durlavi Dassya* (3), the question arose in a suit between an auction purchaser who bought the right of one Durlavi Dassya, and her daughter Patteswari, whose suit under section 283 of the Code (relating to suits by an unsuccessful claimant) was dismissed. The suit was filed by the purchaser against the unsuccessful claimant for a declaration of her title and the decree in the previous suit was sought to be availed of as concluding the matter in issue. Jenkins, C. J., and Mookerjee, J., were of opinion that the provisions as to *res judicata* contained in section 11 of the Code were exhaustive and that judgments in suits between third parties, however cogent they might be as evidence where the same matter is in question in a suit by or against a stranger, did not operate as a bar to the suit under section 11 of the Code. Jenkins, C. J., observed: "It appears to me that in these circumstances, and having regard to the facts with which we have to deal in this case, the result of that litigation is at least as cogent against the defendant as would have been an instrument of transfer executed by Patteswari, the ostensible owner, in favour of her sons. I wish to make it clear that, in the view I take, I cannot regard the decree in the previous litigation as amounting to *res judicata* which would bar all possibility of evidence on the part of the defendant. It would, I conceive, have been open to the defendant to show that, notwithstanding that decree, there were circumstances either vitiating the result of that litigation or affecting its result so as to prevent its operation in favour of Patteswari's sons." The learned Judges were not prepared to follow the dictum in *Sayam Ramamoorthi Dhora* v. *Secretary of State for India in Council* (2) that the provisions of the Civil Procedure Code were not exhaustive and judgment not *inter partes* can make the question *res judicata*. This decision was referred to and followed by the Chief Justice and Seshagiri Aiyar, J., in Second Appeal No. 1747 of 1919. The learned Judges were of opinion that the provisions of the Code as to *res judicata* were exhaustive and that a judgment not between the same parties or their privies was only evidence

(21) (1856) 11 Ex. 569; 25 L. J. Ex. 200; 156 E. R. 957; 26 L. T. (o. s.) 204; 4 W. R. 234; 105 R. R. 651.

(22) (1849) 2 N. Y. 269; 51 Am. Dec. 294.

of title. They were not prepared to follow *Sayam Ramamurthi Dhora* v. *Secretary of State for India in Council* (2) and *Suppa Bhathar* v. *Suppu Sokkaya Bhattar* (8) on the ground that the attention of the learned Judges was not drawn to the decision of the Privy Council in *Gokul Mandar* v. *Pulmanund Singh* (4). In *Ramnad Zemindar* v. *Dorasami* (23) which related to a monthly allowance, it was held that a litigation as regards the right to recieve the allowance would not estop the Zemindar from putting the party claiming it against him to the proof of his title on the ground that he was not a party to the previous litigation. So far, therefore, as the Civil Procedure Code is concerned, I do not think that the trial of a suit or issue can be barred because of an adjudication in a prior suit or proceeding to which the plaintiff was not a party or privy.

Turning to the Evidence Act, I have already pointed out that sections 41 and 42 draw a distinction between judgments *in rem* and judgments *in personam* and it seems to me to be clear from the sections that a judgment which does not fall within section 41 can only be evidence but cannot be used for the purpose of preventing the other side from proving facts which he sets up.

It is not open to us to import considerations as to convenience in dealing with matters which have been codified and dealt with by Evidence Act, however attractive the theory may be, and however much one would like to have the principle embodied by the Legislature in the Codes. It is no doubt true that there are decisions of this Court which adopt the view of Bigalow as to judgments *in personam* creating an estoppel as against strangers [see *Srinavasa Aiyangar* v. *Arayar Srinavasa Aiyangar* (1), *Sayan Ramamoorthi Dhora* v. *Secretary of State for India in Council* (2), *Suppa Bhattar* v. *Suppu Sokkaya Bhattar* (8) and *Bojinapalli Venugopala Rao Garu* v. *Nekkalapudi Venkatrayudu* (9).] In the last of these cases it was held that a decision between the plaintiff and another person that the latter is a co-proprietor with him is conclusive on third parties where the contention raised by them depends on the relationship between the plaintiff and such person, and the learned Judges followed *Srinaivasa Aiyangar* v. *Arayar Srinviasa Aiyangar* (1) but they, however, observed that the rule that makes the decision conclusive on third parties was not the rule of *res judicata* and they based their decision on the ground that it would be intolerable to hold that, when the relationship between the two parties have been determined by litigation between them, other persons can contend that one of them has not the right against the other which he has been held to have.

With all respect, it seems to me that these decisions do not take into consideration the effect of the provisions of the Evidence Act and the limitations imposed by a consideration of those sections. To hold that a judgment which does not fall under section 41 is conclusive proof would be to act in direct contravention of the provisions of section 42 which declares that judgments, orders or decrees, other than those mentioned in section 41, are relevant but not conclusive proof.

It seems to me that where a judgment *in personam* is pleaded, its legal effect and probative force will depend upon the facts of each case. As pointed out by Sir Lawrence Jenkins in the case I have referred to, the judgment of a compstent Court whereby a declaration is made as regards property in dispute, would have the force of a conveyance by the other parties to the suit in favour of the successful litigant. Where, therefore, all the parties interested in the immoveable property or in the right in contest have been parties to the previous litigation it may be that the judgment obtained in the previous litigation would render it impossible for persons to get rid of the effect of the judgment. But this is not because the judgment constitutes *res judicata* or judgment *in rem*. The difficulty would be analogous to the difficulty of a person who wants to impeach the title which is conferred on his opponent by all the persons who could have a legal interest in the property with the additional fact that when a judgment is relevant it is not open to a party to show that as between the parties the conclusion arrived at by the Judge is wrong and is not warranted by the evidence. The decision in *Suppa Bhattar* v. *Suppu Sokkaya Bhattar* (8) may be supported on the ground

(23) 7 M. 341; 8 Ind Jur. 188; 2 Ind. Dec. (N. S.) 821.

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that all the parties interested were parties to the previous litigation in favour of one of them. Cases where *jus tertii* is set up are really no exceptions to the rule. In all cases of *jus tertii* the person who sets up the rights of a third party is bound to prove that the third party has or had the rights alleged and it is always open to the other party to displace the title of the person so set up by showing that he was a party to the litigation which has negatived that title. Whatever would estop or bar the persons whose title is set up must also bar the person pleading *jus tertii* whether the estoppel is by record, deed or *in pais*. This is the principle on which *Rex* v. *Hebden* (15) referred to by my Lord was decided. The defendant relied on his right to the office of bailiff owing to his having been elected by two former bailiffs. A judgment was produced in which the right of the persons whom he set up was negatived and it was held that having made the title of the previous bailiffs part of his right, there could be no better evidence in disproof other than the judgment where their rights were negatived.

I would hold that the decision in the previous suit is not conclusive but is only evidence and that it is open to the plaintiff to establish his title as against the Government and I would answer the question raised by the reference in the affirmative.

The case coming on for final hearing, after the expression of the above opinion by the Full Bench, the Court delivered the following

JUDGMENT.

WALLIS, C. J. and KRISHNAN, J.—We are unable to agree with the Subordinate Judge that, assuming the office to be hereditary, the plaintiff has proved that he is the lawful successor by hereditary right. As the office cannot be enjoyed by several heirs in common, it follows, in our opinion, that succession must be by primogeniture, and, in the absence of any evidence to the contrary, we think that the succession must be by lineal primogeniture, that is, by descent to the eldest son and his son and that a grandson who is the son of an eldest son of the last office-holder is entitled to succeed in preference to a junior son, where the eldest son has predeceased his father, or is incapable of succeeding owing to insanity or any similar reason. The appeal must be allowed and the suit dismissed with costs throughout.

M. C. P.

Appeal allowed.

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 128 OF 1921.

November 30, 1921.

Present:—Mr. Daniels, A. J. C.

WILAYAT HUSAIN—DEFENDANT—APPLICANT

versus

PUTTU LAL—PLAINTIFF—OPPOSITE PARTY.

Minor, transactions with—Partnership business—Presumption of benefit.

In the case of a business undertaking managed by a father on behalf of his minor son, where transactions are carried out in the ordinary course of business, it is not necessary for a creditor to give specific evidence of benefit in each individual transaction, and the fact that the transactions were carried out in the ordinary course of business is sufficient to raise a presumption that they were for the benefit of the business.

Baba Din v. *Bansraj*, 27 Ind. Cas. 567; 18 O. C. 84; 2 O. L. J. 55, referred to.

Revision against a decree of the Judge Small Cause Court, Lucknow, dated 19th July 1921.

Mr. *Ghulan Hasam*, for the Applicant.

Mr. *Bishambhar Nath Khanna*, for the Opposite Party.

JUDGMENT.—This is an application for revision of an order of the learned Judge of the Small Cause Court. The suit was one for the price of cloth purchased on the defendant's behalf by his father and certificated guardian, Mumtaz Husain. The learned Judge has found on evidence which I find to be sufficient, though the applicant attempts to challenge it, that the shop was originally carried on in partnership by the applicant and his two elder brothers. The applicant was at that time a minor. His two elder brothers

successively died and at the time when the cloth was purchased the applicant alone remained and had become the sole owner of the shop. Even in the application made by the father to be appointed his guardian it had been stated that the shop belonged to the sons and that it was for the purpose of carrying on this shop that the application was made. It has been contended that there is no proof that the purchase of this cloth was for the benefit of the defendant. It appears to me that in the case of a business undertaking where transactions are carried out in the ordinary course of business it is not necessary for the creditor to give specific evidence of benefit in each individual transaction. The fact that the transactions were carried out in the ordinary course of business is sufficient to raise a presumption that they were for the benefit of the business. This has been held in the case of a Hindu joint family trading partnership in *Baba Din* v. *Bansraj* (1). Even if evidence were necessary the defendant has himself stated in his evidence that he always believed that whatever the father did in connection with the business was done for his benefit. I find no reason for interfering with the decree of the learned Judge of the Small Cause Court and I accordingly reject the application with costs.

N. H.

Application rejected.

(1) 27 Ind. Cas. 567; 18 O. C. 84; 2 O. L. J. 55.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 70 OF 1917.

November 25, 1921.

Present:—Mr. Justice LeRossignol and Mr. Justice Campbell.

MESSRS. KHOSLA BROTHERS OF LAHORE—DEFENDANTS—APPELLANTS

versus

THACKER'S DIRECTORIES LIMITED, OF CALCUTTA—PLAINTIFFS—RESPONDENTS.

Copyright Act (III of 1914)—Copyright, infringement of—Test—Damages and compensation—Assessment.

In an action for an injunction and damages for an infringement of plaintiffs' copyright, if it be found that even inaccuracies in both the works are identical, that references of significance in plaintiffs' work are reproduced in defendants' work but, by reason of absence of other matter, have no significance therein and there is identity not merely of information but of language, that leaves no doubt that the work of the defendants is a copy of the plaintiffs' in a very high degree. [p. 984, col. 2.]

In such a case a plaintiff would be entitled to the amount of the proceeds of the sales of the offending work and to general damages for infringement of copyright, probable loss of trade, advertisements, etc. [p 985, col. 1.]

Where in such cases damages are not accurately calculable, they are damages at large. [p. 984, col. 2.]

Kelly v. *Morris*, (1866) 1 Eq. 697; 35 L. J. Ch. 423; 14 L. T. 222; 14 W. R. 496 and *Morris* v. *Ashbee*, (1868) 7 Eq. 34; 19 L. T. 550, referred to.

First appeal from the decree of the Additional Judge, Lahore, dated the 10th November 1916.

Bakhshi *Tek Chand*, for the Appellants.

Mr. *C. Bewan Petman*, for the Respondents.

JUDGMENT.—This appeal arises out of an action by the plaintiff-firm, of Calcutta, against the defendant-firm, of Lahore, for an injunction and for damages on the ground that the defendants' publication "Khosla's Directory" constituted an infringement of the plaintiffs' copyright in their work "Thacker's Indian Directory".

The Court below found that piracy by the defendants was established and granted a decree restraining defendants from publishing their book and decreeing Rs. 3,000 damages to plaintiffs.

The defendants appeal to this Court, and though their first ground of attack was a denial of the plaintiffs' copyright in "Thacker's Indian Directory", that ground has been expressly withdrawn before us.

Next, it was argued that the Trial Court had no jurisdiction, inasmuch as under Act III of 1914, The Indian Copyright Act, all suits under the Act must be instituted either in the High Court or in the District Judge's Court, that the case was transferred by the District Judge on the 22nd June 1914 to the Court of Mr. Forbes, Additional District Judge, and, therefore, not Additional Judge, but Mr. Forbes who was transferred before the completion of the trial had jurisdiction to try the suit.

This objection we have no hesitation in overruling, for the transfer was clearly to the Court of the Additional District Judge and as that is a permanent Court, Mr. Forbes' successors had jurisdiction to try the case precisely in the same degree as he had.

A further objection was raised that one of defendants' witnesses, Brij Lal, had not been summoned, and the Trial Court should have given wider opportunity for calling him, but on examination of the record, we find that for over a year the defendants failed to get this witness served and received from the Court below all the latitude to which they were entitled. In any case this witness was not intended to prove more than the plaintiffs were prepared to admit.

On the main question in the case, whether in fact there has been piracy, we agree entirely with the Court below.

The plaintiffs allege that a very substantial portion of defendants' publication is a word for word copy of their Directory; that even plaintiffs' mistakes have been reproduced by defendants, and that defendants' method of compilation consisted, when it did not consist of mere copying of the plaintiffs' work, of the despatch to persons concerned with a request for corrections, if any, of slips cut out of the plaintiffs' work.

In proof of these allegations, we have seen a large number of instances, in which the inaccuracies in both works are identical, others in which references, of significance in plaintiffs' work, are reproduced in defendants but, by reason of the absence of other matter, have no significance therein.

We have found *passim* an identity not merely of information but of language that leaves no doubt that defendants' work was a copy of the plaintiffs' in a very high degree [*cf. Kelly* v. *Morris* (1), *Morris* v. *Ashbee* (2)].

Finally, the oral evidence is unimpeachable that where defendants did make inquiry, their inquiry was limited to a mere correction and verification of the material collected by the plaintiffs.

With regard to the reliefs granted it is objected that the plaintiffs are entitled to no injunction as they knew by 1910 that the defendants were pirating their work and took no action till 1914. Having regard to the fact that the plaintiffs are a Limited Company of Calcutta whilst defendants reside in Lahore and that plaintiffs had to collect evidence, we do not think plaintiffs were unduly slow in asking for relief, in any case, the Directory in suit is that for 1913 whilst the suit was instituted in June 1914.

The last objection is, that the Court below has fixed the amount of damages arbitrarily, that plaintiffs have proved no loss and did not press their prayer for an account of the sales by Khosla.

In cases such as these the plaintiffs are at liberty to claim general damages and also compensation for conversion, and although it was desirable that plaintiffs should have pressed their inquiry into the sales by Khosla, we see no reason to doubt that the damages awarded are very moderate indeed, in view of the importance of the work pirated and the gross nature of the piracy.

In *Exchange Telegraph Company* v. *Gregory & Co.* (3) it was held that where damages are not accurately calculable, they are damages at large.

In *Byrne* v. *Statist Company* (4) the plaintiffs did not press for an account and the Judge assessed the damages on general considerations. Section 7 of Act III of 1914 defines the right of the owner of the copyright to take proceedings in respect of the conversion of infringing copies, but this relief has not been sought in this case, and the prayer for the equitable remedy of an account of profits has not been pressed, so that the damages awardable in this case are merely those for infringement of the copyright and infringement by sale of copies, the plaintiffs cannot have both an inquiry into damages and an account of profits: *De Vitre* v. *Betts* (5).

In *Muddock* v. *Blackwood* (6) it was held that the amount due as damages was the actual amount of the proceeds of the copies sold.

(1) (1866) 1 Eq. 697; 35 L. J. Ch. 423; 14 L. T. 222; 14 W. R. 486.

(2) (1868) 7 Eq. 34; 19 L. T. 550.

(3) (1896) 1 Q. B. 147; 65 L. J. Q. B. 262; 74 L. T. 83; 60 J. P. 52.

(4) (1914) 1 K. B. 622; 83 L. J. K. B. 625; 110 L. T. 510; 58 S. J. 40; 30 T. L. R. 254.

(5) (1873) 6 H. L. 319; 42 L. J. Ch. 641; 21 W. R. 705.

(6) (1894) 1 Ch. 58; 67 L. J. Ch. 6; 77 L. T. 498; 14 T. L. R. 43; 46 W. R. 166.

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Applying these principles to the facts of this case, the plaintiffs appear to be entitled to the amount of the proceeds of the sales of the offending work and to general damages for infringement of copyright, probable loss of trade, advertisements, etc., and there can be little doubt that the sale proceeds alone of Khosla's Directory far exceeded Rs. 3,000 (£200).

For these reasons we decline to interfere and dismiss this appeal with costs.

R. M. *Appeal dismissed.*

CALCUTTA HIGH COURT.
CIVIL RULE No. 480 OF 1921.
January 23, 1922.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, Justice Sir John Woodroffe, KT., and Justice Sir Asutosh Mookerjee, KT.

In re RABINDRA CHANDRA CHATTERJEE—PETITIONER

Legal Practitioners Act (XVIII of 1879), s. 14, interpretation of—Jurisdiction to entertain proceedings against legal practitioner—Enquiry before institution of proceedings—Formulation of charge.

Section 14 of the Legal Practitioners Act empowers any Court in which a Pleader practises to consider a charge of misconduct made against him in such Court, and the section does not limit the consideration of the charge to the Court in which the misconduct is alleged to have been committed. [p. 988, col 1.]

Babu Het Ram, In the matter of, 188 P. L. R, 1901, followed.

Per *Mookerjee, J.*—Section 14 of the Legal Practitioners Act does not specify the nature of the materials upon which the Court concerned may take action. There must, however, be enquiry supported by legal evidence, if proceedings are instituted. [p. 989, col. 1]

Nabin Chandra Das Gupta, In re, 35 C. 317; 12 C. W. N. 381; 7 Cr. L. J. 254, followed.

In proceedings under section 14 of the Legal Practitioners Act it is essential that the charge must be formulated with precision so as to enable the legal practitioner concerned to meet the allegations against him. [p 989, col. 2.]

Babu Het Ram, In the matter of, 188 P. L. R. 1901; *Southekal Krishna Rao, In the matter of*, 14 I. A. 154; 15 C. 152; 12 Ind. Jur. 11; 5 Sar. P. C. J. 96; 7 Ind. Dec. (N. S.) 655 (P. C.), *Randall v. Brigham*, (1868) 7 Wallace 523; 19 Law. Ed. 285 and *Advocate, In the matter of an*, 4 C. L. J. 259, followed.

Proceeding under section 14 of the Legal Practitioners Act taken by the District Judge, Dacca, against Rabindra Chandra Chatterji, a Pleader, practising in the District Court at Dacca.

FACTS appear from the judgment.

Babu *Dasarathi Sanyal* (with him Dr. *Sarat Chandra Basak* and Babu *Bepin Chandra Basu*), for the Petitioner.—The petitioner before your Lordships is a junior Pleader of the Dacca Bar. He filed a plaint in the Court of the learned Subordinate Judge with insufficient stamp. When the mistake was pointed out to him, he submitted that as the Collectorate had closed he could not get the requisite stamp and prayed for one day's time. This the learned Subordinate Judge rejected. He then prayed that the stamp of small denomination might be accepted or that cash might be accepted—all these prayers were rejected. The learned Subordinate Judge then asked the petitioner to leave the Court and then asked the Pleaders present to ask the petitioner to go out. Then the learned Judge called his *Chaprasi*. The petitioner complained against the conduct of the Judge to the Bar Association which passed a resolution asking members not to appear before the said Judge. Sometime later the petitioner instituted a criminal case against the said Judge. I beg to submit that the institution of a criminal case cannot be a ground for proceedings under the Legal Practitioners Act. Every citizen has the right to institute criminal case against any one, rightly or wrongly. If the complaint is false, the accused can get damages, but that cannot be a ground for proceedings under the Legal Practitioners Act.

[SANDERSON, C. J.—There has yet been no enquiry by the District Judge. How can we say that there is no ground for such proceedings?]

Had the learned District Judge jurisdiction to start proceedings as he did? The incident took place before the Subordinate Judge in another Court. The District Judge had no cognizance in the matter. He should not have proceeded on newspaper reports and confidential Police report. Reads section 14, Legal Practitioners Act. I submit there were no proper materials before the District Judge to start proceedings

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against the petitioner. There was no legal foundation for the proceedings. Refers to *Nabin Chandra Das Gupta, In re* (1).

The case should, at any rate, be transferred to another Judge. His explanation has aggravated our apprehension of not getting justice at his hands.

[MOOKERJEE, J.—The District Judge cannot decide the matter. He can only hold the enquiry.]

The conduct of the District Judge has given rise to serious apprehension and in the interest of justice the case should be transferred to the Additional District Judge.

Mr. *B. L. Mitter*, Standing Counsel (with Babu *Surendra Nath Guha*), appeared for Government and submitted that all incidents did not take place in the Court of the Subordinate Judge and that apart from Police report it cannot be denied that there were Bar Association Meetings and dissuasion of Pleaders from attending their proper work. On these materials the Judge can certainly take cognisance of the matter.

Babu *Dasarathi Sanyal* replied.

JUDGMENT.

SANDERSON, C. J.—This was a Rule granted by my learned brothers, Mr. Justice Chatterjea and Mr. Justice Pearson, calling upon the District Judge of Dacca to show cause why the proceedings under section 14 of the Legal Practitioners Act against the petitioner should not be quashed or, in the alternative, why the proceedings should not be transferred to some other Court or why such other order should not be passed as to this Court might seem proper. The Court made an order that, in the meantime, pending the hearing of the Rule, further proceedings under section 14 of the Legal Practitioners Act should be stayed. It appears that the learned District Judge of Dacca caused a notice to be served upon the petitioner under section 14 of the Legal Practitioners Act. That notice referred to certain matters, which, I think, may be classed under three heads: With regard to the first, the allegation was that the petitioner, being a Pleader of the Court, was, on the 15th of June 1921, "guilty of grossly improper conduct" in the Court of the Subordinate Judge, Babu Pashupati Basu, in that he addressed the Subordinate Judge in an offensive manner and repeatedly refused to submit to his order in regard to the admission of a plaint that was insufficiently stamped and, after the Subordinate Judge had passed his order, repeatedly interrupted him in a grossly improper and discourteous manner. The second matter, that was alleged, was that after this incident the petitioner caused a meeting to be called of the members of the Bar Association, Dacca, and, that by the statements he made regarding the Subordinate Judge, Babu Pashupati Basu, induced certain Pleaders of that Court to abstain from appearing in the Court of the Subordinate Judge on behalf of their clients in cases in which they had been engaged. Then the notice went on to allege that, in consequence of such inducement, certain Pleaders wilfully and without excuse and in contravention of their agreements with the persons who had engaged them to appear on their behalf in the Court of the Subordinate Judge refused to appear in the Court of the Subordinate Judge and thus deprived their clients of the legal assistance they had agreed to render them, and the third matter to which reference was made was that it was alleged that the petitioner had filed a complaint in the Court of the Deputy Magistrate, Babu B. M. Ghose, against the Subordinate Judge, Babu Pashupati Basu, charging him with having, while in the discharge of his duties as Judge, committed certain criminal offences; and by reason of these matters it was alleged that the learned Pleader was guilty of grossly improper conduct and had rendered himself liable to be suspended or dismissed under section 13 of the Legal Practitioners Act. The first point on which the learned Pleader in support of the Rule has relied, is that the learned District Judge who directed the service of this notice had no jurisdiction to institute these proceedings by reason of the fact that the misconduct relied upon did not take place in the learned District Judge's Court. There seem to me to be more than one answer to this argument. In the first place, the alleged misconduct on which the notice was based did not take place altogether in the Court of the learned Subordinate Judge. It is true that the matters referred to under the first head, which I have mentioned, took place in the learned Subordinate Judge's Court; but the matters which are referred to under heads 2 and 3

(1) 35 C. 317; 12 C. W. N. 381; 7 Cr. L. J. 252.

namely, the alleged inducement to abstain from appearing in the Court of the Subordinate Judge and the alleged complaint in respect of criminal offence did not take place in the Court of the learned Subordinate Judge. Consequently, it cannot be said that the whole of the alleged misconduct, upon which the notice was based, had taken place in the Court of the learned Subordinate Judge.

Apart from that, in my judgment, the learned District Judge had jurisdiction to deal with all the matters which were alleged in the notice, inasmuch as the petitioner (the learned Pleader) was practising in the Court of the learned District Judge and it was within his jurisdiction, upon proper materials being laid before him, to institute the proceedings in the manner in which he did.

The second point on which the learned Vakil relied was that the learned Judge had acted upon materials which were not sufficient and in a sense improper in that he had stated that he had acquired some of the information upon which he relied from newspaper reports. It is clear from the learned Judge's answer to the petition that the only matters on which information from newspaper reports was attained, were, first, the proceedings at the meeting of the Bar Association and, secondly, the institution of a criminal case against the learned Subordinate Judge. As regards those two matters there is no dispute that there was a complaint in criminal proceedings laid, and there is also no dispute that a Resolution was passed by the members of the association to carry out a certain course of conduct. The learned Judge has informed the Court of the materials which he had with regard to the other matters and as to how he obtained those materials, and, in my judgment, this second point affords no reason for making the Rule absolute.

The third point which the learned Vakil urged was that this case ought to be transferred from the file of the learned District Judge to the file of the learned Additional District Judge. In this case the petitioner, (the learned Pleader), has set out in his petition his reasons why the case should be transferred from the learned District Judge's file. In my judgment, the allegations which have been made have been completely answered by the explanation which the learned District Judge has given and I can see no reason for any reasonable apprehension on the part of the petitioner that he will not get a fair and impartial hearing at the hands of the learned District Judge. In my judgment this Rule should be discharged.

In discharging the Rule, I am expressing no opinion as to the merits of the matter. My judgment is confined to holding that it is not possible at this stage of the proceedings to say that none of the allegations, if proved, would amount to professional misconduct within the meaning of the Act.

WOODROFFE, J.—I agree. As stated in the judgment of the learned Chief Justice, the only matter before us now is whether the proceedings should be quashed or transferred: and, with no other question we are now concerned. It may be that the facts charged did not happen or, if they did, those facts were insufficient for proceeding against the applicant. On this I say nothing now. If it were shown that the facts charged, if proved, did not constitute grounds for proceeding under the Act, then there would be a case for quashing the proceedings as asked; but in this case there is at least one charge, namely, as regards "the addressing of the Subordinate Judge in an offensive manner" and "repeatedly interrupting him in a grossly improper and discourteous manner" as to which, whatever may be said as regards the other charges, it is not possible to say that it may not in any case be a ground for proceeding under the Act. Therefore, it seems to me that the proceedings cannot now be quashed and that the facts must be enquired into. No doubt, as it was contended by the learned Vakil for the applicant, there must be a foundation for these proceedings as for any other; but I am unable to say that there was no ground for such proceedings because details of the information which include a report submitted by the learned Subordinate Judge himself, and other reports said to have been received, have not been set out in detail. Moreover, although there may be difference as to what actually occurred in the case of some of the facts, many others appear to be well enough known.

RABINDRA CHANDRA CHATTERJEE, *In re.*

On the question of jurisdiction, it is said that section 14 of the Legal Practitioners Act says "charged in such Court." It does not say that the charge must be made only by that Court in which the alleged misconduct has taken place. Therefore, it does not by these wordings limit the charge to the Court in which the alleged misconduct took place. Moreover, as already pointed out by the learned Chief Justice, the charge includes matters which are said to have occurred subsequent to the proceedings in the Court of Babu Pashupati Basu which are the subject of the first charge. It has been further held in the case of *Babu Het Ram, In the matter of* (2) that section 14 of the Legal Practitioners Act empowers any Court in which a Pleader practises to consider a charge of misconduct made against him in such Court and that the section does not limit the consideration of a charge to the Court in which the misconduct is alleged to have been committed. I see no reason for dissenting from the opinion there expressed.

On the last point, namely, that of transfer, the grounds upon which it has been urged, have been met in the explanation of the District Judge. I do not think that the applicant has established a case for the grant of the transfer asked for.

MOOKERJEE, J.—I agree that this Rule cannot be supported in either of its two branches.

As regards the first alternative, the contention of the petitioner that the proceedings should be quashed is based upon a two-fold ground. It is argued, in the first place, that the proceedings initiated by the District Judge are without jurisdiction, as the alleged incident did not take place in his Court. This position is, in my opinion, founded upon a construction of section 14 of the Legal Practitioners Act which is not borne out by its language. Section 12 authorises the suspension and dismissal of Pleaders and *Mukhtears* convicted of criminal offences by the High Court. Section 13 then provides for the suspension and dismissal of Pleaders and *Mukhtears* guilty of unprofessional conduct even though the particular act of misconduct has not led to conviction by a Court of Justice. Section 14, thereupon, provides that "If any such Pleader or *Mukhtear*" (that is a Pleader or *Mukhtear* holding a certificate as mentioned in section 13) "practising in any subordinate Court or in any Revenue office is charged in such Court or office with taking instructions except as aforesaid (*i. e.*, as mentioned in section 13) or with any such misconduct as aforesaid" (*i. e.*, as specified in section 13) "the presiding officer shall send him a copy of the charge and also a notice that, on a day to be therein appointed, such charge will be taken into consideration." This section plainly authorises a subordinate Court to institute proceedings against a Pleader or *Mukhtear* practising in that Court. It is not restricted to cases where the alleged misconduct has been committed in the Court wherein the proceedings are instituted. This was the interpretation adopted in the case of *Babu Het Ram, In the matter of* (2) and no good reason has been assigned why we should place a narrow construction upon the section.

The second ground which forms the basis of the contention that the proceedings should be quashed is that they have no legal foundation. There is, in my opinion, no substance whatever in this argument. Our attention has been invited to the case of *Nabin Chandra Das Gupta, In re* (1) where proceedings instituted under section 14 were quashed on the ground that if what was alleged against the legal practitioner, namely, refusal to accept engagement, was established, it would not constitute a ground for a disciplinary order under section 13. In the case before us, such a position cannot be maintained. It cannot be disputed that some at any rate of the allegations against the legal practitioner may, if established, constitute grounds for a disciplinary order under section 13. It cannot consequently be maintained that there is no legal foundation for these proceedings.

It has been urged, however, that the proceedings have been instituted on materials which cannot be treated as affording a legal foundation for the initiation of an enquiry under section 13. The contention is that as the District Judge has taken action on the basis of a confidential report by the Subordinate Judge, on another con-

(2) 188 P. L. R. 1901.

fidential report by the Additional Superintendent of Police, on reports in a newspaper as to the proceedings at a meeting of the Bar Association, on the fact of institution of a criminal case by the Pleader, and on certain information furnished by the ministerial officers of the Court, the proceedings must be deemed to be without legal foundation. I am not prepared to accept this contention as well founded. Section 14 does not specify the nature of the materials upon which the Court concerned may take action. It is plain, however, that if proceedings are instituted, there must be an enquiry supported by legal evidence. That this is the correct view of the scope of section 14, is clear from the judgment of the Judicial Committee in *Southekal Krishna Rao, In the matter of* (3), where Sir J. Hannen made the following observation: "It does not appear very clearly what led to the institution of those proceedings, but it is necessary to inquire into their origin, as if it became known to an officer presiding in a subordinate Court that one of the paretitioners before that Court has been guilty of unprofessional conduct, it would be within the scope of his duties to take steps for the purpose of having that matter adjudicated upon." This is identical with the opinion expressed by the Supreme Court of the United States in *Randall* v. *Brigham* (4) where Field, J., observed as follows: "It is not necessary that proceedings against attorneys for malpractice, or any unprofessional conduct, should be founded upon formal allegations against them. Such proceedings are often instituted upon information developed in the progress of a cause; or from what the Court learns of the conduct of the attorney from his own observation. Sometimes they are moved by third parties upon affidavit; and sometimes they are taken by the Court upon its own motion. All that is requisite to their validity is that, when not taken for matters occurring in open Court, in the presence of the Judges, notice should be given to the attorney, of the charges made, and opportunity afforded him for explanation and defence. The manner in which the proceedings shall be conducted, so that it be without oppression or unfairness, is a matter of judicial regulation. The authority of the Court over its attorneys and counsellors is of the highest importance. They constitute a profession essential to society. Their aid is required, not merely to represent suitors before the Courts, but in the more difficult transactions of private life. The highest interests are placed in their hands and confided to their management. The confidence which they receive and the responsibilities which they are obliged to assume, demand not only ability of a high order, but the strictest integrity. The authority which the Courts hold over them, and the qualifications required for their admission, are intended to secure those qualities." This view has been followed in practice in many cases reported in the books; amongst them two may be mentioned here: *Advocate, In the matter of an* (5) and *Advocate, In the matter of* (6). In the first case, action was taken on the basis of an information communicated to this Court by the Advocate-General in a letter addressed by him. In the second case, action was taken by this Court on the basis of a casual statement in the deposition of a witness in a proceeding in a subordinate Court. What is essential, however, is that the charge must be formulated with precision so as to enable the legal practitioner concerned to meet the allegations against him, *Ganapathi Sastry, In re* (7). In the present case, the petitioner has not contended that the allegations contained in the charge are vague and indefinite. On the other hand, the eighteen paragraphs of his written statement give a very full and complete account of his version of the case. Indeed, up to the present moment there is nothing to show that the petitioner has been in any way embarrassed by vagueness or indefiniteness in the charge against him. On these grounds, I hold that the first alternative branch of the Rule cannot be supported.

As regards the second alternative, it has

(3) 14 I. A. 154; 15 C. 152; 12 Ind. Jur. 11; 5 Sar. P. C. J. 96; 7 Ind. Dec. (N. S.) 685 (P. C.).

(4) (1868) 7 Wallace 523; 19 Law Ed. 285.

(5) 4 C. L. J. 259.

(6) 4 C. L. J. 262; 4 Cr. L. J. 241.

(7) 3 Ind. Cas. 341; 19 M. L. J. 504; 6 M. L. T. 253; 11 Cr. L. J. 274.

MUHAMMAD HANIF v. RATAN CHAND.

been contended that there is a reasonable apprehension of miscarriage of justice in the mind of the petitioner. I am not able to adopt this view and I cannot overlook that the ultimate order, if any, can be passed by this Court and this Court alone on the materials supplied by the subordinate Court.

I hold accordingly that the Rule must be discharged.

B. N.

Rule discharged.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 829 OF 1919.

December 21, 1921.

Present:—Mr. Justice Scott-Smith and Mr. Justice Harrison.

MUHAMMAD HANIF—DEFENDANT—APPELLANT

versus

RATAN CHAND—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 120—Declaration, suit for—Successive causes of action—Limitation.

A person is not bound to bring a declaratory suit on any and every possible invasion of his title. [p. 991, col. 1.]

Hakim Singh v. *Waryaman*, 140 P. R. 1907; 187 P. W. R. 1907, followed.

Plaintiff purchased the *shamilat* appertaining to a certain *khata* in 1879. In 1895 the *shamilat* of the village was divided into three plots, and one of these was partitioned, the remaining two being kept undivided. Plaintiff put forward a claim to a share in the plot which was partitioned but his claim was denied and he received no share out of that plot. He, nevertheless, continued in joint possession of the undivided plots of *shamilat* land and his enjoyment thereof was in no way interfered with. In 1914 fresh partition proceedings were started in respect of these plots, and plaintiff's right to a share in the *shamilat* was again denied. He now brought a suit for a declaration of his title :

Held, that, although the denial of his title by the defendants in 1895 gave the plaintiff a cause of action, he was not bound to sue for a declaration of his title, inasmuch as he continued in joint possession of the undivided plots of the *shamilat* land and that the defendants' denial of his title in 1914 gave him a fresh cause of action and his suit was, therefore, within limitation. [p. 991, col. 1.]

Ahmad v. *Karmdad*, 11 P. W. R. 1908, *Kalu* v. *Ram Lal*, 34 Ind. Cas. 958; 71 P. L. R. 1916; 91 P. W. R. 1916, *Ghulam Hussain* v. *Saifullah Khan*, 42 Ind. Cas. 346; 79 P. R. 1917; 140 P. W. R. 1917, distinguished.

Hakim Singh v. *Waryaman*, 140 P. R. 1907; 187 P. W. R. 1907, relied on.

Second appeal from a decree of the District Judge, Shahpur at Sargodha, dated the 9th December 1918, reversing that of the Subordinate Judge, Second Class, Sargodha, dated the 2nd July 1918.

Lala *Moti Sagar*, R. S., and Lala *Badri Das*, R. B., for the Appellant.

Bakhshi *Tek Chand*, for the Respondent.

JUDGMENT.—In the suit out of which the present second appeal arises the plaintiff-respondent sued for a declaration that he was the owner of a share in the *shamilat* appertaining to *khata* No. 75 in village Hadali. He alleged that he purchased the *shamilat* of this *khata* from one Tahir on 17th February 1879. In 1885 the same *shamilat* was sold by Tahir to defendant No. 2, appellant, who pleaded that the plaintiff's suit was barred by limitation. The Trial Court dismissed the suit on two grounds:—(1) that the *shamilat* in question was not sold to the plaintiff by Tahir in 1879, and (2) that the suit was barred by time, as plaintiff's title was denied in the course of partition proceedings in 1895. The lower Appellate Court, however, held (1) that the sale to the plaintiff in 1879 included the land in dispute, and (2) that the suit was not barred by time, because only a part of the *shamilat* was divided in 1895, and thereafter the plaintiff remained in joint possession of the village *shamilat*, of which the land in dispute is a part. It, therefore, decreed the claim and Muhammad Hanif, defendant, has filed a second appeal to this Court.

It is not now contended that the plaintiff did not buy the *shamilat* appertaining to *khata* No. 75 in 1879, but it is again urged that the present suit is barred by time. A copy of an entry in the *wajib ul-arz*, prepared in the Settlement of 1891, shows that the *shamilat* of village Hadali was divided into three plots *jim*, *sin* and *toe* and that the village proprietors agreed that only *toe* should be divided, plots *jim* and *sin* being retained undivided as grazing ground. In 1895, there was a partition of plot *toe* and the plaintiff put forward his claim to a share in it by virtue of the sale in his favour of 1879. But on the 18th September 1895 the Revenue

Officer held that he was not a co-sharer in the *shamilat* appertaining to *khata* No. 75 and he was, therefore, not allotted any share therein. His share in that plot was 8 *bighas* 4 *kanals* in area and it went to Muhammad Hanif and thereafter the plaintiff took no steps to establish his title. In 1914 fresh proceedings for partition of plots *jim* and *sin* took place and the plaintiff again put forward his claim to a share in them, and because the Revenue Officer rejected his application for a share, he brought the present suit to establish his title. It is admitted that the plaintiff is a co-sharer in the *shamilat* independently of his claim to a share by reason of the sale to him in 1879. It is also admitted that he has all along been in joint possession with other co-sharers of plots *jim* and *sin* and is enjoying grazing rights therein. Counsel for the appellant cites *Ahmad* v. *Karmdad*(1), *Kalu* v. *Ram Lal* (2) and *Ghulam Hussain* v. *Saifullah Khan* (3) as authorities for the contention that the present suit is barred by time. Those authorities are, in our opinion, all of them distinguishable from the present case, because in those cases there was only one invasion of the plaintiff's rights and he had to bring a suit for a declaration within six years of that invasion. In *Hakim Singh* v. *Waryaman* (4) it was held that a suit for a declaration of his title to immoveable property by a person in possession as proprietor is not barred if brought within six years from the time when the defendant attempts to oust him from the land, although a right to sue the defendant who had been recorded as owner of the property in the Settlement Record had already accrued and become barred. No doubt the defendant's denial of his title in 1895 gave the plaintiff a cause of action to sue for a declaration, but he remained in joint possession of the undivided plots of *shamilat* land and his enjoyment thereof was in no way interfered with, and it was, therefore, unnecessary for him to bring a suit to establish his title. He could well afford to wait until an attempt was made to deprive him of his share in those plots. We note also that the entries in the Revenue Records have all along been in his favour.

It was pointed out in *Hakim Singh* v. *Waryaman* (1) (see page 672 of the record) that a man is not bound to bring a declaratory suit on any and every possible invasion of his title, and such suits are not encouraged by the Court unless they are clearly necessary. When the fresh proceedings for partition began in 1914, and the defendant denied plaintiff's title to a share in the *shamilat* appertaining to *khata* No. 75 in plots *jim* and *sin* of the *shamilat*, there was a fresh invasion of the plaintiff's title, which, in our opinion, gave him a fresh cause of action. The reason why he brought no suit at the time of the partition proceedings of 1895 was, doubtless, that the area then involved was very small. But now that the defendant's action threatens to deprive him of his share in the rest of the *shamilat*, he is entitled, upon the fresh cause of action to bring a suit for a declaration.

In our opinion, the decision of the lower Appellate Court is right and we dismiss the appeal with costs.

Z. K.

Appeal dismissed.

(1) 11 P. W. R. 1903.
(2) 34 Ind. Cas. 958; 71 P. L. R. 1916; 91 P. W. R. 1916.
(3) 42 Ind. Cas. 346; 79 P. R. 1917; 140 P. W. R. 1917.
(4) 140 P. R. 1907; 187 P. W. R. 1907.

PATNA HIGH COURT.
PRIVY COUNCIL APPEAL No. 9 OF 1922.
July 5, 1922.
Present:—Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Mullick.

PRAKASH CHANDRA SARKAR—APPELLANT
versus
BRINDABAN CHANDRA SARKAR—RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 109, 110, O. XXI, r. 15—Appeal to Privy Council—Joint decree-holders—Execution application by one for his own share—Order of Court directing execution for benefit of all—Order not determining rights in controversy in suit—Leave, grant of.

A., one of three decree-holders, applied for transfer of his third share to another Court in whose jurisdiction the property of the judgment-debtor was situate. The remaining decree-holders were served with notice of the application but raised no objection,

and the Court made the desired order. Objection to the order was taken by the judgment-debtor before the Execution Court. The matter went up in appeal to High Court which declared that the transfer must be treated as a transfer of the whole decree and that no sum should be paid out of Court to *A.* except on his giving security to refund the same if required. Some time after this *A.* started a fresh execution in which *B.*, one of the remaining decree-holders, applied to be added as a party. This was allowed. A revision application against the order was dismissed by the High Court, and leave was sought by *A.* to appeal to the Privy Council:

Held, that there were no grounds for allowing the application for leave to appeal to His Majesty in Council. [p. 993, col. 2; p. 995, col. 2.]

Per *Miller, C. J*—(1) that the order sought to be appealed against was not a final order determining the rights of the parties in any matter in controversy in the suit as the rights of the decree-holders as to their shares to claim the benefit of the decree were settled by the decree itself and were further determined by the High Court judgment which declared that the transfer of part of the decree must be treated as a transfer of the whole, that the order related to procedure and was merely a natural corrolary of the High Court judgment; [p. 993, cols. 1 & 2.]

(2) that in view of the clear provisions of O. XXI, r. 15 empowering a Court in such a case to protect the interests of all the joint decree-holders, there was no substantial question of law involved. [p. 993, col. 2.]

Per *Mullick, J.*—That in view of the judgment of the High Court declaring that the execution proceedings could only be prosecuted by *A.* on behalf of all the decree-holders, which judgment not being appealed against had become final, it was no longer open to *A.* to contend that *B.* should not have been added as a party to the execution proceedings. [p. 995, col. 1.]

Application for leave to appeal to His Majesty in Council from an order of the Division Bench, dated the 8th December 1921.

Messrs. *S. C. Mitter*, *N. C. Sinha* and *D. N. Sirkar*, for the Appellant.

Mr. *A. K. Roy*, for the Respondent.

JUDGMENT.

MILLER, C. J.—This is an application for leave to appeal to His Majesty in Council filed on behalf of Prakash Chandra Sarkar from an order of a Division Bench of this Court made in its revisional jurisdiction on the 8th December last. The petitioner was one of three brothers who obtained a mortgage decree against Pande Baldeo Ram and others which they executed against the mortgaged property which was situated in Gaya. The decree was executed against the mortgaged property which proved insufficient to satisfy the decree. A decree for the unsatisfied balance was then obtained against the defendants in that suit under section 90 of the Transfer of Property Act, 1882 (now O. XXXIV, r. 6 of the Civil Procedure Code) from the Subordinate Judge of Gaya in the year 1909. The decree was passed in favour of the petitioner and his brothers jointly. The petitioner, subsequently, on the 9th October 1909, applied to the Court at Gaya to transfer the decree to the Subordinate Judge at Ranchi for execution against certain property of the judgment-debtors in that district. He stated in his application that the other decree-holders were unwilling or unable to join in the application and asked that the decree should be transferred as regards his third share only of what remained due to the decree-holders. The other decree-holders were served with notice of the application. One of them, who, we are told, was a lunatic offered no objection and did not appear; the other objected only on the ground that one of the judgment-debtors was dead and proceedings ought to be taken against his representatives. This defect was cured and on the 13th June 1910 it was ordered that the decree be sent to the Court of the Subordinate Judge at Ranchi for execution. In the course of execution proceedings, sometime later, a certificate of non-satisfaction was sent from the Court at Gaya to that at Ranchi and showed the total amount due which was over Rs. 67,000 of which Rs. 22,371, *viz.*, one-third, together with some interest and costs, it was sought to satisfy in the execution. On execution being taken out the judgment-debtors objected that the procedure was irregular and the Executing Court ordered that the sum realised in execution should not be paid to the applicant without the consent of the other decree-holders. The petitioner appealed from this order to the High Court. The appeal was heard on the 15th August 1917 by the late Chief Justice and Mr. Justice Sharfuddin who considered that the transfer of one-third of the decree was irregular and that the order of transfer could not be held binding upon the respondents, the judgment-debtors, upon whom no notice had been served. They further expressed the opinion that the Executing Court was right in treating the transfer as if it was a transfer of the whole decree and in not allowing the appellant to proceed as if he were the sole decree-holder. They thought, however, that the Court below

had gone too far and varied the order by directing that no sum should be paid out of Court to the appellant except on his giving security to the satisfaction of the lower Court to refund the same if required. By O. XXI, r. 15 where a decree has been passed jointly in favour of more persons than one any one or more of them may apply for execution of the whole decree for the benefit of them all, but in such a case the Court is bound to make such order as it deems necessary for protecting the interests of the persons who have not joined in the application. There is no other provision in the Code for enabling one of several joint decree-holders to apply for execution. In that execution it appears that a sum of Rs. 3,000 was realised, the attached property being sold to the decree-holder who was allowed to set off the purchase price against the decretal amount, and the case was dismissed on part satisfaction. A fresh execution case was started in November 1918 in which Brindaban Chandra Sarkar, one of the other decree holders and the respondent in the present appeal, applied to be added as a party. The appellant objected but the learned Subordinate Judge made an order that Brindaban Chandra Sarkar be added as an executing decree-holder in the case together with the appellant, Prakash Chandra Sarkar. The property under attachment was subsequently sold for Rs. 1,300. The appellant moved the High Court in revision contending that the order of the learned Subordinate Judge was without jurisdiction. The High Court rejected the application in revision on the ground that the Subordinate Judge had jurisdiction to make the order and further that after the decision of this Court, dated the 15th August 1917, which directed that the transfer should be treated as a transfer of the whole decree and that the interests of the other decree-holders should be protected, there was no substance in the appellant's application in revision.

It is from this order that the appellant now seeks to appeal to His Majesty in Council. In my opinion, the application should be rejected. The order now sought to be appealed from is not, in my opinion, a final order determining the rights of the parties in any matter in controversy in the suit. The rights of the parties, in so far as their claim to share in the benefit of the decree was concerned, were settled by the decree itself which was in their favour jointly. If there should be any doubt about that, these rights were further declared by the decision of the Chief Justice and Mr. Justice Sharfuddin on the 15th August 1917, and the present order is one which relates to procedure only. I may add that the decision of the 15th August 1917 is not now under appeal and cannot, therefore, be questioned. The order now sought to be appealed from is merely a natural corrolary of the previous judgment and directs the manner in which the rights of the parties shall be given effect to. Moreover, it appears that it is more than 12 years since the decree was passed and any further application to execute it is time-barred. We are not informed definitely whether the execution case has terminated but as the property has been sold it would appear that this is probably the case. If it is so, it would follow that as the total amount in dispute under the present proceedings is only Rs. 1,300 which is below the statutory limit necessary to enable the appellant to appeal, no further execution proceedings can be taken and it is difficult to see how the present appeal can involve any claim or question to or respecting property of Rs. 10,000 or upwards, even though the unsatisfied balance of the decree should exceed that sum. Whether the execution has terminated it is not necessary to determine, as on the other points the application should, in my opinion, fail. In any case the only appeal permissible from the present decision which is an order in revision would be confined to the question whether or not the Subordinate Court had jurisdiction in the matter. That it had jurisdiction in such a case to protect the interests of the joint decree-holders other than those actually making the application for execution can hardly be doubted in face of the clear provisions of O. XXI, r. 15 and there is not, in my opinion, any substantial question of law to be determined. As the appeal which it is sought to prefer to His Majesty in Council is from a decision of affirmance it seems to me that the application must fail also on this ground.

I would, therefore, dismiss the application

with costs to the respondent. Hearing fee five gold *mohurs*.

MULLICK, J.—This application arises out of a joint mortgage decree obtained in 1891 by the petitioner, Prakash Chandra Sarkar, and two others.

The decree holders first of all brought the mortgaged properties to sale in the district of Gaya, next they took out execution against the properties other than the mortgaged properties and in 1915 Prakash obtained an order from the District Judge of Gaya transferring one-third of the decree to the Judicial Commissioner of Chota Nagpur for execution. The proceedings finally came before the Subordinate Judge of Palamau and on the 9th December 1916 that learned Judge passed an order that Prakash Chandra Sarkar might proceed with the execution of the decree but would not be permitted to take out any of the proceeds unless the other decree-holders joined with him in applying for payment. It was Prakash Chandra Sarkar's contention before the Subordinate Judge that the District Judge of Gaya had transferred only his separate one-third share in the decree amounting to Rs. 30,516-14-7 and that he alone was competent to prosecute the execution proceedings. He denied that the other two decree-holders were entitled to any share in the proceeds of the execution. Against that order an appeal was preferred to the High Court at Patna and on the 15th August 1917 a Division Bench held that the objection of the judgment-debtors would be sufficiently met if the Subordinate Judge's order were modified and if it were directed that no sum should be paid out to the appellant except on his giving security to the satisfaction of the Court below for the refund of the sum if required. Meanwhile the execution before the Subordinate Judge of Palamau was proceeding and on the 17th February 1917 certain properties belonging to the judgment-debtors worth Rs. 3,000 were purchased with the permission of the Court by the decree-holder, Prakash Chandra Sarkar, he being allowed to set off the purchase-money against the decretal amount. On the 7th March 1918 the execution case was finally dismissed on part satisfaction.

The next application for execution was made by Prakash Chandra Sarkar on the 28th November 1918 and in the proceedings that followed certain properties belonging to the judgment-debtors were attached; but the sale could not be held, because on the 18th November 1919 Brindaban Chandra Sarkar, one of the co-sharer decree-holders, filed a petition claiming that he was entitled to share in the execution to the extent of his one-third share in the decree. Prakash Chandra Sarkar repeated the objections which he had urged in his appeal in the High Court, but on the 8th January 1920 the Subordinate Judge decided against him and directed that Brindaban Chandra Sarkar should be added as an executing decree-holder and that a fresh sale proclamation should be issued for the sale of the attached properties by inserting his name along with that of Prakash Chandra Sarkar. On the 15th March 1920 the sale was held realising a sum of Rs. 1,300. In the meantime, on the 5th February 1920, Prakash Chandra Sarkar preferred an appeal to the High Court against the Subordinate Judge's order of the 8th January; he also filed an application for revision by way of greater precaution in regard to the same matter. The application for revision but not the appeal was pressed and on the 8th December 1921 Jwala Prasad and Ross, JJ., affirmed the order of the Subordinate Judge and held that Prakash Chandra Sarkar could only execute the decree on behalf of all the decree-holders and that Brindaban Chandra Sarkar was properly added as a party to the execution proceedings.

Leave is now sought to appeal to His Majesty in Council against this order made by the Division Bench.

The substantial questions of law involved are put as follows:—

(1) Although the original mortgage-decree was a joint decree, the share of Prakash Chandra Sarkar being a defined and ascertained share and admitted to be one-third, there is no bar in law to his prosecuting an application exclusively in respect of his share.

(2) Before the transfer order of the 17th August 1914 was made by the District Judge of Gaya a notice was issued upon the other two decree-holders at the instance of Prakash Chandra Sarkar asking whether they had any objection to his taking out execution in respect of his one-third share. No objection was made and it is contended that the District Judge having ordered execution to proceed only in respect of the amount due to Prakash

Chandra Sarkar, Brindaban Chandra Sarkar is now estopped from objections to the execution of that order.

(3) The order of the District Judge of Gaya transferring the decree is final as regards the right of Prakash Chandra Sarkar to prosecute the proceedings for his own benefit and to the exclusion of his co sharers, and that the Execution Court in Palamau has no jurisdiction to go behind the District Judge's order by adding Brindaban Chandra Sarkar and by giving him an interest in the proceeds of the execution.

Now, whatever may be their merits, it appears to me that in the present circumstances these contentions are no longer material. The judgment of the Division Bench of this Court passed on the 15th August 1917 which was not challenged by proceedings in the Privy Council has become final and by it the learned Judges affirmed the order of the Subordinate Judge made on the 9th December 1916 holding that the order of the District Judge of Gaya was irregular and that the execution proceedings could only be prosecuted by Prakash Chandra Sarkar for the benefit of his co decree-holders. The learned Judges of the High Court expressed this opinion in clear terms but instead of affirming the Subordinate Judge's order which required all the decree-holders to join in an application for withdrawing the sale-proceeds they thought it would be sufficient for the protection of the co sharers if Prakash were allowed to withdraw the money realised after giving security for the satisfaction of the claims of his co-sharers should they subsequently come forward with a claim. That being so it was no longer open to Prakash Chandra Sarkar to contend that the execution proceedings in Palamau must be conducted for his sole benefit and there was no defect of jurisdiction or material irregularity in the exercise of jurisdiction on the part of the Subordinate Judge when on the 8th January 1920 he ordered Brindaban Chandra Sarkar to be added as an executing decree-holder. I presume that in conformity with the orders of the 15th August 1917, the Subordinate Judge, before paying out the money to Prakash and Brindaban, took or will take security for protecting the interest of the remaining decree-holder. But that matter is not before us at the present moment.

A point was made on behalf of the opposite party that the original decree being more than 12 years old is now barred and that no fresh application for execution can be entertained in consequence of the provisions of section 48 of the Civil Procedure Code. In the absence of any information as to whether the execution case which was started by the application of the 28th November 1918, namely, Case No. 61 of 1918, has been finally disposed of or is still pending, it is impossible for us to give a decision on this point. But apart from this point there is sufficient material before us for holding that no leave should be given in this case.

N. H. *Application dismissed.*

MADRAS HIGH COURT.

CIVIL APPEAL No. 137 OF 1920.

August 11, 1921.

Present:—Mr. Justice Oldfield and Mr. Justice Ramesam.

VAITHINATHA IYER (DEAD) AND OTHERS —PLAINTIFFS—APPELLANTS

versus

GOVINDASWAMI ODAYAR AND OTHERS— DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), s. 74—Contract—Penal terms—Test—Chit fund — Special relation between stake-holder and subscribers—Bond, execution of, by prize-winner for payment of future instalments —Provision for forfeiture of dividend, interest and premium in default of any instalment and liability for whole amount with enhanced interest, whether penal—Instalment bond—Failure to enforce terms on some defaults—Waiver.

The test to determine the penal nature of the terms of a contract is, whether the terms are unreasonable as a whole and whether in fact they are so unreasonable that the parties never contemplated that they should receive effect. [p. 997, col. 1.]

A stake-holder of a chit fund stands in a special relation to its subscribers by reason of the fact that he alone is liable to each subscriber and there is no liability between the subscribers *inter se*; and without punctual payments by the individual subscribers the stake-holder cannot discharge his liabilities to the successful bidders as they arise. Such relation justifies stringency in the conditions of payment by subscribers and, in particular, in the rate of interest provided for in cases of default. [p. 997, cols. 1 & 2.]

Where a successful bidder at a chit fund executes a bond to the stake-holder for an amount representing the sum total of future instalments payable by him which provides that, in default of payment of any instalment, the executant would not only forfeit the dividend, interest and premium but become liable to pay the entire amount immediately with enhanced interest at the rate of 18 per cent. per annum the stipulations are neither unreasonable nor penal. [p. 997, col. 2.]

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Periasami Thalavar v. *Subramanian Asari*, 14 M. L. J. 186, followed.

Wallis v. *Smith*, 1882) 21 Ch. D. 243; 52 L. J. Ch. 145; 47 L. T. 389; 31 W. R. 214 and *Thompson* v. *Hudson*, (1869) 4 H. L. 1; 38 L. J.Ch. 431, distinguished.

The waiver by a creditor to enforce the terms of an instalment bond on the falling due of a few instalments does not affect his right to use the coercive measures provided therein in cases of future default. [p. 997, col. 2.]

Maclaine v. *Gatty*, (1921) A. C. 376; 90 L. J. P. C. 73. 124 L. T. 385; 26 Com. Cas. 148; 37 T. L. R. 139, referred to.

Appeal against the decree of the Court of the Subordinate Judge, Negapatam, in Original Suit No. 59 of 1918.

FACTS appear from the judgment.

Messrs. *K. V. Krishnaswami Aiyar* and *C. V. Rajagopalacharair*, for the Appellants.—The lower Court has wrongly construed the terms of the bond to be penal. It overlooked the large responsibilities of the stake-holder of a chit fund to his subscribers. He alone is responsible to each individual subscriber. He has to pay the prizes punctually and he can only do so if the subscribers are punctual in payment. Stringent provisions have to be made to enforce punctual payments. The provisions in the bond cannot be said to be unreasonable. See *Periasami Thalavar* v. *Subramanian Asari* (1) and *Gundala Venkataramma Dossi Panthulu Garu* v. *Thorada Pulliah*, Second Appeal No. 23 of 1902.

The fact that the plaintiff did not enforce the stringent provisions when the third and fourth instalments fell due should not deprive him of his right to exercise the option in cases of future default. *Maclaine* v. *Gatty* (2).

Mr. *S. Subramania Aiyar*, for the Respondents.—The stipulation for immediate payment of the whole amount in case of default of any instalment, the enhanced interest, the forfeiture of the subscribers' right to dividend and premium are distinctly penal. Whereas the defendant has to pay only Rs. 1,000 for each instalment, the bond substitutes practically a larger liability in case of default. See *Maclaine* v. *Gatty* (2). If there is a *pro rata* distribution of profits the defendant might even have to pay less. See also *Wallis* v. *Smith* (3).

(1) 14 M. L J. 186.

(2) (1921) A. C. 376; 90 L. J. P. C. 73; 124 L. T. 385; 26 Com. Cas. 148; 37 T. L. R. 139.

(3) (1882) 21 Ch. D. 243; 52 L. J. Ch. 145; 47 L. T. 389; 31 W. R. 214.

Also, the plaintiff not having enforced the penal terms when the 3rd and 4th instalments fell due has waived his right and cannot afterwards enforce it.

JUDGMENT.—This appeal arises out of the defendant's default in connection with a chit conducted by the plaintiff. The defendant was the successful bidder at the second auction held and afterwards paid the third, fourth and fifth instalments correctly. He defaulted in payment of the sixth instalment and the plaintiff is now attempting to recover the money on the bond, which, on taking the prize at the second auction, the defendant executed. The lower Court has held that the terms of the *kararnama*, Exhibit A, are penal and not enforceable and it has accordingly given relief to the defendant in a manner to be particularly explained with reference to the conditions under which the chit was worked. Exhibit A shows that the chit was to be in 12 instalments, the subscription for each being Rs. 1,000. The instalments were at intervals of six months. The total subscription for the first instalment went to the stake-holder and that for the last instalment went to any subscriber, who had not bid at any of the intermediate instalments. The subscription at each of these intermediate instalments was available for loan to the successful bidder at the auction, which was held every six months, the successful bidder being the bidder who offered to accept the lowest proportion of the total subscription. The other provisions to be referred to are that, in case the subscribers failed to pay their subscriptions, they were not only to forfeit the dividend, interest and premium, which will next be explained, but were also to pay the whole amount on demand with interest thereon at $1\frac{1}{2}$ per cent. per mensem from the date of the auction; and it was provided further that the successful bidders should, in each case within 15 days, execute documents to the stake-holder for the due payment of the chit amounts of the subsequent instalments and for abiding by the terms of Exhibit A; Exhibit B being the document executed by the defendant. Reference has been made to the dividend and interest. The dividend apparently refers to the amount to be distributed among the subscribers by deduction from the amount payable by them of the difference between Rs. 12,000, the nominal

amount available at each auction, and the amount which the successful bidder agreed to accept instead of it. Interest is explained as being the sum of Rs. 720, which the agreement provides was to be deducted from the nominal amount of the subscriptions at each instalment for interest due for the ensuing six months, the principle being, apparently, that the subscribers who had not been successful at that auction were to be compensated by deductions from what they had to pay for use of their money during the six months.

The lower Court on these terms has observed that the agreement is penal in three respects, firstly, the liability of the defaulter for future instalments from the date of his default, secondly, his deprivation of the dividend and interest above referred to, and, thirdly, the imposition on him of liability for interest on the amount due from him at 18 per cent. from the date of his default; and it has further said that, although each of the said three stipulations taken by itself may not amount to a penal stipulation, yet the three together are penal and should be relieved against. It has given relief by awarding the actual amount of payments, which the defendant would have had to make on account of each instalment if he had not defaulted, together with a reasonable compensation of Rs. 50 in connection with each default.

In reaching this conclusion the lower Court has, it seems to us, entirely lost sight of the most material element in the case. It had, speaking generally, to decide whether these terms were unreasonable as a whole and whether in fact they were so unreasonable that the parties never contemplated that they should receive effect. Yet throughout the whole of the lower Court's judgment we find no mention of the special relation, in which the stake-holder of the chit is to the subscribers and the special necessity for provision for protection of his interest in the agreement, by which those relations are regulated. That this relation is of a special nature and justifies stringency in those conditions and in particular in the rate of interest provided for in cases of default has been clearly recognised in the decisions in *Periasami Thalavar* v. *Subramanian Ascri*(1) and *Gundala Venkatarama Doss Panthulu Garu* v. *Thorada Pulliah*, Second Appeal No. 23 of 1902, with which we respectfully agree. The stake-holder has necessarily to depend on punctual payments from his subscribers and to reserve to himself powers to enforce such payments. For the stake-holder alone is liable to each subscriber and there is no liability between the subscribers *inter se*; and without punctual payments by the individual subscribers the stake-holder could not discharge his liabilities to the successful bidders, as they arose. In Exhibit A in fact the stake-holder is given exceptional powers, including the power to remove a subscriber who makes default during the currency of the chit and to introduce a new subscriber in his stead. Looking at the transaction as a whole, as defined by Exhibit A, we are unable to hold that any of the conditions are unreasonable or are such as the parties might not naturally recognise should regulate the exceptional relations between them. Generally, therefore, we cannot treat any of them as penal. In these circumstances we turn to the two arguments on which the lower Court has relied.

The lower Court has firstly attached importance to the waiver by the plaintiff of his right to enforce the terms of Exhibit B in connection with the fourth and fifth instalments. We need only refer to *Maclaine* v. *Gatty* (2), as an authority for the position that such a waiver does not affect the creditor's right to use the coercive measures provided by his bond in cases of future default.

Next, full argument was addressed to us to show that the stipulations to which reference has been made are essentially penal. *Wallis* v. *Smith* (3) was cited and reference was also made to *Thompson* v. *Hudson* (4). In the former of these authorities the question directly under consideration was the effect of default in payment of the prescribed sum of money in connection with the breach of one or other of a number of obligations, an obligation to pay a far smaller sum of money being one of them. That is not directly applicable here. It was only incidentally in the course of the judgments, particularly in that of Lord Justice Lindley, that the principle on which the defendant now relies was referred to. That principle, which is fully supported by the second case already cited, is shortly

(4) (1869) 4 H. L. 1; 38 L. J. Ch. 431.

that no substitution of liability for a large sum in case of default for a smaller sum will be enforced by the Court. But, though that principle can be accepted at once, it is not sufficient for the decision of the case; for we are not satisfied that the substitution of a large sum of money for a smaller one is in question (Exhibits A and B). It is urged that there is such a substitution, inasmuch as Exhibit B is for instalments calculated each at Rs. 1,000, whereas the instalment actually payable in each case was less, firstly, because it should have included only what the defendant had to pay if he had continued without default, and, next, in view of the deduction which under Exhibit A was to be made from each subscription on account of interest as already explained, the benefit of each of these deductions being forfeited under Exhibit B.

With reference to the first objection it can only be said that both Exhibits A and B are clear. They provide for the defendant's liability for the whole amount of each subscription and not for the amount which he might have turned out liable for. In fact it is difficult to say how any other arrangement could have been made. The lesser amount which the defendant contends should have been made the basis of his liability could not be ascertained until each auction was held; and it may be observed on the other side that, if the amount which the plaintiff would have been entitled to receive were to be the measure of the defendant's liability, it is difficult to avoid the argument that the amount which the plaintiff would have had to expend in order to find money by borrowing for distribution to the shareholders should also have been taken into account. We can readily understand that the arrangement in case of default was for a fixed liability and not for a sum which could not be ascertained when the default occurred; and we, therefore, read Exhibit A, as imposing a liability of the former description. Then as regards interest we think the tenour of Exhibit A is clear. The subscription is always referred to as one of Rs. 1,000 per instalment and the amount of interest is referred to as the sum to be deducted from the Rs. 12,000. There is no question of the defendant being liable only for the net amount.

In these circumstances, we allow the appeal and modify the lower Court's decree by substituting a decree for the amount claimed in the plaint with interest and costs in both Courts. Time for redemption, six months from this date.

M. C. P.

Decree modified.

CALCUTTA HIGH COURT.
APPEAL FROM APPELLATE DECREE
No. 101 OF 91.
February 27, 1922.
Present:—Mr. Justice Newbould and Mr. Justice Panton.
Raja JOGENDRA KISHORE ROY CHOUDHURY—PLAINTIFF—APPELLANT
versus
SHEIKH AKTAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Excess rent for excess area, suit for—Finding essential for disposal of suit—Bengal Tenancy Act (VIII of 1885), s. 52—Final Court of fact, duty of—Findings of fact to be clearly expressed—Appeal, second.

In a suit for excess rent for excess area in respect of a tenancy the finding that there is nothing to show that at the inception of the tenancy rent was settled or that it was understood that rent should be settled by assessment on area, is not sufficient for the disposal of the controversy between the parties. The landlord's case does not depend on his being able to prove what had happened at the inception of the tenancy. If the landlord can show that since the creation of the tenancy rent had been assessed, and that when rent was last assessed the assessment was on the basis of a certain area and that the defendants are in possession of land on which no rent was assessed at the time, then the landlord is entitled to increase of rent. The Court should come to a finding whether or not there has ever been assessment of rent on the basis of area and, if so, whether that area is less than the land found to be held by the tenant at the time of the suit. [p. 999, col. 2.]

Durga Priya Choudhury v *Hazra Gain*, 62 Ind. Cas. 453; 25 C. W. N 204, relied upon.

It is the duty of a Judge when sitting as a final Court of fact to state clearly in his judgment what his findings are; the High Court sitting in second appeal cannot deduce from casual statements in the judgment, findings of fact which are not clearly expressed. [p. 999, col. 2.]

Appeal against the decree of the Special Judge, Mymensingh, dated the 8th of July

1918, reversing that of the Assistant Settlement Officer, Netrakona, dated the 16th of May 1917.

FACTS appear from the judgment.

Babu *Tarak Chandra Chakravarty* (with him Babu *Ramani Mohan Chatterjee*), for the Appellant.—The lower Appellate Court was wrong in setting aside the order of the first Court for additional rent. It was not for the landlord to prove the area of the plot at the inception of the tenancy, that is for the tenant to prove. The landlord has proved all that he could. When there is an intermediate adjustment in 1306 B. S., why should the plaintiff be required to go back to the inception of the tenancy as regards area and rent? Refers to *Durga Priya Choudhury* v. *Hazra Gain* (1). Refers to section 52 of the Bengal Tenancy Act. The landlord has to prove the area previous to the present claim. The comparison which would disclose the excess is the comparison with the last assessment. The Special Judge cast upon me a burden which is unnecessarily heavy. There was an adjustment before the present claim. Refers to section 52, sub-section 2 of the Bengal Tenancy Act. No party required the Court to make any investigation into the early history of the tenancy. Burden shifts on the tenant, *Dhrupad Chandra Koley* v. *Harinath Singha Roy* (2). Refers to *Lakhi Narain Sarongi* v. *Sri Ram Chandra Bhunya* (3). When I have showed excess and have made out a *prima facie* case, the burden of proof is shifted to the tenant to prove that there was a consolidated rent. See *Lakhi Narain Sarongi* v. *Sri Ram Chandra Bhunya* (3).

Babu *Birendra Kumar De*, for the Respondents.—It is clear from the judgment of the lower Appellate Court that he does not believe that there was ever any assessment of rent based on the area held by the tenant. His findings are clear and conclusive and cannot be chellanged in second appeal. The landlord has not proved on which basis the rent was assessed.

Babu *Tarak Chandra Chakravarty* briefly replied.

JUDGMENT.—This is an appeal against the decision of the Special Judge of Mymensingh reversing the decision of the Assistant Settlement Officer of that District. The main point arising in this appeal is whether the learned Judge has rightly held that the plaintiff appellant is not entitled to excess rent for excess area. The Assistant Settlement Officer found that the areas of the holdings in certain *khatians* were larger at the time of the Survey and Settlement than the measurements shown in the landlord's papers, and on this basis granted the landlords additional rent for additional area. This decision has been reversed on the finding that there is nothing to show that at the inception of the tenancies rents were settled or that it was understood that rents should be settled by assessment on areas.

This finding is not sufficient for the disposal of the question. The learned Judge appears to have fallen into the error similar to that pointed out by a Division Bench of this Court in the case of *Durga Priya Choudhury* v. *Hazra Gain* (1). There it was held that the landlord's case did not depend on his being able to prove what happened at the inception of the tenancy. If the landlord can show that since the creation of the tenancy, rent had been assessed, and that when rent was last assessed, the assessment was on the basis of a certain area and that the defendants are in possession of land in which no rent was assessed at the time, then the landlord is entitled to increase of rent. The learned Special Judge has not found whether or not there has ever been assessment of rent on the basis of area and, if so, whether that area is less than the land now found to be held by the tenants. He has not come to a finding on the essential point whether the tenant is in occupation of the land in which rent had not been assessed and for which he is bound to pay rent. It is contended on behalf of the defendants-tenants that from the judgment of the lower Appellate Court it is clear that he does not believe that there was ever any assessment of rent based on the area held by the tenant. But it is the duty of the Judge in his judgment when sitting as the final Court of fact to state clearly what his findings are, and this Court sitting in second appeal cannot deduce from casual statements in the judgment findings of fact which are not clearly expressed.

Two other points were taken on behalf of the appellant, but there is no substance in

(1) 62 Ind. Cas. 453; 25 C. W. N. 204.
(2) 45 Ind. Cas. 660; 22 C. W. N. 826; 27 C. L. J. 568.
(3) 11 Ind. Cas. 212; 15 C. W. N. 921; 14 C. L. J. 146.

MUHAMMAD AFZAR v. MANKUMAR MAHTON.

them. One is that the finding of the length of the Gaj 22½ inches is not justifiable. This is a question of fact and no question of law arises in this connection. The next point is that the lower Appellate Court should not have remanded the case in respect to *khatians* Nos. 171 and 181 for finding whether the rents were *mukarari* or not. The issue as to this was clearly made in the written statement, and as no issue was formally framed before the Court there cannot be held to be any waiver of this contention because the Assistant Settlement Officer when writing his judgment omitted to include this in the issues; nor was the learned Special Judge debarred from holding a finding on this issue necessary because the point was not expressly raised as regards *khatian* No. 171 in the grounds of appeal to him. The appeal raised the question of the enhancement of rent in *khatian* No. 171 and that was sufficient to justify the appellant's Pleader arguing the point, that the holding was *mukarari* when the appeal was heard.

The result is that this appeal must be allowed. The decree of the lower Appellate Court in so far as it relates to enhanced rent under section 52 of the Bengal Tenancy Act is set aside and the case sent back to that Court to be re-heard in the light of the observations we have made.

The costs will abide the result.

E. H.

Appeal allowed;
Case sent back.

PATNA HIGH COURT.
CIVIL REVISION No. 7 OF 1922.
May 16, 1922.
Present :—Mr. Justice Coutts and Mr. Justice Das.

Qazi Syed MUHAMMAD AFZAR *alias* GHULAM MAHIUDDIN—PLAINTIFF PETITIONER

versus

MANKUMAR MAHTON *alias* LACHMI NARAIN MAHTON—DEFENDANT—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 151—Inherent power of Court, exercise of—Consent of parties—Consolidation of suits.

The consent of parties is not a condition precedent to the exercise by a Court of the powers conferred upon it by section 151 of the Civil Procedure Code; a Court, therefore, has jurisdiction under the section to consolidate suits without the consent of the parties.

Appeal from an order of the Subordinate Judge, Patna.

Messrs. *Kulwant Sahay* and *Siveshwar Dayal*, for the Petitioner.

Messrs. *S. M. Mullick* and *B. C. Sinha*, for the Opposite Party.

JUDGMENT.

COUTTS, J.—This is an application in revision against an order of the Subordinate Judge of Patna consolidating two suits. It is not contended that the learned Subordinate Judge had not jurisdiction under section 151, Civil Procedure Code, to consolidate the suits; and that he has such jurisdiction has been held not only in this Court but in other High Courts in India and I may refer particularly to the case of *Kali Charan Dutt* v. *Manodabala Dasi* [*Surja Kumar Mondal*] (1) where this matter was very fully considered. It is contended, however, that the jurisdiction under section 151, Civil Procedure Code, cannot be exercised without the consent of parties. No authority has been adduced in support of this contention and I am unable to accept it. It seems clear that if the Court has jurisdiction to consolidate under section 151, Civil Procedure Code, it must have that jurisdiction without the consent of parties. If this were not so, it would not have inherent jurisdiction to consolidate at all, for, consent of parties cannot confer a jurisdiction that does not exist.

It is not for us in revision to consider whether, in this particular case, consolidation should have been allowed or not, but I may remark that, in my opinion, the Court has exercised its jurisdiction wisely. I would accordingly dismiss this application with costs. Hearing fee three gold *mohurs*.

DAS, J.—I agree.

W. C. D. *Application dismissed.*

(1) 15 Ind Cas 807; 17 C. W. N. 526; 16 C. L. J. 591.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2111 OF 1919 WITH RULE No. 38 OF 1919.

January 31, 1922.

Present:—Justice Sir N. R. Chatterjea, Kt., and Mr. Justice Pearson.

RAM RENU ROY AND OTHERS—DEFENDANTS—PETITIONERS—APPELLANTS

versus

MIDNAPUR ZAMINDARY COMPANY, LIMITED—PLAINTIFF—OPPOSITE PARTIES—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), ss. 7, 52, 105—Claim for excess rent for excess area—Question of enhancement of rent, if can be taken up.

Where in Settlement proceedings under section 105 of the Bengal Tenancy Act, a landlord applies for excess rent for excess area as also for enhancement of rent but abandons his claim to the latter claim and the question of the enhancement of rent is not gone into and only a decree for excess rent for excess area is passed, it is not open to the Special Judge on appeal to decree an enhancement of rent on the principles of section 7 of the Act. Having regard to the provisions of section 52 of the Act the Special Judge should only confine himself to the question of fair and equitable rent. [p. 1002, col. 1.]

Appeal against the decree of the Additional Special Judge, Midnapur, dated the 2nd June 1919, modifying that of the Assistant Settlement Officer, Camp I Salboni, dated the 26th July 19 7.

FACTS appear from the judgment.

Babu *Karunamoy Bose*, (with him Babu *Panchanon Ghose*), for the Appellants.—The defendants are the appellants. The appeal arises out of proceedings under section 105, Bengal Tenancy Act by the plaintiff. The plaintiff originally applied for additional rent for additional area and also for enhancement of rent but subsequently the last claim was given up. So no issues were raised on the point and the question was not gone into. The plaintiff claimed Rs. 98 for additional rent but the Assistant Settlement gave a decree for Rs. 65 only. On appeal, the Special Judge gave a decree for Rs. 128. I submit section 7 of the Bengal Tenancy Act has no application, inasmuch as there was no claim for enhancement of rent. The case should have been decided under section 52 of the Bengal Tenancy Act only. My next point is that the plaintiff not having substituted within time the deceased respondent the appeal to the lower Appellate Court had abated. Hence the present decree appealed against cannot stand.

Mr. *U. N. Sen Gupta*, (with him Babu *Probodh Kumar Das*), for the Respondent.—As regard the first point, I submit the Courts below took into consideration the assets of the tenure. Section 7 has been rightly applied by the Special Judge. As regard the second point, it is concluded by the findings of fact based upon the materials in the record. If you are against me on the first point then the case should go back.

Babu *Karunamoy Bose* replied in brief.

JUDGMENT.—This matter comes up before us by way of appeal and revision and arises out of proceedings under section 105 of the Bengal Tenancy Act for settlement of fair rent.

So far as the present case (No. 271) is concerned, although the plaintiff applied for additional rent for additional area and also for enhancement of rent, when the matter came up before the Assistant Settlement Officer the latter claim appears to have been abandoned. The Assistant Settlement Officer states as follows:—"In Cases Nos. 271 and 54, the plaintiff claimed additional rents in the plaints but in the rest of the applications they claimed, besides additional rents, enhancement of rent under section 30 (*a*) and 30 (*b*) of the Bengal Tenancy Act." The issues framed in the case show that, so far as the present case is concerned, there was no issue as to enhancement of rent. The excess area was found by the Settlement Officer and the excess rent was calculated on a certain basis. In the result, Rs. 65-3-6 was the rent settled.

There was an appeal by the plaintiff to the Additional Special Judge. The learned Judge was of opinion that the obvious course was to fix the rent on the principles of section 7 of the Bengal Tenancy Act and he held that Rs. 128 should be the rent payable by the defendant although the plaintiff claimed only Rs 98.

We think that the learned Judge was wrong in enhancing the rent, with reference to the provisions of section 7 of the Bengal Tenancy Act. The question whether the rent should be enhanced or not, was not gone into by the Court of first instance. As pointed out above, the only question set out in the beginning of the judgment

of that Court was what was the additional rent for the additional area.

It is pointed out by the learned Counsel on behalf of the respondent that the Assistant Settlement Officer did, as a matter of fact, consider the assets of the tenure in the present case and that, therefore, it must be taken that he considered the question whether the rent of the defendants should be enhanced; and that, although no reference to section 7 of the Bengal Tenancy Act was made in the plaint, it was sufficient for the landlord to pray for settlement of fair and equitable rent and to state the grounds upon which the alteration of rent was claimed.

But if the Assistant Settlement Officer considered the question of assets for the purpose of enhancement of the rent, he was wrong in doing so, because, having regard to the manner in which the case was treated in the Court of first instance, and having regard to the issues, the defendants had no opportunity of adducing evidence on the point whether the rent should be enhanced.

We think, therefore, that the learned Special Judge ought not to have considered the question of enhancement but should have confined himself to the question of fair and equitable rent having regard to the provisions of section 52 of the Act.

We may mention that a batch of second appeals from the decision of the same Special Judge came up to this Court and there also in the original application, enhancement was claimed on a two-fold ground, namely, first, additional rent was claimed for excess area and, secondly, rent was claimed at a higher rate than that paid by the defendants on the ground that they paid at a lower rate than was paid by other tenants for adjoining lands. But when the case came before the Assistant Settlement Officer, the claim for enhancement (*i.e.*, the second ground) was abandoned and the claim was restricted to additional rent for excess area. There, also, the plaintiff appealed against the decision of the Assistant Settlement Officer, who made a decree for additional rent for the excess area to the Special Judge, and the latter increased the rent as assessed by the Settlement Officer. This was not merely on the ground that the additional rent was payable in respect of excess lands but also that rent was payable at a higher rate than was paid by the tenants. It was observed by Mookerjee, A. C. J. (Fletcher, J., agreeing) that "the proceedings must be taken on the basis that the rent for the original area was to remain unaltered." We think that the observations apply to this case also.

We ought to mention that another ground was taken on behalf of the appellant, namely, that the appeal to the lower Appellate Court abated by reason of no substitution having been made within six months of the death of the respondent. The Court below has decided the question in favour of the plaintiff, and, although the observations made by the Judge are open to criticism, we think it was open to him to come to the conclusion at which he arrived, upon the affidavit and other evidences in the case.

The decree of the lower Appellate Court is reversed and the case is sent back to that Court in order that the learned Special Judge may assess the additional rent for additional area without taking into consideration any question of enhancement of rent

Costs will abide the result.

This order disposes of the Rule. We allow no separate costs in the Rule.

R. N.

Case sent back.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 2011 OF 1914.

February 10, 1920.

Present:—Mr. Justice Shadi Lal and Mr. Justice Martineau.

BANWARI LAL AND OTHERS, REPRESENTATIVES OF BAL MUKAND, DECEASED, THROUGH *Musammat* BAGHWANTI, THEIR GRANDMOTHER AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Musammat KISHEN DEVI AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXIII, r. 1—Permission to file suit, whether must be express—

BANWARI LAL v. KISHEN DEVI.

Order granting permission, whether can be questioned after it has become final—Probate and Administration Act (V of 1881), s. 55, proceedings under—O. XXIII, r. 1, application of.

Under O. XXIII, r. 1, of the Civil Procedure Code it is not necessary that the permission mentioned therein should be given in express terms, it is sufficient if the grant of permission can be implied from the order, read with the application on which it was made. [p. 1005, col 1.]

Ghulam Ali Shah v. *Shahabal Shah*, 3 P. R. 1905; 87 P. L. R. 1905; 13 P. W. R 1905 and *Jita Singh* v. *Hari Singh*, 37 Ind. Cas. 128; 97 P. R. 1916, 229 P. W. R. 1916, dissented from.

The propriety of an order under O. XXIII, r. 1, of the Civil Procedure Code, granting permission to withdraw with liberty to bring a fresh suit cannot be questioned after the order has become final. [p. 1005, col. 1.]

Chhajju v. *Khyali Ram*, 14 Ind. Cas. 175; 9 A L. J. 378, referred to.

Plaintiffs applied for Probate of a Will, but subsequently asked for permission to withdraw the application, saying that they intended to file a regular suit on the basis of the Will. The Court passed an order permitting the withdrawal and dismissed the application. On the filing of the regular suit objection was taken under O. XXIII, r. 1, of the Civil Procedure Code:

Held, (1) that O. XXIII, r. 1, of the Civil Procedure Code was not applicable to Probate proceedings; [p. 1004, col. 1.]

Ghellabhai v. *Nandubai*, 21 B 335; 11 Ind. Dec. (N. S.) 227, *Janakbati Thakurain* v. *Gajanand Thakur*, 37 Ind. Cas. 12; 20 C. W. N 986; 1 P. L. J. 377; 1 P. L. W. 41, *Jugeshwar Nath Sahai* v. *Jagatdhari Prasad*, 40 Ind. Cas. 345; (1917) Pat. 192; 2 P. L. J. 535; 5 P. L. W. 230, referred to.

Kalyanchand Lalchand v. *Sitabai Dhanasa*, 23 Ind. Cas 325; 38 B 309; 16 Bom. L. R. 5, distinguished

(2) that even if it were held to be applicable, the order passed by the Court permitting the withdrawal must be read with the application on which it was passed and must be construed as giving permission to the plaintiffs to file the suit. [p. 1005, col. 1.]

Keeiangoti Narayana Tantri v. *Nagappa*, 44 Ind. Cas. 889; 34 M. L. J. 515 and *Golam Mahmed* v. *Shibendra Pada Banerjee*, 35 C. 990 at p. 995; 12 C. W. N. 893, referred to.

First appeal from the decree of the District Judge, Ludhiana, dated the 1st June 1914.

Bakhshi *Tek Chand* and Mr. *Mukand Lal, Puri*, for the Appellants.

Lala *Moti Sagar*, R. S., and Bhagat *Gobind Das*, for the Respondents.

ORDER.—The plaintiffs are first cousins of Gauri Shankar, a Bari Khatri of the town of Jagraon in the Ludhiana District, who died on the 1st February 1908, and the defendants are his widow, daughter, daughter's son and son-in-law. The plaintiffs allege that Gauri Shankar's widow, *Musammat* Kishen Devi, defendant No. 1, is wasting the property left by her husband, and has given some of it to her son-in-law, Rattan Chand, defendant No. 4, and they ask for the appointment of a Receiver for the management and protection of the property, for the issue of an injunction to *Musammat* Kishen Devi, and for a declaration that the alienation which they allege she has made in favour of Rattan Chand shall be void as against them. They allege that the entire property is ancestral and that some of it belonged jointly to them and Gauri Shanker. They claim a right to restrain *Musammat* Kishen Devi from wasting and alienating the property on two grounds, (1) that by custom they are entitled to inherit the property on *Musammat* Kishen Devi's death to the exclusion of her daughter and daughter's son, and (2) that Gauri Shanker made a Will by which he declared that the plaintiffs would be his heirs after *Musammat* Kishen Devi's death.

The defendants traverse the plaintiffs' allegation, and maintain that the plaintiffs have no *locus standi*.

The main issues in the case are on the questions of custom and the execution of a Will by Gauri Shanker. The lower Court has dismissed the suit, finding (1) that the plaintiffs have failed to prove a custom by which they are entitled to succeed to the property to the exclusion of the daughter and daughter's son, and that the parties are governed by Hindu Law, and (2) that the plaintiffs have not proved that Gauri Shanker executed any Will. The plaintiffs have appealed.

Mr. Tek Chand, who appears on their behalf, has criticised the proceedings of the learned District Judge in certain respects. He has urged that his clients were not allowed to inspect the defendants' account books for which they had applied, and were not given full opportunity of arguing their case. Nothing is said, however, in regard to these matters in the memorandum of appeal, and the only purposes for which it is contended that the case should be remanded are, (1) in order that a commission may issue to test the instances of succession mentioned by the defendant's witnesses, and (2) in order that plaintiffs may be allowed

to produce certain evidence which the lower Court has excluded.

With regard to the first point, a very large number of witnesses were produced on both sides on the question of custom, and we see no reason for directing the issue of a commission. There is, however, force in Mr. Tek Chand's contention on the second point.

In the first place, the lower Court after the 1st October 1912 appears to have declined to take evidence as to whether the property in dispute was ancestral or not; see the plaintiffs' application dated the 2nd October 1912 and the Court's order thereon on the 5th October on page 65 of the paper-book. The plaintiffs might possibly succeed in proving a custom by which collaterals succeed to ancestral property in preference to a daughter, but fail to prove a custom by which collaterals exclude a daughter from succession to non-ancestral property, and in that event it would be necessary to determine which portions, if any, of the property in dispute are ancestral.

In the second place, the District Judge has refused to take the evidence of several witnesses whom the plaintiffs wished to examine in regard to the execution and loss of the Will; see pages 170 and 171 of the paper-book. The plaintiffs had had the witnesses summoned and were entitled to examine them. Non-service of the summonses was due to the Court having given insufficient time for their being served, and not to any fault on the plaintiffs' part.

Mr. Govind Das on behalf of the defendants points out that the plaintiffs applied for Probate of the Will, but that after a caveat had been lodged by Gauri Shanker's daughter they withdrew from the application, which was consequently dismissed (page 524 of the paper-book). He argues that under O. XXIII, r. 1, Civil Procedure Code, the plaintiffs are debarred from suing on the basis of the Will after that withdrawal.

We are of opinion that O. XXIII, r. 1, does not apply to Probate proceedings. The provision in section 55 of the Probate and Administration Act that the proceedings in the Court of the District Judge in relation to the granting of Probate shall be regulated by the Code of Civil Procedure is qualified by the words "so far as the circumstances of the case will admit." It was held in *Ghellabhai* v. *Nandubai* (1) that a Probate application cannot be referred to arbitration. In *Janakbati Thakurain* v. *Gajanand Thakur* (2) it was held that there can be no dismissal of a Probate case in accordance with the terms of a compromise between the propounder and the objector. In *Jugeshwar Nath Sahai* v. *Jagatdhari Prasad* (3) the same view was taken, and it was further held that O. XXIII, r. 1, Civil Procedure Code, does not apply to an application for Probate. *Kalyanchand Lalchand* v. *Sitabai Dharaia* (4) which has been referred to by Mr. Govind Dass, is not in point, as in that case Probate was refused because the Will was held to be not proved, and there was no withdrawal from the application for Probate.

Even if it were held that O. XXIII, r. 1, applies, the plaintiffs would not be precluded from bringing the present claim on the basis of the Will. In the statements made by them in the Probate proceedings on the 23rd June 1911, they said that they intended to file a regular suit, and asked for permission to withdraw from their application, by which they clearly meant permission to withdraw with liberty to institute a suit, for under O. XXIII, r. 1, a plaintiff can withdraw his suit without any permission if he does not at the same time ask for leave to institute a fresh suit. After the plaintiffs' statements had been taken the Court on the same date passed its order permitting the plaintiffs to withdraw from the application, and dismissing it. That order has to be read with the statements on which it was passed, and it must be construed as granting permission to the plaintiffs to file a suit. *Keelangoti Narayana Tantri* v. *Nagappa* (5) and *Golam Mahomed* v. *Shibendra Nada Banerjee* (6), which are cited by Mr. Tek Chand in this connection, are in point.

Mr. Govind Das contends that permission to bring a fresh suit must be given in express terms, and he relies on *Ghulam Ali*

(1) 21 B. 335; 11 Ind. Dec. (N. S.) 227.
(2) 37 Ind. Cas. 12; 20 C. W. N. 936; 1 P. L. J. 377, 1 P. L. W. 41.
(3) 40 Ind. Cas. 345; (1917) Pat. 192; 2 P. L. J. 535; 5 P. L. W. 230.
(4) 23 Ind. Cas. 325; 38 B. 309; 16 Bom. L. R. 5.
(5) 44 Ind. Cas. 889; 34 M. L. J. 515.
(6) 35 C. 990 at p. 995; 12 C. W. N. 893.

Shah v *Shahabal Shah* (7) and *Jita Singh* v. *Hari Singh* (8). It is true that the learned Judges who decided *Ghulam Ali Shah* v. *Shahabal Shah* (7) said in their judgment that the permission required by section 373 of the Civil Procedure Code then in force must be given in express terms, but this was an *obiter dictum*, as it was found that in that particular case not even an implied permission to withdraw with liberty to bring a fresh suit could be inferred from the order passed on the application made in the previous suit, which was merely an application informing the Court of the compromise and asking that the suit might be consigned to the record room.

Jita Singh v. *Hari Singh* (8) is no doubt in point and supports Mr. Govind Das' contention, but it was a ruling of a Single Judge and was based merely on the *obiter dictum* in *Ghulam Ali Shah* v. *Shahabal Shah* (7).

It is not stated in Order XXIII, rule 1, that the permission mentioned therein must be express, and, in our opinion, it is sufficient if the grant of permission can be implied from the order, read with the application on which the order was made.

Mr. Govind Das also contends that permission to withdraw from the application for Probate with liberty to bring a regular suit could not legally have been granted to the plaintiffs, because there was no formal defect in the application and there were no sufficient grounds for allowing the plaintiffs to institute a suit. But we think that it is not open to the defendants to question the propriety of the order granting the permission, which has become final. *Ohhajju* v. *Khyali Ram* (9) is in point in this connection.

We hold, therefore, that even if O. XXIII, r. 1, were considered to be applicable, the necessary permission to bring a suit was given to the plaintiffs by the order of the 23rd June 1911, and that they are entitled to maintain the present suit on the basis of the Will. We remand the case to the Court of the Senior Subordinate Judge of Ludhiana under O. XLI, r. 28, Civil Procedure Code, and direct him to take the evidence which the parties may have to produce on the question which portions, if any, of the property in dispute are ancestral, and also the evidence of the remaining witnesses for the plaintiffs mentioned in the statement of the plaintiffs' Pleader on the 27th May 1914 in regard to the Will, as well as the evidence of the witnesses, if any, whom the defendants may wish to produce in reply. After taking the evidence the Senior Subordinate Judge should return the record to this Court.

N. H.

Case remanded.

(7) 3 P. R. 1905; 87 P. L. R. 1905; 13 P. W. R. 1905.
(8) 37 Ind. Cas. 128; 97 P. R. 1916; 229 P. W. R. 1916.
(9) 14 Ind. Cas. 175; 9 A. L. J. 378.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1264 OF 1919.

February 6, 1922.

Present:—Sir N. R. Chatterjea, Kt., and Mr. Justice Pearson.

BEHARI LAL NANDI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

NRITYANANDA GHOSE AND OTHERS DEFENDANTS—RESPONDENTS.

Possession, suit for, on basis of dispossession—Dispossession, what is—Evidence of definite acts of ownership adduced by both parties—Court, if can resort to any presumption as to title—Limitation Act (IX of 1908), Sch. I, Art. 142.

There is no dispossession unless there is termination of the possession of the rightful owner followed by the actual possession of another. [p. 1007, col. 2.]

Sheikh Sonhur Ali Hazarika v. *J. Huttman*, 1 C. W. N. 277, referred to.

Where in a suit for recovery of possession of land, each of the parties to the suit sets up the exercise of some definite acts of ownership over the land, the Court must decide the case upon the evidence adduced by the parties without resorting to any presumption as to title. [p. 1008, col. 1.]

Jones v. *Chapman*, (1849) 2 Ex. 803 at p. 821; 18 L. J. Ex. 453; 154 E. R. 717; 76 R. R. 794, distinguished.

Appeal against a decree of the Officiating Subordinate Judge, Second Court, Hooghly, dated the 19th March 1919, reversing that of the Munsif, Amta, dated the 15th May 1916.

FACTS appear from the judgment.

Babus *Mohendra Nath Roy* and *Manmotha*

Nath Roy, for the Appellants, submitted that, on the question of limitation, it was not enough to say that the defendant No. 1 had been in possession. It must be found that there was an ouster of the plaintiff by the defendant. The finding of the Trial Court is (at page 40 of the paper-book) that both the plaintiff and the defendant were exercising acts of possession. In such a case it cannot be said that the plaintiff was dispossessed. *Brojendra Kishore Roy* v. *Bharat Chandra Roy* [*Sarojini Ray*] (1), *Sheikh Sohnur Ali Hazarika* v. *J. Buttman* (2) and the other cases cited by the Trial Court. The possession in such a case must be deemed to be with the plaintiff *Jones* v. *Chapman* (3).

[CHATTERJEA, J.—The finding of the Trial Court is not accepted by the Appellate Court which says the plaintiff was dispossessed in 1306.]

I have adduced evidence to show my possession within 12 years, but the Appellate Court has been pleased to disbelieve that. I submit in such a case the position is the same as if I had adduced no evidence. Then, having regard to the nature of the land, which is alluvial, a presumption ought to be drawn in favour of the possession of the plaintiff, and then it has to be considered whether the acts of possession by the defendants constitute an ouster of the plaintiff.

Further, whatever dispossession there was in 1306 was dispossession of a lessee, and that cannot be a dispossession of the lessor: *Hajra Sardara* v. *Kunja Behari Nag* (4).

On the question of a new case being made, this is one of those cases where the Court ought to allow variance between pleading and proof, as there cannot be any surprise to the other party. The evidence would be the same in either case. The 5th issue is sufficiently elastic to cover title by accretion—it says "any other title." The case of *Raja Rup Singh* v. *Rani Baisni* (5) is a case where the matter was not clearly set out in the plaint but was raised in the issues and that was held to be enough. In *Motabhoy Mulla* v. *Muhi Harihar* (6) by a mere amendment of the pleadings the question could have been set out and the parties also went to trial upon it, and it was held that the fact that the amendment was not made should not debar a consideration of the question. In *Sree Eckowrie Sing* v. *Heeraloll Seal* (7) which is a converse case to the present, the charge was attempted at the appellate stage and was hence disallowed.

On the question of title, the mistake of the learned Judge is to think that title by accretion can be acquired only by the recess of a navigable river.

Reads from Bengal Regulation XI of 1825, section IV, clause 3; whether the *char* thrown up belongs to the Crown (the river being navigable) or to a private proprietor (the rive being non-navigable), in either case it is subject to the rule in clause 1.

Dr. Dwarka Nath Mitter and Babu *Asiranjan Chatterjee*, for the Respondent.—The short answer is limitation.

Previous possession is alleged and the suit is based on subsequent dispossession. Therefore, Article 142 applies: *Mohima Chunder* v. *Mohesh Chunder* (8). My friend did not expressly contend that Art. 144 applied, but he wanted a presumption to be drawn in his favour having regard to the nature of the land. But the land was capable of enjoyment in the ordinary mode from 1294 and had been cultivated up to 1305—refers to plaint paragraph 6: that is their case and that is the evidence.

[CHATTERJEA, J.—That has been disbelieved. Babu Mohendra Nath contended that the position was the same as if no evidence had been given by him.]

The question is whether the land was capable of being possessed.

The finding of the lower Court upon the question of possession has been displaced. There is no suggestion that the question of possession was dependent upon the peculiar nature of the land. Such a question might arise in the case of land still subject to

(1) 31 Ind. Cas. 242; 20 C. W. N. 481 at p. 483; 22 C. L. J. 283.
(2) 1 C. W. N. 277.
(3) (1849) 2 Ex. 803 at p. 821; 18 L. J. Ex. 456; 154 E. R. 717; 76 R. R. 794.
(4) 40 Ind. Cas. 271; 25 C. L. J. 635; 21 C. W. N. 1001.
(5) 7 A. 1; 11 I. A. 149; 4 Sar. P. C. J. 533; A. W. N. (1884) 246; 3 Ind. Dec. (N. S.) 902 (P. C.).
(6) 29 Ind. Cas. 223; 39 B. 399; 17 M. L. T. 402; 28 M. L. J. 589; 13 A. L. J. 529; 19 C. W. N. 713; 21 C. L. J. 507; 17 Bom. L. R. 460; 2 L. W. 524; (1915) M. W. N. 522; 42 I. A. 103 (P. C.).
(7) 12 M. I. A. 136; 11 W. R. P. C. 2; 2 B. L. R. P. C. 4; 2 Suth. P. C. J. 171; 2 Sar. P. C. J. 399; 1 Ind. Dec. (N. S.) 485; 20 E. R. 292.
(8) 16 C. 473; 16 I. A. 23; 5 Sar. P. C. J. 321; 8 Ind. Dec. (N. S.) 312 (P. C.).

incursion of water, but that is not the case here.

[CHATTERJEA, J.—If the plaintiff adduces evidence of possession and that is disbelieved, can the plaintiff say "I have title, you must presume possession in my favour ?"]

I submit not. The plaintiff came to Court with a particular case and directed evidence on that. And when that is disbelieved, he cannot turn round and say, "Because I have title, I am relieved from showing possession within 12 years." The case of *Ram Bandhu* v. *Kusu Bhattu* (9) shows that where there is evidence of possession no presumption can be resorted to. Having become fit for enjoyment and been cultivated before 12 years before suit, this *chur* land is exactly on the same footing as any other land, and no presumption can be drawn.

[CHATTERJEA, J., refers to an unreported judgment delivered by his Lordship on 13th January 1922 [since reported: *Rakhal Chandra Ghose* v. *Durga Das* (10)] and *Basanta Kumar Roy* v. *Secretary of State* (11).

In this last case Art. 144 applied, the defendant had to establish his title by adverse possession. Here the party come to Court with the allegation of possession and dispossession and that attracts Art. 142. The findings are conclusive on this point.

On the other question, the Trial Court was wrong in allowing a new case, *viz.*, of accretion, to be made. Prayer (*ka*) of the plaint shows he was claiming title to the land as a reformation *in situ* There was no issue up on this point. Refers to *Sree Eckowrie Sing* v. *Heeraloll Seal* (7), *Eshenchunder Singh* v. *Shamachurn Bhutto* (12), *Malraju Lukshmi Venkayyamma Row* v. *Venkatadri Appa Row* (13). The question of accretion was raised because I raised the question. That would not entitle the plaintiff to make a different title from that with which he has come to Court.

Babu *Mahendra Nath Roy* briefly replied.

JUDGMENT.—This appeal arises out of a suit for declaration of title to, and recovery of possession of, one *bigha* of land.

(9) 5 C. L. R. 481.

(10) 67 Ind. Cas. 673; 26 C. W. N. 724.

(11) 40 Ind. Cas. 337; 44 I. A. 104; 1 P. L. W. 593; 32 M. L. J. 505; 21 C. W. N. 642; 15 A. L. J. 398; 25, C. L. J. 487; 19 Bom. L. R. 480; (1917) M. W. N. 482; 6 L. W. 117; 22 M. L. T. 310; 44 C. 858 (P. C.).

(12) 11 M. I. A. 7; 6 W. R. P. C. 57; 2 Ind. Jur. (N. S.) 87; 2 Sar. P. C. J. 209; 20 E. R. 3.

(13) 59 Ind. Cas. 767; 33 C. L. J. 171; 19 A. L. J. 97; 40 M. L. J. 144; 13 L. W. 256; (1921) M. W. N. 77; 29 M. L. T. 164; 25 C. W. N. 654; 23 Bom. L. R. 713 (P. C.).

The disputed one *bigha* has been found to be an accertoin to another 12 *cottas* of land. The 12 *cottas* of land was found by the Court of first instance to belong to the plaintiffs. The lower Appellate Court, however, was of opinion that the plaintiffs could not succeed, because they had not set up a case of accretion but had set up a case of re-formation *in situ*, and he gave also other reasons for deciding the question of title against the plaintiffs.

It is unnecessary, however, to discuss the question of title as we think that the finding upon the question of limitation disposes of the case. It has been found by the learned Subordinate Judge that the plaintiffs' suit is barred by limitation as they had failed to prove possession within 12 years of the suit.

It is contended before us on the assumption that the plaintiffs are the rightful owners, (as it must be assumed for the purpose of considering the question of limitation without deciding the question of title), that in order to constitute dispossession of the rightful owner by a trespasser, it is not sufficient to show the trespasser's possession but it is also necessary to show the cessation of the owner's possession. Our attention is drawn to a finding of the Court of first instance, namely, that "the nature of the disputed land is such that it is not improbable that for sometime both the plaintiffs and the defendant No. 1 used the land, for neither party was in actual personal possession and none of the grain-dealers or boat-makers or boat repairers who actually used the land was in occupation of the whole of the land, and as they had but transitory interest in the land in their occupation, they would not ordinarily question the right of entry of another person upon a different portion of the disputed land. The mere fact that the defendant No. 1 through his tenants did some acts of possession on the disputed land would not necessarily amount to the plaintiff's dispossession."

It is true, as pointed out by Banerji, J. in the case of *Sheikh Sohnur Ali Hazarika* v. *J. Huttman* (2), that there is no dispossession unless there is termination of the possession of the rightful owner followed by the actual possession of another.

In the case of *Jones* v. *Chapman* (3) Maule, J., observed :—

"If there are two persons in a field,

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each asserting that the field is his, and each doing some act in the assertion of the right of possession, and if the question is, which of those two is in actual possession, I answer, the person who has the title is, in actual possession, and the other person is a trespasser."

Upon the facts as found by the Court of first instance, both parties were in possession through temporary tenants, each exercising acts of possession over different portions of the land for temporary periods. The learned Subordinate Judge, however, on appeal has not accepted that case for the plaintiffs. He has considered the evidence adduced by the plaintiff and disbelieved it. He finds "there can, therefore, be no doubt that from 1306 at least the defendant No. 1 has been in possession on his own behalf." The suit was instituted 16 years after 1306. Further on, the learned Judge finds that the plaintiffs were dispossessed by defendant No. 1.

It is contended, however, that even if the plaintiffs' witnesses were disbelieved, the learned Judge ought to have considered whether the evidence of the defendants as to possession was such as to constitute ouster of the plaintiffs, having regard to the character of the land and the nature of possession said to have been exercised, and, if not, whether there was not any presumption in favour of the rightful owner.

But the case of the plaintiffs themselves was that before 1310, the land was actually in the cultivation of their tenants, that in 1310 there was a surrender and that subsequently the plaintiffs were in possession by letting out the land to grain-dealers and for the purpose of boat repairs and other acts. The plaintiff's case, therefore, was not that the land was incapable of enjoyment though the land was not cultivated. The defendant's case was that he was in continuous possession of the entire land (as part of his *jama*) through tenants. If, therefore, according to both parties, definite acts of ownership were exercised over the land the Court must decide the case upon the evidence adduced by the parties without resorting to any presumption.

In the case of *Ram Bandhu* v. *Kusu Bhattu* (9) Garth, C. J., observed: "As long as reliable evidence of acts of ownership is forthcoming, there is no difference between the proof of possession in the case of jungle or uncultivated lands, and that in the case of cultivated lands, any such proof is oftentimes forthcoming.....But it does sometimes happen that neither party to a suit has exercised any acts of owership at all over the land in question which are capable of proof; and then in the doubt created by such absence of proof, or of reliable proof, the Court is obliged to resort to evidence of title, and to presume that the party who has the title has also the possession. But in the present case there would seem to be evidence of at least some acts of ownership; and if so, it would be right for the Court to decide the case upon that evidence, so far as the question of possession is concerned, without resorting to the proof of title."

It may be pointed out that the words "reliable evidence" "or reliable proof" in the decision quoted above appear to have been used in the sense of definite and unequivocal acts of ownership which can be acted upon, because the learned Judges observed: "But in the present case there would seem to be evidence of at least some acts of ownership": the matter was before this Court in second appeal and this Court directed the lower Court to decide the case upon the evidence of possession. This Court in second appeal could not possibly express any opinion whether the evidence was "reliable" in the sense that the evidence could be believed.

In the present case the land was not jungle land, and although uncultivated subsequent to 1310, it was the case of both parties that the land was let to grain-dealers and for the purpose of boat-repairs and other acts, and, as stated above, the finding of the Court of first instance that both parties exercised possession by letting out small and different portions of the land to different tenants for temporary periods has not been accepted by the Court of Appeal below.

We think, having regard to the definite findings that the plaintiffs were dispossessed by the defendants, and that the defendants have been in possession (by which we think was meant exclusive possession) for a period of 16 years before the suit, the suit must be held to be barred by limitation.

The appeal accordingly fails and is dismissed with costs.

B. N. & R. N.

Appeal dismissed.

END OF VOLUME LXVII.

GENERAL INDEX.

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—— :-o:-O-:o-: ——

Acceptance—*Conditional acceptance—Contract—Clause in indent authorising sale of goods after notice—Reference to arbitration—Arbitrator's jurisdiction to decide questions of law and fact on which his jurisdiction depends—Arbitration Act (IX of 1889)—Contract Act (IX of 1872), s. 33—Contingent contract—Uncertain future event.*

An importer of piece-goods accepted an order "subject to revision and confirmation by mail if required." It was established by evidence regarding the ordinary course of business that the words "if required" in the said condition meant "if required by some telegraphic mistake between England and India for which neither of the contracting parties was responsible": no such mistake occurred:

Held, that there was a complete and binding contract.

First Appeal No. 438 of 1917, decided on December 2, 1920, distinguished.

Per *Piggott, J.*—A special clause in an indent, which provides that, in the event of buyer's failure to accept the seller's draft and to pay it at maturity, the importer can sell the goods by public auction, after due notice, and claim the difference between the selling price and the contract price, does not bar a reference to arbitration until goods are sold by public auction after notice.

An arbitrator can interpret such a clause and decide that its non-compliance does not bar a claim for damages.

Per *Walsh, J.*—The decision of the question whether there has been a completed contract so as to bind the parties to submission in writing, does not rest with arbitrators Questions of fact and law, upon which the jurisdiction of arbitrators depends, are for the Courts. A SASHIL CHANDRA DAS *v.* SAKHAMAL BANSIDHAR, 20 A. L. J. 377; 4 U. P. L. R. (A.) 69; 44 A. 472 **487**

Account, *suit on—Continuous account—Test—Cause of action, when arises—Suit on cross-contract.*

If the items in an account are so connected together that it appears the dealing is not intended to terminate with one contract, but to be continuous, so that one item if not paid shall be united with another and form one continuous demand, the whole together forms but one cause of action and cannot be divided.

An amount due on a contract and cross-contract in any case, is not payable until the due date, because the effect of a cross-contract is to fix the liability for the due date. S FIRM OF LILARAM MADHAWDAS *v.* FIRM OF HUSSAINBHOY KARIMJI, 15 S. L. R. 207 **44**

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—— 1872—III. *See* SONTHAL PARGANAS SETTLEMENT REGULATION.

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1915—(5 & 6 GEO. V, C. 61). *See* GOVERNMENT OF INDIA ACT.

Adoption, *direct evidence of, if necessary.*

It is not necessary to produce direct evidence of the fact of an adoption; where it has taken place long since and where the adopted son has been treated as such by the members of the family, and in public transactions every presumption will be made that every circumstance has taken place

Adoption—concld.

which is necessary to account for such a state of things as is proved or admitted to exist ; JAGANNATH MARWARI *v.* CHANDNI BIBI, 34 C. L. J. 432. 26 C. W. N. 65 **31**

Adverse possession *as between co-sharers —Joint property—Rights of co-tenants—Possession of one co-tenant, when adverse to others.*

In order to establish adverse possession as between co-sharers, there must be evidence of an open assertion of a hostile title by one of them to the knowledge of the others; mere non-participation in the profits by one party and exclusive occupation by the other is not conclusive.

If possession may either be lawful or unlawful, in the absence of evidence, it must be assumed to be the former.

Possession is never considered adverse, if it can be referred to a lawful title.

Every co-tenant has the right to enter into and occupy the common property and every part thereof, provided that in so doing he does not exclude his fellow tenants or otherwise deny to them some right to which they are entitled as co-tenants; and they on their part may safely assume, until something occurs of which they must take notice and which indicates the contrary, that the possession taken and held by him is held as a co-tenant; and is in law the possession of all the co-tenants, and not adverse to any of them.

But one co-tenant may oust the others and set up an exclusive right of ownership in himself, and an open, notorious and hostile possession of this character for the statutory period will ripen into title as against the co-tenants who were ousted

In order to render the possession of one co-tenant adverse to the others, not only must the occupancy be under an exclusive claim of ownership, in denial of the rights of the other co-tenants, but such occupancy must have been made known to the other co-tenants, either by express notice or by such open and notorious acts as must have brought home to the other co-tenants' knowledge of the denial of their rights.

No comprehensive formula can be framed to test whether the possession of a co-tenant in a particular case is adverse to the other co-tenants. But the evidence to show adverse possession by one co-tenant must be much clearer than between strangers to the title, and the hostile intent of the co-tenant in possession must be shown by unequivocal conduct. JAGANNATH MARWARI *v.* CHANDNI BIBI, 34 C. L. J. 432; 26 C. W. N. 65 **31**

—— *Joint collection of rent—Failure to deliver share, whether amounts to assertion of hostile title.*

In cases of joint collection of rent, the failure of one party to deliver to the other his share of the rent cannot be held to amount to an assertion of adverse title or to dispossession until it is shown that the other party's title was definitely denied.

Pat KULDIP SINGH *v.* RAM SEWAK SINGH **755**

—— *Land subject to destructive action of river—Diluvion and re-formation—Conditions to be fulfilled.*

The question of the acquisition by adverse possession of title to property which is subject to the

Adverse possession—concld.

destructive action of a river should be investigated on the basis of when diluvion commenced, and when re formation took place, and the person setting up such a title must prove, either that he had by adverse possession acquired such title since the date of re-formation and before the commencement of litigation, or that he had acquired such title to the extinction of the title of the true owner before the date of the diluvion. **C** JOGENDRA NATH SAHA v. JAGADINDRA NATH ROY, 34 C. L. J. 138 **170**

——— *Mortgaged land—Possession, when adverse.*

In case of mortgaged land there can be no question of adverse possession unless the party claiming adverse possession had come into possession not only against the mortgagor but also against the mortgagee **B** VINAYAK KESHAV GULVE v. BALA SHIVRAM HINGNE, 24 BOM. L. R. 261 **176**

——— *Mortgagee acquiring rights of co-mortgagor—Knowledge of other co-mortgagor—Redemption, right of, extinguishment of.*

If a mortgagee gets in the equity of redemption from one of two co-mortgagors and claims to be in possession as owner to the knowledge of the other co-mortgagor, the right of the co-mortgagor to redeem his share will be extinguished after twelve years. But if the co-mortgagor is not acquainted with the purchase of the equity of redemption from the other co-mortgagor, time will not run against him in favour of the mortgagee who has purchased **B** IBHRAM GULAMHUSAIN v. MOHIDDIN BALKU, 24 BOM L. R. 287 **219**

Agency, *contract of—Custom turning agent into principal outrageous—Right of re-sale—Re-sale, when breach of contract.*

The vendor's right of re-sale does not arise until the date fixed by the contract has expired. If the property has undoubtedly passed and the real date for paying the balance of purchase-money and for delivery of the article has not arrived the re-sale is a breach of contract entitling the vendee to repudiate the transaction.

The suggestion that an agent, being a medium of communication between two parties, without the consent of his principal or without a term in his contract authorising him to do so, which is the same thing, can turn himself into a principal and use his principal's money and the advantages which he has obtained from his position as agent, to make a profit for himself, is unheard of and outrageous. Such a custom is unreasonable, even impossible as a matter of law in a contract of agency **A** KISHORI LAL v. JIWAN LAL, 4 U. P. L. R. (A.) 59 **231**

Agra Tenancy Act (II of 1901), *mortgage, invalid under—Personal covenant to pay mortgage-debt whether enforceable—Contract Act (IX of 1872), s. [illegible], application of.*

Where a mortgage is unenforceable, being in contravention of the provisions of the Agra Tenancy Act, any personal covenant entered into by the mortgagor and embodied in the mortgage-deed, to pay the mortgage-debt in the event of the mortgage being held to be invalid, is also unenforceable, as to enforce such an agreement would be contrary to the provisions of section 24 of the Contract Act. **A** HAR PRASAD v. SHEO GOBIND, 20 A. L. J. 318; 44 A. 486 **793**

Agra Tenancy Act—concld.

——— **s. 164 (2)**—*Profits, suit for—Negligence of Lambardar neither alleged nor proved—Decree, whether to be based on gross rental or actual collection—Mixed question of law and fact—Negligence—Presumption—Proof.*

In a suit for profits brought by a co-sharer against a *lambardar*, if no negligence is alleged or proved against the *lambardar* within the meaning of section 164 2 of the Agra Tenancy Act, a decree can be given on the actual collection and not on the gross rental.

The question whether the lower Court was right in giving a decree on the basis of gross rental is a mixed question of law and fact.

The fact that a large portion of the demand for a certain year remained uncollected does not necessarily lead to the inference that the balance would not be recovered in subsequent years and that the deficit in that particular year was due to the negligence of the *Lambardar*. Evidence must be given before such an inference can be drawn. **A** JODHI RAM v. KAUNSILLA, 20 A. L. J. 313; 4 U. P. L. R. (A.) 160 **521**

Agreement *to give in adoption—Consideration—Annuity, promise of—Agreement, validity of.*

Where the consideration for an agreement to give a boy in adoption, is a promise to pay to the parent of the boy an annuity, such promise is sufficient to invalidate the agreement. **B** NARAYAN LAXMAN CHANDAVADKAR v. GOPALRAO TRIMBAK CHANDAVADKAR, 24 BOM. L. R. 414 **850**

Alluvial accretions—*Title—"Gradual, slow and imperceptible," meaning of—English rule.*

The recognition of title by alluvial accretion is largely governed by the fact that the latter is due to the normal action of physical forces and the different conditions of Indian and English rivers are such that what would be abnormal and almost miraculous in the latter is normal and commonplace in the former.

Even if the test of "gradual, slow and imperceptible" according to the English rule is applied to such accretions, it should be borne in mind that slow and imperceptible are only qualifications of the word 'gradual' and this word with its qualifications only defines a test relative to the conditions to which it is applied. **P C** SECRETARY OF STATE FOR INDIA v. RAJA OF VIZIANAGARAM, 30 M. L. T. 112; 26 C. W. N. 34[illegible]; 15 L. W. 389; 42 M. L. J. 589; 20 A. L. J. 438; 35 C. L. J. 463; 45 M. 207; (1922) M. W. N. 281 **1**

Appeal, Civil—*Appellate Court, whether can take cognizance of facts since institution of suit—Suit for declaration—Dispossession of plaintiff during pendency of suit—Possession, decree for.*

An Appellate Court can take cognizance of matters which may have happened after the institution of the suit for the purpose of moulding the relief that a party is entitled to, provided it is not based on a new title which accrued after the action.

Plaintiff, who was in possession of a certain house, brought a suit for a declaration of his title in respect of it During the pendency of the matter in the Appellate Court, the plaintiff was formally ousted from possession of two-thirds of the house under an order of a Court passed in certain partition proceedings. The Appellate Court, after the neces-

Appeal, Civil—contd.

sary amendment in the plaint, granted the plaintiff a declaration in respect of the one-third of the house of which he was in possession and gave him a decree for possession in respect of the remaining two-thirds:

Held, that the Appellate Court was justified in adopting this course. L TARA CHAND v. ABDUL AHAD **894**

——— *Court Fees Act (VII of 1870), s. 7 cl. (ix), Sch. I, Art. 1—'Suit,' whether excludes "appeal"—Mortgage—Foreclosure and redemption suits—Court-fee payable on memorandum of appeal.*

Court-fees are payable not on suits or on appeals but on documents which are filed, exhibited or recorded in Courts in accordance with section 6 of the Court Fees Act.

The provisions of section 7 of the Court Fees Act are applicable equally to appeals as to original suits and the word 'suit' in section 7 of the Act is not used in contradistinction to the word 'appeal.'

A reference to section 17 of the Court Fees Act shows that the word "suit" is not used in the Act in contradistinction to "appeal"

It does not, however, follow from this view of the law that where plaints are chargeable under clause *(ix)* of section 7 read with Art. 1 of the First Schedule of the Court Fees Act the memoranda of appeal filed against decrees passed in such suits are invariably chargeable in the same manner.

A suit may change its nature in appeal and though the original suit may be for redemption or foreclosure there may be no question raised in appeal as to the right to redeem or foreclose and the appeal may be merely in respect of the amount which the Court of first instance has held to be payable. In such a case the suit in appeal would clearly not be a suit falling within the provisions of clause *(ix)* of section 7 and the amount or value of the subject-matter in dispute would not be computed in accordance with the provisions of that clause but would be a specified sum, the Court-fee payable on which would be *ad valorem* in accordance with the provisions of Art. 1 of Schedule I of the Act.

If a suit for redemption or foreclosure is dismissed, the Court-fee payable by the plaintiff-appellant on his memorandum of appeal ought to be computed in accordance with the provisions of clause *(ix)* of section 7 of the Court Fees Act, that is, according to the principal money expressed to be secured by the instrument of mortgage.

If a suit to redeem is decreed and the defendant-appellant merely challenges the right to redeem, the Court-fee payable on the memorandum of appeal ought also to be computed in accordance with the provisions of clause *(ix)* of section 7 of the Court Fees Act.

If a suit to redeem or foreclose is decreed and the plaintiff or the defendant in appeal merely challenges the amount to be paid or received without questioning the right to redeem or foreclose, the Court-fee payable on the memorandum of appeal will be on the subject-matter in dispute, that is, on the additional amount claimed or the amount in respect of which the appellant seeks to avoid liability.

Appeal, Civil—contd.

Where in a foreclosure suit a decree is passed for a certain sum in default of payment of which within a fixed time the property shall be foreclosed and the defendant in appeal denies the plaintiff's right to foreclose on the ground that he is not liable to pay any portion of the sum decreed, the Court-fee payable on the memorandum of appeal ought to be calculated *ad valorem* on the subject-matter in dispute according to Art. of Schedule I, that is, on the amount of the decree the payment of which the defendant by his appeal seeks to avoid.

Where a decree is passed for redemption on payment of a certain sum and in appeal the defendant not only denies the plaintiff's right to redeem but in the alternative claims that if he be entitled to redeem he can do so only on payment of a larger sum than that fixed by the Court of first instance, the Court-fee ought to be paid on the relief which is liable to pay the higher fee; on the former the fee would be computed in accordance with the provisions of clause *(ix)* of section 7 read with Art. 1 of Schedule I and on the latter the Court-fee would be *ad valorem* on the difference between the amount found due by the lower Court and that claimed by the appellant. O SANGAT BAKHSH SINGH v. RAWAT DIJDEO BAKHSH SINGH, 25 O. C. 30 **968**

——— *Finding of fact—Appellate Court, duty of.*

Although a Court of Appeal ought not to differ from a Trial Court on a finding of fact in the absence of strong and weighty reasons for doing so, yet it has certain responsibilities, and in a proper case it will examine the evidence with a view to seeing whether Judge of the Trial Court in giving judgment has not misdirected himself. **Pat** CHANDRAMA KUER v. RAMGAYAN **57**

——— *Ground not taken in memorandum of appeal, whether, and when permissible.*

Although an appellant may, with the permission of the Court, be heard on grounds not taken in the memorandum of appeal, this should ordinarily not be allowed after the period of limitation for appeal has expired. L JIWAN SHAH v. FATEH BIBI, 5 L. L. J. 165 **44**

——— insufficiently stamped—Mistake—Court, when will not extend time to pay proper fee. *See* COURT-FEE **130**

——— *Memorandum not stamped even according to appellant's own valuation—Extension of time—Poverty and ignorance of law—Rejection of plaint—Decree—Appeal—Court-fee.*

The plaint in a suit for possession of land, assessed to fluctuating land revenue was rejected on nd January 1917 on the ground that the plaintiff, who had paid Court-fee on ten times the land revenue, failed to pay Court-fee on the market value of the land within the period allowed by the Court. An appeal against the order of rejection was preferred on 21st March 1917 on a stamp of Rs. 2. The memorandum of appeal was returned as insufficiently stamped but it was re-filed without making good the deficiency. On 7th June 1917 Court-fee was paid on ten times the land revenue and at the hearing the appellant's poverty and ignorance of law were invoked as grounds of failure to make up the deficiency:

Appeal, Civil—concld.

Held, (1) that no valid memorandum of appeal was presented within the period of limitation prescribed for the appeal inasmuch as the appellant had not paid Court-fee even on ten times the land revenue which was his own valuation of his claim;

(2) that the pleas of poverty and ignorance of law were not well-founded as it was the appellant's duty to pay the fee at least on the valuation which he had himself placed upon his claim.

An order rejecting a plaint for non-payment of deficient Court-fee, amounts to a decree, and a memorandum of appeal from such order must bear an *ad valorem* stamp **L** SHAHU *v.* BAKRI, 3 L. L. J. 237 **901**

——— ——— Memorandum of appeal dismissed for deficiency of Court-fee—Appellate Court's order, if appealable—Court-fee payable on memorandum of first appeal. *See* CIVIL PROCEDURE CODE, s. 144 **225**

——— ———, memorandum of, registered—Rejection—Dismissal. *See* CIVIL PROCEDURE CODE, s. 144 **225**

——— ——— *Party not aggrieved, whether can appeal.*

Plaintiff's father deposited a certain sum with a Bank in the joint names of himself and one *D.* payable to 'either or survivor'. He subsequently made a Will devising his property of every description to the plaintiff and died before the period of the deposit had expired. Plaintiff obtained Probate of the Will and sued the Bank and *D.* for a declaration that the deposit belonged exclusively to the deceased and that the plaintiff was entitled to receive it on maturity as the executor of the deceased. *D.* did not appear, but the Bank resisted the suit. The suit was eventually decreed. The Bank appealed impleading *D.* also as a respondent to the appeal.

Held, that the Bank had no *locus standi* to prefer the appeal, inasmuch as its position was merely that of a stake-holder and it was not in any way prejudiced by the decree passed in favour of the plaintiff. **L** ALLAHABAD BANK, LTD., DELHI *v.* MRS. LENA MACDONALD OF DELHI **868**

——— **, Second**—Finding of fact. *See* SPECIFIC RELIEF ACT, s. 42 **152**

——— ——— *Finding of fact*

A finding that time is or is not of the essence of a contract is a finding of fact and cannot be assailed in second appeal **L** FAZAL ILAHI *v.* IMPERIAL CHEMICAL CO, DELHI **157**

——— ——— *Finding of fact—Erroneous finding based on evidence—Finding, whether may be considered as no finding in fact—High Court, power of, to interfere.*

The High Court will not, in second appeal, interfere with an erroneous finding of fact arrived at by an Appellate Court, if that Court had before it evidence in support of the finding Nor can the finding in such a case be looked upon as amounting to no finding at all. **L** BHAGWAN SINGH *v.* NIRANJAN SINGH, 3 L. L J. 409 **435**

——— ——— *Finding of fact—Erroneous view of law—Finding inconsistent with facts established—High Court, power of, to interfere*

Where the finding of an Appellate Court proceeds upon an erroneous view of the law, and is inconsistent with the facts accepted by that Court as

Appeal, Second—concld.

established the High Court will interfere to set aside the finding. **A** SABAL SINGH *v.* SALIK RAM SINGH, 20 A L. J. 473; 4 U. P. L. R. (A.) 93 **67**

——— ——— *Finding of fact—Pedigree, finding as to*

A finding of fact, such as a pedigree set up by the plaintiff which is based on evidence, cannot be challenged in second appeal. **O** NIAMAT ALI *v.* ASHIQ ALI, 9 O. L J. 127 **803**

——— ——— *Finding of fact, when will be interfered with—Parties, duty of.*

A finding of fact cannot be interfered with in second appeal, unless it can be shown that there was no evidence to support it. If either of the parties raise the point that there is no evidence to justify the finding, it is their duty to place that evidence on the record, to enable the Court of second appeal to decide the question, and not merely to rely upon certain references thereto in the judgments of the lower Courts **Pat** GRANT, W M. *v* EKLAL JHA, P. L. T. 3[illegible] **49**

——— ——— *Finding of ownership—Finding of fact*

A finding that a certain person is or is not the owner of a certain property is a finding of fact and cannot be assailed in second appeal **O** ABDUL RAZZAQ *v.* MUHAMMAD HAJJAM, O L J. 181 **7[illegible]7**

——— ——— *Hindu joint family - Question of jointness—Question of fact, when*

A decision whether persons form a Hindu joint family or not is ordinarily a question of fact, when the correct legal principles on which the point should be decided have been appreciated, and as such cannot be assailed in second appeal. **L** MAYA WANTI *v.* ISHAR SINGH, 3 L. L. J. 552 **789**

——— ———, memorandum of, unaccompanied by First Court's judgment—Presentation, validity of. *See* CIVIL PROCEDURE CODE, O. XLII, AS AMENDED BY HIGH COURT **670**

——— ——— *Misreading of evidence—Misconstruction of document not relating to title—Point of law.*

The misreading or misconstruction of documents, not documents of title, is not a point of law which would justify interference in second appeal. **Pat** MAHABIR MISSER *v* ASO KUER **435**

——— ——— *New point.*

A point in respect of which no issue was framed in the Trial Court, and which was not argued in the first Appellate Court, cannot be raised in second appeal **C** NAYAJAN ALI *v.* MIDNAPORE ZAMINDARY CO LTD. **770**

——— ——— Point not raised in first appeal—Abandonment. *See* CIVIL PROCEDURE CODE, s. 11 **656**

——— ——— *Question of law, new.*

A new point can be raised for the first time in second appeal provided it is purely a question of law which arises out of the findings of the Courts below and is not affected by any facts outside those findings. **L** DIWAN CHAND *v.* BISHEN DAS, 2 L L J. 255 **919**

Appellate Court—*Admission of document, objection to—Objection not raised before Trial Court—Evidence Act (I of 1872), s. 63—Document admitted as secondary evidence by Trial Court—*

Appellate Court—concld.

Appellate Court, whether may question its admissibility.

When a copy of a document has been admitted in the Court of first instance without any objection, the Appellate Court is not entitled to allow any objection to be taken to its admissibility at the appellate stage.

Where a document is admitted as secondary evidence by the Trial Court, that is to say, it is admitted as being a true copy, it is not open to an Appellate Court to consider whether in fact the provisions of section 63 of the Evidence Act were complied with or not when it was admitted and the Court is not entitled to take evidence offered to prove that the document is not a true copy of the original. **Pat** RAMLOCHAN MISSRA *v.* HARINATH MISSRA, 3 P. L. T. 397 **628**

———, *judgment of, based on inaccuracies—High Court, power of, to set aside—Arbitration—Revision—High Court, when, will interfere.*

The judgment of an Appellate Court which is based entirely upon inaccuracies or misunderstandings is vitiated thereby, and cannot be upheld by the High Court: and although the High Court is reluctant to interfere on revision in arbitration cases, it will nevertheless do so in the event of such gross and material irregularities. **L** KESAR MAL-SHANKAR DAS *v.* HUKAM CHAND-BADRI NATH, 2 L. L. J. 681; 69 P. L. R. 1922 **260**

Appropriation of payments—*Contract Act (IX of 1872), ss. 59, 60—Appropriation towards principal or interest—Civil Procedure Code (Act V of 1908), s. 51, O. XL, r. 1—Mortgage-decree—Decree-holder entitled to sell property—Receiver, whether can be appointed.*

In the absence of an agreement to the contrary, payments made in satisfaction of a decree should be appropriated first towards the interest and the balance, if any, should be credited towards the principal

Where under a mortgage decree the mortgagee is entitled to sell the mortgage property, a Court should not, on the application of the judgment-debtor, appoint a Receiver under Order XL, rule 1, Civil Procedure Code.

Section 51 of the Civil Procedure Code merely prescribes the mode in which a decree-holder may seek execution of his decree and does not give the judgment-debtor a right to apply for the appointment of a Receiver. **Pat** MOKHTAR AHMAD *v.* BIBI RAHIMUNNISA BEGUM, (1922) PAT. 66 **606**

Approver, *statement of, as to his accomplices—Corroboration, necessity of—Corroborative statement made after long delay, reliability of.*

The statement of an approver as to who were his accomplices must be corroborated by reliable evidence before it can form the basis of a conviction.

Where the corroboration offered is the statement of two men who apparently knew something about the matter from the very beginning but refused to make any statement until the third day of the Police investigation, the statement must be regarded with suspicion and as not sufficient corroboration. **L** FATTA *v.* EMPEROR, 2 L. L. J. 226, 23 CR. L. J. 476 **828**

Arbitration—*Private award—Absence of one of several arbitrators, if makes award invalid—Waiver—Civil Procedure Code (Act V of 1908), Sch. II, para. 6.*

Arbitrators must be present during the whole of the proceedings and deliberations but it is open to the parties to waive the absence of one of the several arbitrators Therefore an award signed by an arbitrator, who was present one day only for a short time and did not hear the evidence or take part in the deliberations of the remaining arbitrators, is not invalid, if the irregularity is waived. **C** RAMA NATH MISRA *v.* RAMRANJAN MISRA **856**

Arbitration Act (IX of 1899)—Contract Act (IX of 1872), s 33—Contingent contract—Uncertain future event. *See* ACCEPTANCE **487**

Arms Act (XI of 1878), s. 19—*Marriage procession—Public assemblage—Carrying gun without license—Offence.*

Accused was convicted under section 19 of the Arms Act for carrying a gun in a marriage procession. Under the terms of the license, the licensee was forbidden to take the gun to a public assemblage, and it was contended that a marriage procession was not such an assemblage:

Held, that the conviction was justified, as the marriage procession was a public assemblage, because the moment such a procession emerges from private premises and goes down the public street, it is open to the public to join the procession, and the procession becomes a public assemblage. **B** KALYANCHAND GOPALCHAND *v.* EMPEROR, 4 BOM. L. R. 487; 5 CR. L. J. 450 **722**

Award without intervention of Court during pendency of litigation, whether can be recorded as adjustment. *See* CIVIL PROCEDURE CODE, s 89, O. XXIII, R. 3 **123**

Badni contract—*Agent, if entitled to be recouped for loss incurred on behalf of principal—Commission agent*—Onus probandi.

An agent is not entitled to be recouped for loss incurred by him on behalf of the principal in a *badni* (wagering) contract.

A commission agent often enters into transactions on his own account and the onus lies on him to prove that in a particular transaction he acted as agent and not as principal. **L** FIRM SHIB LAL-RAM LAL *v.* FIRM HARI RAM-CHHADAMI LAL **959**

Batwara partition—*Bakasht lands—Co-sharer in possession before partition—In partition lands allotted to another co-sharer—Co-sharer in possession, whether entitled to remain in possession.*

In all cases of a *batwara* partition between co-proprietors, if the lands are merely the *bakasht* lands of the landlords before the partition, then, in the absence of any special arrangement come to between the landlords themselves at the time of the *batwara*, none of them has the right to dispute the possession of those into whose *takhta* the particular lands in question fall The only exceptions are those which are created by law either under the Bengal Tenancy Act or under some other provision of law whereby a tenancy interest or possibly some other interest in land is acquired.

There is no law which provides that merely because a co-sharer has been in possession of *bakasht* lands, belonging to himself and his co-sharers, he is, therefore, entitled after a Collectorate partition

Batwara partition—concld.

to remain in possession of those lands when they are allotted to the *takhta* of one of his co-sharers **Pat** GYAMUDDIN KHAN *v.* RAMYAD SINGH, 3 P. L. T. 419 **530**

Benami—*Registered partition-deed—Co-sharers—Burden of proof Limitation and adverse possession —Limitation Act (IX of 1908), Sch I, Arts 144, 134.*

The burden of proving that the grant of a share to a person by a registered partition-deed was *benami* for another lies on the person alleging it.

To prove dispossession and adverse possession against such person clothed with all the insignia of beneficial ownership, very strong and reliable evidence should be required. Limitation against a co-sharer does not begin to run until his title is openly denied. **P C** ARAB ALI KHAN *v.* MAHMUD ALI KHAN, 20 A. L. J. 545; 35 C. L. J. 554; 43 M. L. J. 104; 31 M. L. T. 91; 24 BOM. L. R. 951 **444**

Benamidar—*Suit for recovery of possession*

A *benamidar* can maintain a suit for recovery of possession. **C** MAFIZUDDIN *v.* MOHAMMAD ISLAM **741**

Bengal Alluvion and Diluvion Act (IX of 1847), s. 6—*Land revenue, assessment of*—Churs *and islands formed in rivers after Permanent Settlement—Bengal Land Revenue Assessment (Resumed Lands) Regulation (II of 1819), ss. 3, 31.*

All *churs* and islands in rivers flowing through, or opposite to, lands belonging to the *zemindaris* in Bengal which have been formed since the Decennial Settlements made permanent by Regulation I of 1793 are liable to assessment under the Bengal Alluvion and Diluvion Act

The intention and effect of Act IX of 1847 was merely to alter the machinery by which lands gained from the sea or rivers by alluvion or dereliction were to be assessed, and not to subject to assessment any lands which would not have been liable thereto under the law in force at the time when the Act was passed and, accordingly, a question raised as to the assessability of *churs* must be determined by reference to the pre-existing law and particularly to Regulation II of 1819

The effect of Regulation II of 1819 is to declare that all *churs* newly formed since the Decennial Settlement, though upon a river-bed which is recognised as the property of the owner of an estate, are to be treated as land gained since the Settlement and consequently unsettled at the time This express provision cannot be excluded merely by showing that the river-bed from which the *churs* have been thrown up was, at the date of Settlement, the property of the *zemindar* and that the Settlement was imposed upon the *zemindari* as a whole. The ownership of the bed may determine the proprietary rights in the *churs*: but property is one thing and assessability is another. The Regulation declares in terms that new *churs* are to be included in the category of unsettled lands, and contains no exception for *churs* formed upon a river-bed belonging to a settled estate.

The express provisions in section 31 of the same Regulation (II of 1819) that waste land shall not be the subject of an additional assessment when brought into cultivation, when contrasted with the provisions of section 3 of the same Regulation as to

Bengal Alluvion and Diluvion Act—concld.

newly formed *churs* and islands, affords further support to the view that the Legislature intended to put such *churs* upon a different footing from the waste lands and to make them liable to assessment.

A river-bed cannot be treated as waste land so as to come within the protection of section 31 of Regulation II of 1819. **P C** SECRETARY OF STATE FOR INDIA *v.* MAHARAJA OF BURDWAN, 35 C. L. J. 92; 43 M. L. J. 61; 4 U. P. L. R. (P. C.) 1; 26 C. W. N. 619 49 C. 103 **835**

Bengal Alluvion and Diluvion Regulation (XI of 1825), s. 4, *applicability of to Madras.*

Quære—Whether the law as to accretions promulgated in the Bengal Alluvion and Diluvion Regulation coincides with the law as to accretions in the Presidency of Madras or elsewhere in India. **P. C.** SECRETARY OF STAT FOR INDIA *v.* RAJA OF VIZIANAGARAM, 37 M. L. T. 112; 26 C. W. N. 344; 15 L. W. 384; 42 M. L. J. 589; 20 A. L. J. 438; 35 C. L. J. 463; 45 M. 207; (1922) M. W. N. 381 **1**

——— **s. 4,** *interpretation and application of—River-bed property of landlord—Accretion—Landlord and tenant, rights of.*

Held, by the Full Bench:—Clause 1 of section 4 of Bengal Regulation XI of 1825 applies whether the river, out of the bed of which accretions have been formed, is the private property of an individual or the property of the Crown

Per *Dawson Miller, C. J*—The section applies in all cases where the tenant claims, as an increment to his tenure, lands gained by gradual accession from the recess of the river, the property of his landlord, and, except in the case of a claim by the superior landlord, the section is not confined to lands which are the property of the State.

Clause of section 4 applies both to the case of a superior landlord, who holds from the Crown, and to the case of the holder of a subordinate estate or tenure holding from a landlord intermediate between himself and the Crown, and to be limited in each case to accretions from the lands of the person from whom he holds and to whom revenue in the one case and rent in the other is payable In the case of a superior landlord the person from whom he holds is the Crown and no one else In such a case it is only where the Crown is the proprietor of the accreted lands that the section comes into operation. To permit a landlord to acquire in this manner a proprietary right in the land of his neighbour with whom he has no relationship such as that of a tenant to his landlord, would be going outside the scope and intention of the section and permitting what, in effect, would be confiscation of another man's land. This consideration, however, does not apply where the claim is by a tenant against the land of his landlord, a claim which by the proviso to the first clause of the section is limited to a right of property similar to that possessed by the tenant in the tenure to which the land may become annexed and which, by the same proviso, carries with it the liability to pay an increase of rent.

Per *Mullick, J*—The Regulation does not provide for islands in a large and navigable river the bed

Bengal Alluvion and Diluvion Regulation, 1825—contd.

of which is the property of an individual or those in a small and shallow river the bed of which is not the property of an individual.

As for proprietary rights in accretions, clause 4 read with clause 1 provides for a small and shallow river the bed of which belongs to an individual, and clause 1 for a large and navigable river the bed of which does not belong to an individual. There is no provision for a large and navigable river of which the bed is private property.

With regard to the rights of tenure-holders and *raiyats*, clause deals with rivers of all classes and is subject to no words of limitation or restriction. Therefore, an accretion thrown up along the frontage of a *raiyati* holding on the bank of any river the bed of which belongs to his landlord would be an increase to the holding and would be held as such

The Regulation is not exhaustive. It is subject to the rules of equity and justice.

In India the presumption is that the bed of a large and navigable river belongs to Government, which occupies here a position which is fundamentally different to that which it occupies in England Here Government is the owner of the soil of the country and has all the rights of a proprietor The bed of a navigable river is not the public domain in the same full sense as in a country where all land which is not private property vests in the public and is held by Government as a mere trustee If in these circumstances it is not inequitable to give the adjacent proprietor and *raiyat* land which has accreted out of the river-bed and is the property of another, why should it be inequitable to give a *raiyat* an interest in a river-bed belonging to his landlord which has accreted to his holding and for which he will pay rent In both class of rivers the proprietor will pay Government revenue for the accretion, and compensate himself by taking rent from his tenants. There is no question of any confiscation or taking away.

The ordinary rule of conveyancing is that a grant or lease of land abutting on a river by a person who is in a position to part with the soil is presumed to pass half the adjacent bed of the river without any reference to the instrument of grant even where there is no grant the lessee or tenant is entitled to claim the benefit of the presumption In the absence of contract or proof of a re-formation *in situ*, an occupancy *raiyat* in India would also be entitled to claim the benefit of this presumption

Per *Jwala Prasad, J*—Clause 1 of section 4 is a general one and applies to all kinds of rivers, and lays down the principle upon which the rights to the lands thus gained should be determined.

Though the primary object of the Regulation was to provide rules for determining disputes between the riparian proprietors, yet it has, as a matter of fact, dealt with the rights not only of proprietors but also of subordinate tenures. In fact, the Regulation seems to deal with disputes of all kinds, as is expressly declared by clause fifth of section 4. It applies not only to disputes between the riparian proprietors but also to cases where no riparian proprietor is concerned and the dispute is between the proprietor and his tenant on the same side of the river. **Pat** KHUBI MAHTON *v.* LACHMI DAS, 3 P. L T 513 **642**

Bengal Alluvion and Diluvion Regulation, 1825—concld.

Bengal Land Revenue Assessment (Resumed Lands) Regulation (II of 1819), ss. 3, 31. *See* BENGAL ALLUVION AND DILUVION ACT, s. 6 **835**

Bengal Municipal Act (III of 1884), s. 101, proviso—*"Machinery," meaning of—Water Reservoir and its supporting structure, whether "machinery".*

The word "machinery" in the proviso to section 101 of the Bengal Municipal Act when used in ordinary language, *prima facie*, means some mechanical contrivances which by themselves or in combination with one or more other mechanical contrivances by the combined movement and interdependent operation of their respective parts generate power or evoke, modify, apply or direct natural forces with the object in each case of effecting so definite and specific a result.

But the determination in a given case of what is or is not "machinery" must to a large extent depend upon the special facts of the case.

A balancing tank into which water is pumped for distribution in the water mains of a Municipality together with the supporting structure of such tank is not 'machinery' **P C** CORPORATION OF CALCUTTA *v.* CHAIRMAN OF THE COSSIPORE AND CHITPORE MUNICIPALITY, 15 L. W. 253; 26 C. W. N. 761; 49 C. 190 **926**

Bengal Patni Taluks Regulation (VIII of 1819), s. 11—Khudkast raiyat—*Ejectment.*

Under section 11, *Third*, Bengal Regulation, VIII of 1819, a *khudkast raiyat* is protected from ejection from the holding including the part he uses for residential purposes as well as the waste land and the land he cultivates.

A tenant who is found to have been in *khas* possession of the culturable portion of a holding by cultivating the same through labourers and is also found to have taken a lease of the land and built his *bari* on a part of it about 30 years ago, is a *khudkast raiyat* within the meaning of section 11 of the Regulation. KRISHNA PRAMADA DASI *v.* RASH BEHARI DAS **709**

Bengal Public Demands Recovery Act (III of 1913). *See* CONTRACT ACT, 1872, s 70 **40**

Bengal Tenancy Act (VIII of 1885),—*Transfer of Property Act (IV of 1882)—Under-tenancy—Ejectment—Law applicable.*

Where it is established that the *jama* of an under-tenancy, from its inception, contained agricultural as well as homestead land, a suit to eject the under-tenant is governed by the provisions of the Bengal Tenancy Act, and not by those of the Transfer of Property Act.

Where the terms upon which a tenancy was created cannot be proved by direct evidence, the subsequent conduct of the parties may be considered

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with a view to determine the nature of the tenancy. C ABHAIPADA SIRCAR v. ATOR DOME 66

——— **ss. 7, 52, 105**—*Claim for excess rent for excess area—Question of enhancement of rent, if can be taken up.*

Where in Settlement proceedings under section 105 of the Bengal Tenancy Act, a landlord applies for excess rent for excess area as also for enhancement of rent but abandons his claim to the latter claim and the question of the enhancement of rent is not gone into and only a decree for excess rent for excess area is passed, it is not open to the Special Judge on appeal to decree an enhancement of rent on the principles of section 7 of the Act. Having regard to the provisions of section 52 of the Act the Special Judge should only confine himself to the question of fair and equitable rent C RAM BENU ROY v. MIDNAPUR ZAMINDARY CO. LTD. 1001

——— **s. 29**—*"Specially," meaning of—Applicability of section.*

The word "specially," as used in section 29 of the Bengal Tenancy Act, has no reference to the *quantum* of the reduction of rent allowed for the consideration there mentioned, but merely requires that owing to special circumstances, *viz.*, the agreement to cultivate a particular crop, the rent is ower than it otherwise would have been. Mere proof that the rent was a low rent would not be sufficient to comply with the section unless it were also proved that the low rate was arrived at in consideration of cultivating a particular crop But once it is proved that this is the case, then the actual amount whereby the rent is reduced below what it otherwise would have been if no such obligation had existed is not a matter to be taken into consideration in deciding whether the proviso has been complied with.

Section 29 of the Bengal Tenancy Act has no application to an increase in the amount of rent by reason of an increase in the area, it applies only to an increase in the rate of rent. Pat GRANT, W. M. v. EKLAL JHA, 3 P. L. T. 386 49

——— **s. 50 (1), (2),** *applicability of—"Permanent settlement," meaning of—Presumption under s. 50 (2).*

To gain the advantage of section 50 of the Bengal Tenancy Act, it must be shown that the rate of rent has not been changed from the time of the Permanent Settlement of 1793.

The words "Permanent Settlement" in section 50 (1) and (2 of the Bengal Tenancy Act refer to the Permanent Settlement of 1793, and not to any other Settlement when the land itself was permanently settled.

Even if a case does not come within section 50 of the Bengal Tenancy Act, the fact that uniform rent has been paid for a period of 20 years, may create a presumption in favour of the tenure-holder that the rate of his rent has not been changed from the time of the Permanent Settlement of 1793. C OSMAN MANDAL v. RADHIKA MOHAN ROY 294

——— **s. 50 (2)**—*Enhancement of rent—Presumption under s. 50 (2)—Uniform rate of rent—Tenant claiming benefit of presumption—Proof, nature of.*

To entitle a tenant to the benefit of the presumption under sub-section (2) of section 50 of the Bengal Tenancy Act, the tenant is not required to establish *actual payment* of rent during the twenty years at a uniform rate; he has to establish that he and his predecessors-in-interest have *held* at a rent or rate of rent which has not been changed during the twenty years immediately before the suit or proceeding: for a person may hold as a tenant, even though he does not actually pay the rent agreed upon to his landlord.

It has not been, and, cannot be, maintained that the omission to pay on behalf of the tenant or refusal to receive rent on the part of the landlord causes a cessation of the tenancy.

A tenant paid rent at a certain rate which was uniform from 1845 to 1897, since when there was no actual payment of rent: the landlord attempted to enhance the rent but the tenant did not accede to the demand and no proceeding was instituted in Court for alteration of the rent. In 1915 the tenant was recorded in the Record of Rights as an occupancy *raiyat*, whereupon the landlord instituted the present proceeding for enhancement of rent on the ground that the prevailing rent was higher than that paid by the tenant:

Held, that as the rent which was in operation in 1897 was in operation from 1897 to 1915, in other words, as the rent at which the tenant had held during the twenty years immediately before the institution of the proceeding had been at a uniform rate, he was entitled to the presumption mentioned in sub-section (2) of section 50 of the Bengal Tenancy Act. C MOHINI KANTA SAHA v. PREO NATH NEOGY, 35 C. L. J. 309 381

——— **s. 86 (b)**—Tenant, if can surrender after he had transferred his interest—Mortgage by tenant—Subsequent surrender in favour of landlord, how far operative—Surrender, if wholly invalid—Surrender, whether assignment. *See* SURRENDER 91

——— **s. 103A**, *inference under, if can be drawn from* khasra *papers.*

An inference under section 103A of the Bengal Tenancy Act can only be drawn from the finally published Record of Rights, and not from the material (*khasra* papers upon which the finally published Record of Rights is founded. C ALTAF ALI CHOUDHURY v. JARINA BIBI 871

——— **ss. 103B, 104H, 104G, Part II, Chapter X**—*Rent, settlement of—Record of Rights, entry in, conclusive.*

When a settlement of rent has been made under Part II of Chapter X of the Bengal Tenancy Act no evidence is admissible to prove that rent is payable at a rate different from that entered in the rent-roll.

Entries in a Record of Rights are conclusive, unless altered by means of a suit instituted under section 104-H, sub-section (2) within six months from the date of the certificate of final publication of the Record of Rights, or if an appeal has been presented to a Revenue Authority under section 104 G., then within six months from the date of the disposal of such appeal. PRATAP CHANDRA JANA v. SECRETARY OF STATE FOR INDIA, 35 C. L. J. 304 375

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——— **s. 103-B (3)**—*Record of Rights—Presumption as to correctness—Burden of proof.*

Under the provisions of section 103-B (3) of the Bengal Tenancy Act the entries in a finally published Record of Rights must be presumed to be correct until proved by evidence to be incorrect, and the burden of proof lies *prima facie* on the person seeking to establish their incorrectness But the question on whom the initial onus lies loses its importance and becomes immaterial when each of the contesting parties adduces evidence in support of his case. **C** JOGENDRA NATH SAHA *v.* JAGADINDRA NATH ROY, 34 C. L. J. 133 **170**

——— **ss. 105, 109**—*Matter neither raised nor decided in proceedings for settlement of rent—Jurisdiction of Civil Court*—Res judicata.

When a matter has been neither raised nor decided in proceedings for settlement of rent under section 0 read with section 105A of the Bengal Tenancy Act, the jurisdiction of a Civil Court to decide that matter is not barred constructively under section 109 of the Act on the analogy of the doctrine of constructive *res judicata* as laid down in section 11 of the Civil Procedure Code. **Pat** KESHO PRASAD SINGH *v.* BHAGWAT SARAN PANDE **710**

——— **s. 106**—*Suit for enhancement of rent—Rent fixed per* drone *without reference to area—Vendee of tenancy rights, position of*

Where the rate of rent is not fixed at the inception of the tenancy with reference to any particular area but is fixed per *drone* of the arable land and the tenant agrees to pay this rent so long as the lands are not measured, the landlord is entitled to claim, according to the agreement, enhanced rent for the area which the tenant is found to possess, at the time of the suit.

Where a person purchases a tenancy, executes a *kabuliyat* in respect of it, which simply mentions the fact of the purchase, and prays that his name may be entered in the landlord's register in place of the last tenant, it does not amount to the creation of a new tenancy but is a mere recognition of the original tenancy, as held by the transferor. **C** JOY CHANDRA CHAKRABURTTY *v.* SRIJUT KUMAR ARUN CHANDRA SINHA **241**

——— **s, 109,** *application of—Defence to suit or application, whether barred.*

Section 109 of the Bengal Tenancy Act bars the entertainment of an application or a suit in respect of any matter which is or has been the subject of a proceeding under sections 10 to 108 of the Act, and not the entertainment of a defence to an application or a suit. **C** RAJENDRA NARAIN *v.* KALIM, 26 C. W. N. 758 **813**

——— **Sch. III, Art. 6,** *application of—Essential conditions for application of Article—Sale of portion of occupancy holding in execution of money-decree—Decree-holder not landlord.*

It is essential for the application of Art. 6, Schedule III to the Bengal Tenancy Act that the decree must be obtained in a suit between the landlord and tenant, and that the provisions of the Bengal Tenancy Act must be applicable to them.

A decree-holder who is not the landlord can, against the will of the judgment-debtor and without the express consent of the landlord, cause a portion of his judgment-debtor's occupancy holding to be sold in execution of a money-decree even where there is no local custom of transferability **Pat** RAGHUNATH SAHAY *v.* CHOWA MAHTON, 3 P. L. T. 525 **882**

Bengal Tenancy Act—concld.

——— **Sch. III, Art. 6**—*Suit for declaration and rent—Rent-decree—Execution*

A suit for a declaration that the landlord is entitled to a *nakdi* rent and for a decree for rent is a suit for rent in the strictest meaning of the term and Art. 6 of Schedule III of the Bengal Tenancy Act is not inapplicable to the execution of a rent-decree obtained in such a suit simply because the landlord had asked for a wholly unnecessary declaration. **Pat** DARGAHI MIAN *v.* MANGO KUER, 3 P. L. T. 563 **869**

Bengal Village Chaukidari Act (V of 1870), s. 51. *See* CHAUKIDARI CHAKRAN LANDS **440**

Bombay Abkari Act (V of 1878), ss. 6, 7—*Excise Department, appointment of subordinate officers to—Appointment whether at will and pleasure of Government—Dismissal, power of, restricted.*

The appointment of a subordinate officer to the Bombay Excise Department is made under section 6 of the Bombay Abkari Act by the Commissioner of Excise under delegated powers from the Government, and section 7 of the Act places a restriction on the power of the Commissioner to dismiss such an officer. Consequently an officer appointed by the Commissioner does not hold office at the will and pleasure of the Government, and before he can be dismissed the provisions of section 7 must be strictly complied with **B** DINSHAW J JAVERY *v* SECRETARY OF STATE FOR INDIA, 24 BOM. L. R. 210 **200**

Bombay Irrigation Act (VII of 1879), s. 35—*Loss due to interruption of supply of water—Suit for compensation — Civil Court, jurisdiction of.*

A Civil Court has no jurisdiction to entertain a suit against Government for compensation for loss alleged to have arisen out of interruption to the supply of water to land by the Irrigation Department, as the remedy for such a loss is provided by section 35 of the Bombay Irrigation Act under which the decision of a Collector is final unless there is an appeal to the higher authority. **B** VISHNU VINAYAK VAZE *v.* SECRETARY OF STATE FOR INDIA, 24 BOM L. R. 264 46 B 738 **43**

Bombay Land Revenue Code (Act V of 1879), ss. 203, 204. *See* BOMBAY REVENUE JURISDICTION ACT, s. 11, APPLICATION OF **842**

——— **ss. 203, 204**—*Notice of demand issued by Mamlatdar, whether order within sections—Suit for declaration that land held rent-free, maintainability of—Bombay Revenue Jurisdiction Act (X of 1876), s 11, application of.*

A notice of demand issued by a Mamlatdar that a certain sum of money was due for payment of land revenue, and that, if it was not paid, steps would be taken, according to law, to enforce payment, is not an order within the meaning of sections 203, 204 of the Bombay Land Revenue Code,

Bombay Land Revenue Code—concld.

and, consequently, a suit instituted after the issue of such a notice, by the assessee for a declaration that he is entitled to hold the land rent-free would not be governed by section 11 of the Bombay Revenue Jurisdiction Act. **B** NATHURAM HIRARAM THAKOR *v.* SECRETARY OF STATE FOR INDIA, 24 BOM. L. R. 402 **842**

Bombay Rent (War Restrictions) Act (II of 1918), s. 9—"Tenant," whether includes "sub-tenant." *See* LANDLORD AND TENANT **130**

Bombay Revenue Jurisdiction Act (X of 1876), s. 11. *See* BOMBAY LAND REVENUE CODE, 1879, ss. 203, 204 **842**

Burden of proof—Alienation by father, suit by son to set aside. *See* HINDU LAW—JOINT FAMILY **89**

——— Alienation—Legal necessity. *See* HINDU LAW—WIDOW **235**

———, *question of—Question not material after evidence of both parties is out.*

However important the question of the burden of proof may be in the early stages of a case, after all the evidence is out on both sides, it must be looked at as a whole, and the truth of the occurrence must be inferred from it. **P C** EAST INDIAN RY. CO. *v.* KIRKWOOD, 15 L. W. 248; 45 C. 757 **921**

——— Record of Rights. *See* BENGAL TENANCY ACT, s. 103-B (3) **170**

——— Registered partition-deed — Co-sharers. *See* BENAMI **444**

——— Suit for possession—Title in plaintiff *See* SUIT FOR POSSESSION **176**

——— Trustee claiming adversely. *See* TRUSTEE **31**

Burmese Buddhist Law—*Inheritance—Orasa son's ¼th share—Estate, when comes into existence—Mesne profits*

On the death of his father an *orasa* son becomes entitled to a definite one-fourth part of the estate. The estate comes into existence at his father's death and he is entitled to recover it with mesne profits. **L B** MAUNG PAN ON *v.* MAUNG TUN THA, 11 L. B R. 292 **769**

Calcutta Rent Act (III of 1920)—*Government of India Act, 1915, (5 & 6 Geo. V, c. 61), s. 107—Controller under Rent Act, Court of, whether Civil Court—High Court, power of, to interfere—Civil Procedure Code (Act V of 1908), O. XX, r. 4 (2)—Judgment based on personal inspection—High Court, power of, to set aside.*

The Court of the Controller, appointed under the Calcutta Rent Act, is a Court of civil jurisdiction, and the High Court, by virtue of the general powers of superintendence conferred upon it by section 107 of the Government of India Act, 1915, has power to revise orders made by the Controller

Where the judgment of a Court appears to be based solely on a personal inspection by the Presiding Officer, and contains no reference to the evidence taken in the case, it is liable to be set aside by the High Court. **C** ABDUL HUQ *v* MOHAMADDIN **302**

Carriers Act (III of 1865). *See* RAILWAYS ACT **664**

Cause of action—*Plaintiff deprived of goods by erroneous order of Magistrate—Suit for damages against Secretary of State, whether maintainable*

Plaintiff was lawfully in possession of certain ornaments as pawnee, which under the orders of a Magistrate he made over to the Police for production in Court in a criminal case: subsequently the ornaments were made over by an erroneous order of the Magistrate to the original owner. Plaintiff obtained an order from the Criminal Court directing the person to whom the ornaments were made over to re-place them in the possession of the Court, or else to make good their value: after only a trifling sum had been realised from him on account of their value, he became insolvent, whereupon the plaintiff brought the present suit for damages against the Secretary of State:

Held, that the plaint disclosed no cause of action against the Secretary of State, and that as the Criminal Courts were not the servants or agents of the Secretary of State he was not liable for damages if they made a mistake **A** PANCHAETI AKHARA MAHA MIRBANI *v.* SECRETARY OF STATE FOR INDIA, 20 A. L. J. 420 **70**

C. P. Land Revenue Act (II of 1917), s. 203. *See* LICENSE **373**

C. P. Tenancy Act (XI of 1898), s. 46—*Occupancy holding—Inheritance—Succession of females—"In the male line of descent," meaning of.*

Section 46 of Act (XI of 1898) does not disqualify a female from inheriting an occupancy holding if she is otherwise qualified to do so according to the personl law to which she is subject The words "in the male line of descent" occurring in the section cannot be interpreted as meaning "a male in the male line of descent." **N** SAKHUBAI *v.* HARI **229**

——— **ss. 46, 47**—Transfers of holding less than Rs. 100 in value—Registration—Transfer, whether vitiated by fraud—Remedy to set aside transfer. *See* IMPERFECT PARTITION **121**

——— **s. 46 (1)**—*Occupancy tenant—Succession—Nearer collateral, heir disqualified under the section whether lets in distant heir.*

Section 46 (1) of the C. P. Tenancy Act, 1898, creates a rule of restriction so far as collaterals are concerned The condition requiring the collateral who claims succession to have shared in the cultivation is a disqualification which disentitles the nearest collateral if he has not fulfilled the condition. But it does not confer any right of succession to the occupancy-tenure on a more remote collateral even though he may have shared in the cultivation. **N** AHILIA *v.* BADANSINGH **292**

Chalan made by subordinate Police Officer on authorisation of Superintendent of Police—*Chalan, whether can be treated as complaint.* *See* DEFENCE OF INDIA RULES, 1915, R. 25 (1), (2) **337**

Chaukidari chakran lands—*Resumption by Government*—Putnidar's *right to retain possession on payment of the revenue assessed*—Zemindar, *whether entitled to additional rent*—Putni *contract—Bengal* Village Chaukidari *Act (VI of 1870), s. 51.*

On resumption and settlement of *chaukidari chakran* lands a *putnidar* is entitled to obtain possession of the same on payment of the additional revenue

assessed by Government and is not liable to pay additional rent in respect of these lands to the *zemindar*, if those lands were included in the original *putni* lease granted to him.

Upon the resumption of *chaukidari chakran* lands by Government the rights of the *putnidar* are those conferred on him by the estate and interest created by the *putni* lease; and it is this right which is kept alive by section 51 of the Bengal Village Chaukidari Act, VI of 1870. Consequently the *zemindar* cannot claim to vary the *putni* by enhancing the rent in respect of lands which were included in the original demise even though the profits of those lands were not taken into account in fixing the rent. **C** NARAPAT SINGH *v.* BHUPENDRA NARAYAN SINGH, 26 C. W. N. 943; 36 C. L. J. 145 **440**

Chaukidar's Diary, entry in—Admissibility of, after Chaukidar's death. *See* EVIDENCE ACT, s. 32 (2) **57**

City of Bombay Municipal Act (III of 1888), s. 147—*Landlord and tenant—Tenant sub-letting premises at higher rent than fixed with landlord—Property tax, enhancement of, by Municipality—Landlord, right of, to recover difference from tenant.*

Unless there is strong documentary evidence to show that a landlord has contracted himself out of the protection afforded to him by section 147 of the City of Bombay Municipal Act, he is entitled to claim from the tenant the difference in taxes, if the rateable value of the premises exceeds the amount of rent payable by the tenant. **B** DARASHAH BOMONJI DURASH *v.* LIPTON LTD., 24 BOM. L. R. 479 **430**

——— **s. 154 (2)**—*Building, rateable value of—Bath, lavatories and electric fittings, owner, whether entitled to deduction on account of—Electric fittings, whether "machinery."*

In assessing the rateable value of a building under the City of Bombay Municipal Act, no deduction should be allowed to the owner of the building for the cost of bath-tubs and lavatories which are annexures nor should any deduction be allowed for electric lights and fans, which are not "machinery" within the meaning of section 154 (2) of the Act, and, which, when installed by a landlord, become part of the premises and are necessary for the user of the premises by the tenant. **B** HAJI DAWOOD HAJI ELIAS *v.* MUNICIPAL COMMISSIONER FOR THE CITY OF BOMBAY, 24 BOM. L. R. 476 **476**

Civil Procedure Code (Act XIV of 1882), ss. 13, 244—Res judicata—*Suit by Hindu widow dismissed as barred by s. 244, Civil Procedure Code—Subsequent suit by reversioners, maintainability of—*Vatan *lands—Alienation by widow—Legal necessity.*

In execution of a money-decree obtained against a *vatandar* during his lifetime the property was put up for sale by the Court after his death and purchased by a *vatandar* of the same *vatan*. In the execution proceedings the judgment-debtor was represented by his widow who subsequently filed a suit for a declaration that the sale was illegal. The suit was dismissed as barred by section 244 of the Civil Procedure Code, 1882. The widow died and within

twelve years the plaintiff who was one of the reversionary heirs sued for possession of the lands. The defence raised was that the suit was barred by *res judicata* and that the sale was binding upon the reversioner:

Held, (1) that the suit was not barred by *res judicata* as there was no adjudication on the merits as between the widow and the purchaser which could affect the reversioners;

(2) that the sale was valid and binding upon the reversioners as it was in execution of a money-decree against her deceased husband and therefore for a legal necessity.

Obiter.—At a Court sale an auction-purchaser can get only such rights as could have been conveyed to him by a private sale. **B** GANESH RAMCHANDRA KULKARNI *v.* LAXMIBAI VENKATESH NARAYAN, 24 BOM. L. R. 249; 46 B. 726 **209**

Civil Procedure Code (Act V of 1908), s. 2 (2)—*Decree—Order absolving defendant from liability to pay mesne profits—Appeal.*

An order made upon the objection of a defendant and after hearing the parties, absolving him from the liability to pay mesne profits is a "decree" within the meaning of section 2 (2) of the Civil Procedure Code, and as such is appealable. **C** NAIMUDDIN SARKAR *v.* IMANI MONDAL **93**

——— **s. 2 (3),** effect of. *See* SPECIFIC PERFORMANCE **667**

——— **s. 2 (12)**—*Mesne profits—Decree allowing mesne profits silent about interest—Interest deemed to have been granted.*

When a decree granting mesne profits is silent as to interest, it must be taken to carry interest on them in view of the definition of mesne profits in section 2, clause (12) of the Civil Procedure Code.

A Court has, however, the discretion to penalise a party by disallowing such interest. **A** LALTA PRASAD *v.* SRI GANESHJI, 20 A. L. J. 348; 4 U. P. L. R. (A.) 144 **219**

——— **ss. 10, 115**—*Application for stay of suit—Order refusing stay—Revision.*

An order refusing to stay a suit under section 10 of the Civil Procedure Code does not amount to the decision of a "case" within the meaning of section 115 of the Civil Procedure Code, and, therefore, is not open to revision. **L** FIRM ISHAR DAS-DHARM CHAND OF AMRITSAR *v.* FIRM BUTA MAL-DURGA DAS OF AMRITSAR **870**

——— **s. 11**—*Evidence Act (I of 1872), ss. 40, 41, 42, 43. Judgment not* inter partes, *plea of, in bar to subsequent suit. Judgments* in rem *and* in personam, *scope and effect of—Succession to hereditary office, how determined in absence of special usage.*

Plaintiff sued his brother and brother's son for a declaration that he was entitled to the *Asari Sheriff* office and its emoluments and for an injunction restraining the defendants from interfering with his enjoyment of the office. The suit was dismissed owing to the plaintiff's failure to prove his title. In the present suit by plaintiff against the Government for recovery of a specific amount due to him as the holder of the office:

Held, that it was open to the plaintiff to re-assert his title although the same was definitely negatived in the previous suit.

Distinction between judgments *in rem* and *in personam*, their scope and effect discussed.

Per *Wallis, C J*—The effect of section 11 read with section 9, Civil Procedure Code, is to preclude the Court from refusing to try a suit or issue which was not between the same parties but between one of such parties and a third person.

Per *Kumaraswami Sastri, J*—In cases where there is no bar under section 11, Civil Procedure Code, the Court has to try the issue and if the judgment in the prior suit is filed for the purpose of proving the plaintiff's claim or for the purpose of proving the defence to the action, it is only relevant as a piece of evidence, the probative value of which is regulated by the provisions of the Evidence Act

It is not permissible to travel outside the provision of section 11, Civil Procedure Code, and apply the rule of *res judicata* to cases falling outside the limitation imposed by the section

Where a judgment *in personam* is pleaded, its legal effect and probative force will depend on the facts of each case:

Held, by the Divisional Bench (per *Wallis, C. J* and *Krishnan, J*)—In the absence of evidence to the contrary or a special usage, succession to a hereditary office which cannot be enjoyed by several heirs in common, is by lineal primogeniture. **M** SECRETARY OF STATE FOR INDIA *v.* AHMED BADSHA SAHIB, 4 L. W. 128 & 158; 4 M. L J. 223 & 278; 44 M. 77; (1921) M. W. N. 576 **971**

——— **s. 11**—Res judicata—*Compromise decree—Co-defendants—Decree in partition suit.*

A compromise decree operates as *res judicata* unless it is tainted with fraud or was procured by undue influence.

A decision as between co-defendants cannot be *res judicata* unless it was necessary to decide an issue between the co-defendants in order to grant relief to the plaintiff.

In a suit for partition, where the rights of different persons have to be determined, and have been so determined, the decision might operate as *res judicata*, although the plaintiff in the subsequent suit may have been a defendant in the previous suit. But if the plaintiff in the subsequent suit was only one of the several defendants in the previous suit, had no defence to the claim for partition, was not at all concerned with the share which was claimed by the plaintiff in that suit, was made a defendant simply because he was a co-sharer, and the decision in the suit did not affect any question of partition of shares between him and the plaintiff in that suit, a decision between the plaintiff and other defendants in that suit would not have the effect of *res judicata* as between that defendant and his co-defendants. **A** MOHAMMAD AHMAD *v.* ZAHUR AHMAD, 20 A. L. J. 193; 4 U. P. L. R. (A.) 55; 44 A. 334 **523**

——— **s. 11**—Res judicata—*Decree in previous ejectment suit in favour of tenant in spite of adverse finding as to nature of tenancy—Adverse finding, if res judicata.*

In a suit for ejectment by a landlord the tenant pleaded want of notice to quit and that he was a permanent tenant: the suit was dismissed on the ground of absence of notice but the Court recorded a finding that the defendant had failed to prove that he had a permanent tenancy. The decree being in favour of the defendant, he could not appeal from the adverse finding:

Held, that under the circumstances the decree could not operate as *res judicata* on the question whether the defendant had a permanent tenancy or not. **C** RAJENDRA KISHORE *v.* KUMUD BAN MAHATA **271**

——— **s. 11**—Res judicata—*Doctrine not to be unduly conditioned.*

The doctrine of *res judicata* should not be unduly conditioned and qualified by all sorts of ingenious attempts at evasion, where there has been in fact a fair contest on a question in dispute between the parties and the Court intended to give and has given a final decision on that question **L** KALU *v.* NUPU **755**

——— **s. 11, Explanations,** *application of, to execution proceedings—Appeal, second—Point not raised in first appeal—Abandonment.*

Although the doctrine laid down in section 11 of the Civil Procedure Code relating to *res judicata* may be rightly applied in certain proceedings in execution arising out of the same judgment so as to put an end to litigation and may possibly be applied in certain cases where separate suits have been brought, raising points which have already been decided in execution cases fought between the same parties, still, the special rules laid down in the explanations to that section which go behind the ordinary doctrine of *res judicata*, ought not to be applied generally in execution cases.

A point which is taken before the Trial Court but is not taken before the lower Appellate Court must be considered to have been abandoned and cannot be raised in second appeal **Pat** PRITHI MAHTON *v.* JAMSHAD KHAN, 3 P. L. T. 403 **656**

——— **ss. 11, Exp. IV, 47**—*Punjab Tenancy Act (XVI of 1887), s. 50—Sale of proprietary rights to occupancy tenants Sale set aside—Possession awarded to proprietor—Suit by tenants to establish occupancy rights, whether barred*—Res judicata—*Jurisdiction of Civil and Revenue Courts*

Plaintiffs were occupancy tenants of certain land of which *N.* was the proprietor. *N.* sold the proprietary rights to the plaintiffs and died some time after the alienation. Defendant who succeeded *N.* brought a suit to impugn the sale on the ground that it had been effected without consideration and necessity and was awarded a decree for possession of the land. In execution of that decree defendant obtained actual possession of the land and turned the plaintiffs out The latter objected that they were entitled to retain possession of the land as occupancy tenants, but their objection was disallowed. Upon this they sued for restoration of their occupancy rights:

Held, 1 that section 50 of the Punjab Tenancy Act was not applicable to the case inasmuch as the plaintiffs had been dispossessed in execution of a decree;

(2) that the suit was not barred by the provisions of section 47 of the Civil Procedure Code;

Civil Procedure Code—1908—contd.

(3) that the suit was not barred by the provisions of Explanation IV to section 11 of the Civil Procedure Code, inasmuch as the plaintiffs were litigating under a different title from that under which they litigated in the previous suit. **L** SURAJ KOUR v. NAGINA SINGH, 4 L. L. J. 400 **485**

——— **ss. 18, 21**—*Jurisdiction, territorial, doubt as to—Decree, setting aside of*

In view of the provisions of sections 18 and 21 of the Civil Procedure Code, the decree of a Trial Court cannot be set aside on the mere ground that there is a doubt whether the Court had territorial jurisdiction over the subject-matter of the suit unless there has been a failure of justice **C** JOGENDRA NATH SAHA v. JAGADINDRA NATH ROY, 34 C. L. J. 133 **170**

——— **s. 20**—*"Carries on business," meaning of—Joint Hindu family, members of, position of.*

A man may carry on business either personally or through an agent, and although the manager of a joint Hindu family is not liable to account to the sleeping partners in precisely the same way as the manager of an ordinary business, his position approximates more nearly to that of an agent than to any other He acts on behalf of the family and in its interests and it must be held that each individual member of the family carries on business wherever a branch of the family firm is in active existence. He is, therefore, liable to be sued even in a purely personal suit at any of these places just as a partner in an ordinary partnership is liable to be sued wherever a branch of the business exists. **L** JAMNA DAS v. MURLI DHAR **69**

——— **s. 20**—*Contract Act (IX of 1872), s. 91—Delivery to Railway Company of goods sold—Railway, whether agent of buyer—Suit for damages for breach of contract—Place of suing.*

The delivery by a seller of goods to a Railway Company for despatch to the buyer operates as a delivery to the buyer under section 91 of the Contract Act.

Therefore, a suit for breach of contract to deliver goods by the plaintiff, residing at Amritsar, against the defendant, residing at Bombay, cannot be brought in the Amritsar Court, if the contract was entered into at Bombay. **L** NAND LAL-DAS MAL v. MIAN MUHAMMAD ALI-ALI BHAI **888**

——— **s. 24**—*Transfer of suit—Judge having decided the same law point in another suit, whether good ground for transfer*

The fact that a Judge has decided a point of law arising in one case is not a good ground for transferring from his Court another case of the same party in which the same point arises **L** FIRM OF JAI NARAIN-BABU LAL OF DELHI v. FIRM OF JOHRI MAL-CHUNNA MAL OF DELHI **228**

——— **s. 47**—*Execution of decree - Suit for declaration that decree has been satisfied, whether maintainable.*

A suit for a declaration that a decree has been fully satisfied and is incapable of execution is barred under the provisions of section 47 of the Civil Procedure Code. **L** RAM LABHAYA v. FIRM MUKANDA MAL-KAPUR CHAND **593**

——— **s. 47**—*Questions under s. 47 must have reference to matters subsequent to decree.*

Civil Procedure Code—1908—contd.

Questions under section 47, Civil Procedure Code, relating to the execution of a decree and arising between the parties to a suit in which the decree was passed or their representatives, must be such as have reference to matters arising subsequent to the passing of the decree and not antecedent to it. **L** RAM DAS v NETTO, 61 P. L. R. 922 **753**

——— **s. 47, O. XXXII, r. 3 (3)**—*Execution proceedings—Minor Guardian -Affidavit not filed—Guardian not appearing and acting for minor, effect of—Property sold in execution -Suit to set aside sale — Limitation—Limitation Act (IX of 1908), Sch. I, Arts. 12, 144*

Where in execution proceedings against the minor son of a judgment-debtor, the application for the appointment of the minor's guardian is not accompanied by an affidavit, under Order XXXII, rule 3 (3), of the Civil Procedure Code and the guardian does not appear and act at all for the minor, the latter never becomes a party to the execution proceedings; and if his property is sold in such execution proceedings and he institutes a suit to set aside the sale, the suit is governed by Article 144 and not by Article 12 of Schedule I, Limitation Act. **L** ALAM DIN v ALLAH DAD **547**

——— **ss. 47, 73, 144, 151**—*Attachment of moneys—Rateable distribution among decree-holders, order for—Order set aside in appeal—Restitution, application for, by the attaching decree-holder, maintainability of—Inherent power of Court to order restitution under s 5.*

Respondent obtained a decree against *M.* and in execution attached certain moneys belonging to *M* The moneys, after realisation were rateably distributed among various decree-holders of *M.* The order for rateable distribution was, however, reversed on appeal. Respondent then applied for return of the moneys rateably distributed and this was ordered:

Held, that as the contest was between rival decree-holders, the order for rateable distribution was neither a decree under section 144, Civil Procedure Code, nor an order under section 47, Civil Procedure Code, and that the order for restitution was without jurisdiction

Semble:—Whether the respondent is entitled to relief under the Court's inherent powers under section 151, Civil Procedure Code. **M** VARADA RAMASWAMI v. VUMMA VENKATARATNAM, 30 M. L. T. 178; 15 L. W. 421; (1922) M. W. N. 184; 42 M. L. J. 473 **546**

——— **ss. 47, 102**—*Decree for sum exceeding Rs. 500—Execution for sum less than Rs. 500—Appeal, second, whether lies.*

In determining whether a second appeal lies from an order passed in execution proceedings, the amount of the subject-matter of the suit, and not the amount sought to be recovered in that particular execution must be taken into consideration.

Where in execution of a decree for a sum over Rs. 500, an order is passed in respect of a sum less than Rs. 500, the order is open to second appeal. **L** MOHNA MAL v TULSI RAM, 3 L. 41 **718**

——— **ss. 47, 144**—*Restitution Execution proceedings—Suit for relief of restitution, whether may be treated as proceedings.*

Civil Procedure Code—1908—contd.

Although a suit for restitution is barred by section 144 (2) of the Civil Procedure Code, yet where such a suit is instituted it can be treated as proceeding, under section 47 (2) because an application for restitution is in substance a proceeding in execution. **N** JAMANLAL v. RAGHO **319**

——— **s. 48**—*Dekkhan Agriculturists' Relief Act (XVII of 1879)—Decree, mortgage—Instalments—Failure to pay any instalments entitling decree-holder to execute whole decree—Decree made absolute—Starting point for 12 years' limitation—Limitation.*

On the 11th September 1900 a decree was passed under the provisions of the Dekkhan Agriculturists' Relief Act providing the payment of the decretal amount by ten yearly instalments and also providing that in case of default of the payment of any one instalment the decree-holder was to wait for a year and if the instalment remained still unpaid he was at liberty to recover the whole amount then due. The first instalment fell due in March 1901 and was not paid within a year. Thus the whole decree became payable in March 1902 but the decree-holder applied in December 1903 for a decree absolute and got the order on the 7th January 1904. Some applications were made for execution but the last application was made on the 7th June 1915:

Held, that as the decree was passed under the provisions of the Dekkhan Agriculturists' Relief Act there was no necessity to apply to the Court to have the decree made absolute, that the application to have the decree made absolute could only be treated as a step-in-aid of execution, that the order on the application dated the 7th January 1904 could not be treated as a decree to give a fresh starting point for the period of twelve years allowed by section 48 of the Civil Procedure Code and that, consequently the application of 1915 was barred by limitation. **B** HIRACHAND KHEMCHAND v. ABA LALA PATIL, 24 BOM. L. R. 269; 46 B. 761 **153**

——— **s. 51, O. XL, r. 1**—Mortgage-decree—Decree-holder entitled to sell property—Receiver, whether can be appointed. *See* APPROPRIATION OF PAYMENTS **606**

——— **s. 89, O. XXIII, r. 3**—*Award without intervention of Court during pendency of litigation, whether can be recorded as adjustment—"By any other law for the time being in force," meaning of.*

An award made without the intervention of any Court, and during the pendency of litigation, cannot, unless it is consented to by parties, be recorded as an adjustment under Order XXIII, rule 3 of the Civil Procedure Code, and section 89 of the Code operates to bar the enforcement of it by one of the parties.

The words "by any other law for the time being in force" contained in section 89 of the Civil Procedure Code, refer to some law extraneous to the Code of Civil Procedure, and cannot be legitimately held to cover Order XXIII, rule 3. **L** HARI PARSHAD v. SOOGNI DEVI, 3 L. L. J. 162 **123**

——— **s. 92**—*Ejectment of* mohunt—*Hindu Law—Endowment Sitamarhi Asthal,* mohunt *of—Marriage Forfeiture of* mohuntship.

The *mohunt* of the Sitamarhi Asthal does not necessarily forfeit his *mohuntship* by contracting a matrimonial alliance.

Civil Procedure Code—1908—contd.

Where the plaintiff claims in the plaint, in his own right of succession, possession of properties as well as the position of *mohunt* on the ground that the defendant has forfeited the *mohuntship* by marrying, section 92 of the Civil Procedure Code is no bar to the suit although some of the grounds of his claim are such as would be contemplated in that section. **Pat** RAGHUNATH DAS v. SHEO KUMAR MISSAR **464**

——— **s. 92**—*Hindu temple—Suit by worshipper for declaration—Sanction, whether necessary.*

A Hindu entitled to worship in a temple is not competent, as such, to maintain a suit for possession of property alleged to belong to the temple, as *prima facie* it is only the trustees who can claim that relief. But he can sue for a declaration that a certain property is trust property attached to the temple and no sanction is necessary under section 92, Civil Procedure Code, to bring such a suit **L** SALIG RAM v. BASSAO MAL, 1 L. L. J. 160 **320**

——— **s. 92,** scope of. *See* SPECIFIC RELIEF ACT, s. 42 **659**

——— **s. 97**—*Preliminary and final decrees—Appeal from preliminary decree alone, when maintainable*

Where there are preliminary and final decrees in the same suit, an appeal against the preliminary decree alone cannot be maintained, unless it is instituted before the passing of the final decree. **N** BIHARIDAS v. BAJRANGDAS **261**

——— **s. 102**—*Suit based on agreement to share the income of a tenancy—Suit, whether, of the nature cognizable by Small Cause Court—Appeal, second*

A suit based on an agreement between the plaintiff and the defendant that the latter would pay the former half of what he realised from a tenancy granted to him by the Government is cognizable by a Court of Small Causes as all that is transferred under the agreement is a moveable property and not a right in the tenancy and, under section 102, Civil Procedure Code, no second appeal lies from a decision in such a suit where the value of the subject-matter is less than 500 rupees. **L** GANGA RAM v. MAYA DAS, 3 L. L. J. 419 **841**

——— **ss. 109, 110, O. XXI, r. 15**—*Appeal to Privy Council—Joint decree-holders—Execution application by one for his own share—Order of Court directing execution for benefit of all—Order not determining rights in controversy in suit—Leave, grant of*

A., one of three decree-holders, applied for transfer of his third share to another Court in whose jurisdiction the property of the judgment-debtor was situate. The remaining decree-holders were served with notice of the application but raised no objection, and the Court made the desired order. Objection to the order was taken by the judgment-debtor before the Execution Court. The matter went up in appeal to High Court which declared that the transfer must be treated as a transfer of the whole decree and that no sum should be paid out of Court to *A.* except on his giving security to refund the same if required. Some time after this *A* started a fresh execution in which *B.*, one of the remaining decree-

holders, applied to be added as a party. This was allowed. A revision application against the order was dismissed by the High Court, and leave was sought by *A.* to appeal to the Privy Council:

Held, that there were no grounds for allowing the application for leave to appeal to His Majesty in Council.

Per *Miller, C. J.*— (1) that the order sought to be appealed against was not a final order determining the rights of the parties in any matter in controversy in the suit as the rights of the decree-holders as to their shares to claim the benefit of the decree were settled by the decree itself and were further determined by the High Court judgment which declared that the transfer of part of the decree must be treated as a transfer of the whole, that the order related to procedure and was merely a natural corrolary of the High Court judgment;

(2) that in view of the clear provisions of O XXI, r. 15 empowering a Court in such a case to protect the interests of all the joint decree-holders, there was no substantial question of law involved

Per *Mullick, J.*—That in view of the judgment of the High Court declaring that the execution proceedings could only be prosecuted by *A* on behalf of all the decree-holders, which judgment not being appealed against had become final, it was no longer open to *A* to contend that *B* should not have been added as a party to the execution proceedings. **Pat** PRAKASH CHANDRA SARKAR *v* BRINDABAN CHANDRA SARKAR, (1922) PAT. 29 **991**

——— s. 110—*Appeal to Privy Council—Suit to eject tenant of house—Value of suit, method of computing.*

The value of a suit, for the purposes of an appeal to His Majesty in Council to eject a tenant from premises occupied by him, is the monthly rent of the premises capitalised at 20 years' purchase. **B** HIRALAL D. NANAVATI *v.* KASTURBHAI MANIBHAI NAGARSETH, 24 BOM L R. 350 **938**

——— s. 115—*Revision.*

In revisions the question of substantial justice arises more truly when a case has been decided and where the High Court is of opinion that any technical error, which might have been urged in an ordinary appeal, is not a sufficient reason for interference in revision unless injustice has been caused thereby or the petitioners have been prejudiced. **L** LAHORE ELECTRIC SUPPLY CO, LTD. *v.* BOMBAY MOTOR AND CYCLE CO., LAHORE **742**

——— s. 115, O. IX, r. 2—*Revision—Remedy, other, open—High Court, interference by—Process-fee paid late Dismissal of suit—Illegality*

A High Court generally does not entertain an application for revision when there is another remedy open to a petitioner, but there is nothing in the law which prohibits a High Court from interfering where grave injustice may have been done.

The date of hearing of a suit was 21st October. Plaintiff deposited the process-fee on 11th October at Gujrat The office did not issue a summons to the defendant at Gujranwala on the ground of the process-fee being paid very late and on the date of the hearing the Court dismissed the suit under O. IX, r. 2 of the Civil Procedure Code:

Civil Procedure Code—1908—contd.

Held, (1) that O. IX, r. 2, Civil Procedure Code, had no application to the suit inasmuch as process-fees had been deposited by the plaintiff;

(2) that the office acted wrongly in not issuing a summons to the defendant on 11th October;

(3) that the order dismissing the suit must be set aside in revision. **L** RALLA RAM *v* RAJ, 4 L. L J. 71 **945**

——— s. 115, O. XXI, rr. 89, 92—*Application to set aside sale on deposit—Notice to persons affected thereby—Process fee, payment of, if obligatory on the applicant Revision—Practice of High Court—Confirmation of auction sale Jurisdiction.*

Although Order XXI, rule 92, Civil Procedure Code, requires that no orders shall be made under rule 89 unless notice of an application to set aside the sale has been given to all persons affected thereby, it is not in every case obligatory on the applicant to pay the process fee or to serve notice according to the mode of service prescribed in the Code.

The High Court has jurisdiction under section 115, Civil Procedure Code to interfere with the wrong exercise by subordinate Courts of powers vested in them under the provisions of the law dealing with confirmation or setting aside of auction-sales. **C** SANTOSH BALA LEBI *v.* RAM CHANDRA GHATI **286**

——— s. 144—*Restitution — Application for compensation, order on—Appeal—Memorandum of appeal dismissed for deficiency of Court-fee—Appellate Court's order, if appealable—Court-fee payable on memorandum of first appeal—Appeal, memorandum of, registered—Rejection—Dismissal.*

An appeal lies against an order of a lower Appellate Court dismissing an appeal on the ground of deficiency of Court-fee, the appellant having failed to make good the deficiency within the time allowed for the purpose.

An application for compensation by a judgment-debtor under section 144, Civil Procedure Code, relates to the execution, discharge or satisfaction of the decree and the Court-fee payable on the memorandum of first appeal against an order on the application is 8 annas

Once a memorandum of appeal has been registered it cannot merely be rejected, and even though an Appellate Court in terms does no more than reject the memorandum, the appeal must be deemed to have been dismissed. **N** GABBA *v.* KANCHHEDILAL, 18 N L R 15 **225**

——— ss. 144, 151, O. XXI, rr. 58, 61—*Sale in execution of decree—Money deposited by auction-purchaser rateably distributed among creditors—Judgment-debtor's objection to sale disallowed but finally decreed—Auction-purchaser deprived of sale-property—Application for restitution under s. 144, Civil Procedure Code, if lies—Inherent powers of Court under s. 151, Civil Procedure Code, when to be invoked.*

Restitution can only be granted under section 144, Civil Procedure Code, on the application of a party to the "decree varied or reversed." The applicant must be a *party* entitled to some benefit by way of restitution. It is not sufficient that he is merely a *person* entitled to the benefit.

Section 151 of the Civil Procedure Code should not be invoked to cover an order which only sets right one injustice by the infliction of another, or, as it is said, robs Peter in order to pay Paul The extraordinary powers conferred by this section should not be exercised where the equities are evenly balanced

A claim petition by a judgment-debtor, under O. XXI, r. 58, Civil Procedure Code on the ground that the property attached in execution of decree against him was trust property, was disallowed under r. 61. The judgment-debtor however, filed a regular suit and obtained a decree declaring that the property was trust property and that, therefore, it was not liable to be proceeded against. In the meantime, the property was sold at Court auction and the price paid by the auction-purchaser was distributed rateably among several decree-holders, whose decrees were recorded as satisfied.

Upon obtaining the decree declaring that the property was trust property and therefore, not liable to attachment and sale the judgment-debtor obtained re-delivery of the property under section 144, Civil Procedure Code, and when the auction-purchaser was deprived of the property he claimed back his money from the various decree-holders who had received it rateably In the meantime, their decrees had become time-barred.

Held, that the auction-purchaser could not invoke to his aid the provisions of

(1) section 144, Civil Procedure Code, inasmuch as
 (*a*) the decree in execution of which the property was sold had not been reversed;
 (*b*) the auction purchaser was not a party to the order by which the objection-petition under O XXI, r 58, was disallowed under r. 61: nor could he be treated as the legal representative of the judgment-debtor;
 (*c*) the order which was subsequently varied by the declaratory decree was the one made upon the claim petition and not an order that was passed on the execution petition for attachment and sale of the property;
 (*d*) that the order disallowing the judgment-debtor's objection under O. XXI, r. 61, was not a decree
(2) section 151, Civil Procedure Code, because,
 (*a*) the refund was asked for from persons who had nothing to do with the auction-sale, but merely profited by it, in the way of rateable distribution under the orders of a Court:
 (*b*) the decrees had become time-barred, and if restitution was ordered the decree-holders would be deprived of the fruits of their decrees and this hardship would result to them though no blame attached to them.

M RAJA RAO *v* ANANTHANARAYANAN CHETTY, 15 L. W. 303; 42 M. L. J. 308; (1922) M. W. N 25 **359**

——— **s. 149**—*Deficient Court-fee on memo. of appeal—Extension of time*

Where an appellant deliberately undervalues his relief in appeal and affixes a wholly inadequate Court-fee on his memorandum of appeal, and where after the mistake is pointed out and while he still has time to correct the same, he deliberately refuses to do so, he is not entitled to any extension of time under section 149 of the Civil Procedure Code L TIKKAN RAM *v.* BOSA RAM, 4 U P. L. R. L 177 **106**

——— **s. 151**—*Inherent power of Court, exercise of—Consent of parties—Consolidation of suits*

The consent of parties is not a condition precedent to the exercise by a Court of the powers conferred upon it by section 151 of the Civil Procedure Code: a Court, therefore, has jurisdiction under the section to consolidate suits without the consent of the parties. Pat MUHAMMAD AFZAR *v.* MANKUMAR MAHTON, 4 P. L. T. 184 **1000**

——— **s. 151, O. XLI, rr. 20, 33, O. XXX, r. 4 (2)**—*Appellate Court—Respondent, addition of—Suit by or against a firm in the firm-name—Names of partners disclosed—Death of a partner—Legal representative, whether must be added as party—Determination of partnership—Notice—Continuance of partnership—Presumption—Partner carrying on business of same nature without consent of other partners.*

Apart from all questions as to the scope of O. XLI, r. 20 and O. XLI, r. 33, the Court, in a proper case, has inherent power to add a respondent to an appeal

A suit of the description contemplated by O. XXX of the Code of Civil Procedure may be brought by or against a firm in the firm-name even though the firm may have been dissolved before the date of the suit provided the cause of action arose before the date of dissolution This may be done, notwithstanding the position that a firm is not recognised as an artificial or juristic person The proceedings in a suit so brought continue in the name of the firm, even though the names of the partners are disclosed From this standpoint no valid objection can be taken to the competence of an appeal even if the representatives of a deceased appellant are not added as parties.

Where no fixed term has been agreed upon for the direction of a partnership, any partner may determine the partnership at any time on giving notice of his intention so to do to all the other partners. But the dissolution takes place as from the date of communication of the notice.

Where the evidence discloses that a partner who intended to retire from the partnership did in fact continue to associate with its work, a presumption may legitimately be drawn in favour of the continuance of the partnership.

If a partner, without the consent of the other partners, carries on any business of the same nature and competing with that of the firm, he must account for and pay over to the firm all profits made by him in such business, and he must also make compensation to the firm for any loss occasioned thereby C PULIN BIHARI ROY *v.* MAHENDRA CHANDRA GHOSAL, 34 C. L. J 405 **10**

—— **s. 152**—Alteration of decree six years after enforcement. *See* STAMP ACT, s. 61 **310**

——— **O. II, r. 2**—*Recognition of r. 2 in Revenue Courts.*

The principle recognised by Legislature in O. II, r 2 of the Civil Procedure Code has been held applicable to proceedings in Revenue Courts for recovery of arrears of rent as also in cases of not

merely deliberate relinquishment but also of accidental or involuntary omission. C PRATAP CHANDRA JANA v. SECRETARY OF STATE FOR INDIA, 35 C. L. J. 304 **375**

——— **O. III, r. 4 (2), s. 151**—*Plaint returned for presentation to proper Court—Power of Pleader to represent his client, if determined—S. 151, inherent power under, when to be used*

Under O. III, r. 4 (2), Civil Procedure Code, the appointment of a Pleader is not determined until all proceedings in the suit are ended so far as regards the client.

Where a plaint is returned for presentation to the proper Court, the original *vakalatnama* of the plaintiff's Pleader is not determined where the presentation of the plaint before the proper Court can be considered as a continuation of the proceedings in the suit as originally instituted for the purposes of O. III, r. 4 (2) of the Civil Procedure Code, as for instance, where the plaint is presented to the proper Court on the same day on which it is returned.

By its very terms section 151, Civil Procedure Code, does, in certain specified circumstances, nullify the clear and imperative provisions of the Code as well as those that are ambiguous or advisory, if any of the latter classes exist The provisions which cannot be nullified by virtue of the power mentioned in that section are not those that are clear and imperative but only those whose operation in the particular case will not defeat the ends of justice or lead to abuse of the process of the Court.

The power mentioned in section 151, Civil Procedure Code, must be used sparingly and only in the last resort if only because of the great danger of mistake as to what the justice of a given case may be. N DEBILAL v. KRISHNAJI **296**

——— **O. III, r. 5**—*Pleader's duties and responsibilities—His appointment, determination of—Notice to Pleader, notice to client.*

When a Pleader accepts a brief, it is his duty to attend to his client's interest throughout the proceedings in the case unless his appointment be determined with the leave of the Court by a writing signed by him or his client and filed in Court.

In an appeal filed by a Pleader, a notice of the date fixed for hearing was served on him On that notice, the Pleader made the following entry, "The appellant should be informed. He has his papers with him and has not left his address with me." On the date of hearing no body put in an appearance :

Held, rejecting the appeal, that the appellant must be deemed to have had notice of the date fixed for hearing O SHEO LAIQ SINGH v. AUSAN SINGH, 9 O. L. J. 170; 25 O. C. 40 **554**

——— **O. VI, r. 17**—*Amendment of pleadings—Interlocutory order—Revision*

Leave to amend should always be given unless the Court is satisfied that the party applying for leave is acting *mala fide*, or that, by his blunder he has done some injury to his opponent which cannot be compensated for by costs or otherwise However negligent or careless may have been the omission, however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side.

The High Court should hesitate as a rule to interfere in revision with interlocutory orders of the lower Courts, but it should not hesitate in exceptional cases.

Defendants applied for leave to amend their written statement before issues were struck but the Trial Court refused to grant leave to amend. On an application to the High Court in revision :

Held, that this was an exceptional case in which the High Court would interfere with the interlocutory order of the Trial Court

An interlocutory order passed by the presiding Judge of a Court is not binding on his successor and the latter can go behind the order if a case is made out for his doing so. L JHARIA COAL CO, v. DIWAN CHAND & CO. **335**

——— **O. VI, r. 17**—*Plaint, amendment of—Case ripe for judgment*

A plaintiff ought not to be allowed to amend his plaint at a late stage of the suit, as, where the case is ripe for judgment, where the amendment has the effect of completely altering the nature of the suit. L TOHLU MAL v BUTA, 3 L. L. J. 184 **132**

——— **O. VIII, r. 6**—*Set-off—Counter-claim—Difference—"Money due"—Unascertained damages.*

Set-off and counter-claim are governed by rules of procedure which must be construed strictly.

A set-off can be pleaded as a defence and can only arise where the claim to be set-off one against the other whether by plaintiff or defendant exists in the same right. The principle on which an equitable set-off can be allowed is that the claim on which it is based must arise from the same transaction which is the subject-matter of the plaintiff's suit, and it is only when a claim for damages, for instance, forms the subject-matter of a counter-claim that it makes no difference whether damages are based on a claim arising on the subject-matter of the suit or are based on some transaction which is entirely outside the plaintiff's claim.

Though every set-off can be pleaded as a counter-claim, if a defendant so desires, every counter-claim cannot be pleaded as a set-off. It is, therefore, of the greatest importance to keep separate the questions of set-off and counter-claim when a defendant seeks to claim as a set-off not money due but an unascertained sum for damages.

A counter-claim is bad when it cannot form the subject-matter of a separate suit in the Court trying the suit in which it is pleaded

Where a defendant pleaded a set-off on the basis of an Article of Association, by which the plaintiff was bound and which ran as follows: "The directors may deduct from the dividend or bonus payable to any shareholder all sums of money due from him to the company":

Held, that, as the defendant wanted to set off an unascertained sum for damages, it could not be allowed as it was not money due within the meaning of the above article B VITHALDAS GULABDAS v. HYDERABAD SPINNING & WEAVING CO LTD., 24 BOM. L. R. 328 **326**

——— **O. IX, r. 13, O. XLIII**—*Order refusing to re-admit application to set aside ex parte decree—Appeal.*

Civil Procedure Code—1908—contd.

An order refusing to re-admit and re-consider an application to set aside an *ex parte* decree dismissed for default is not appealable either under the Civil Procedure Code or any other law. **A** SHARIF HUSAIN *v.* HAIDAR HUSAIN, 20 A. L. J. 519 **320**

——— **O. XI, r. 14**—*Production of documents, non-compliance with order for, effect of.*

The mere non-compliance with an order for the production of books and documents in Court, made under Order XI, rule 14 of the Civil Procedure Code, does not warrant the striking off the defence of the party which is guilty of the non-compliance of the order. **A** YALLPUR SUGAR MILLS & CO. *v.* RAM CHANDRA GUR SAHAI COTTON MILLS & CO., 20 A. L. J. 422; 4 U. P. L. R. (A.) 139 **73**

——— **O. XX, r. 4 (1)**—*Small Cause Court, judgment of—Judgment specifying points for decision and entering findings* seriatim, *whether proper—Suit to recover amount on basis of acknowledgment, whether cognizable by Small Cause Court.*

Where a Small Cause Court Judge has in his judgment specified the points for decision and has entered his findings *seriatim* under each of the issues mentioned by him, he has complied with the provisions of O. XX, r. 4 (1), Civil Procedure Code.

A Small Cause Court is competent to try a suit to recover a certain sum of money on the basis of an acknowledgment. **C** BAUL CHANDRA ADDYA *v.* ABDUL MATLEB **851**

——— **O. XX, r. 4 (2)**—Judgment based on personal inspection—High Court, power of, to set aside. *See* CALCUTTA RENT ACT, 1920 **302**

——— **O. XX, r. 14**—*Intention of Legislature.*

O. XX, r. 14 of the Civil Procedure Code implies that, in a suit for pre-emption, a future date should be fixed for the payment of the purchase-money, and indicates that the intention of the Legislature was not that payment should be made on the day on which judgment is announced. **L** HIMMUN *v.* FAUJA, 3 L. L. J. 30 **772**

——— **O. XXI, r. 1 (1) (a)**—*Deposit of decretal amount in Court by judgment-debtor—Notice of payment to decree-holder—Duty of Court.*

In all cases of suits, appeals and applications, when decretal amount is deposited in Court by the judgment-debtor, and when this fact is brought to its notice by permission being asked to deposit the money, it is the duty of the Court to give notice to the decree-holder. The judgment-debtor should, however, pay the necessary process fee. But even if he does not pay the Court is bound to inform the decree-holder of the payment when he appears to ask for sale of the property. **N** NARAYAN *v.* GANPATRAO **242**

——— **O. XXI, rr. 57, 58, 63**—*Execution of decree—Attachment—Claim proceedings—Execution dismissed—Order in claim proceedings—Title suit—Limitation.*

Plaintiffs who had obtained a decree against a certain firm attached certain houses in execution of the decree. Objections to the attachment of one of these houses were filed under O. XXI, r. 58, Civil Procedure Code. Some evidence was taken in support of the objection and proceedings were then adjourned to 1[illegible]th February 1914 for further evidence. In the meantime the decree was partially satisfied and at the request of the decree-holders the Court dismissed the execution proceedings on 9th February 1914. On 1[illegible]th February the decree-holders being absent, the Court passed an order accepting the objection and removing the attachment. In April 1914 the plaintiffs again attached the same house in execution of the same decree. The defendants again objected and their objection was allowed on 27th August 1915. On 2nd October 1915 plaintiffs brought a regular suit for a declaration that the house belonged to the judgment-debtor. The lower Courts dismissed the suit as time-barred on the ground that it had been brought more than one year from the order of 1[illegible]th February 1914:

Held, (1) that the effect of the order of 9th February 1914, dismissing the execution proceedings, was, under O. XXI, r. 57 of the Civil Procedure Code, to remove the attachment;

(2) that after the order of 9th February 1914 the Court had become *functus officio* and that, therefore, the order of 13th February 1914, was a nullity and was not binding on the plaintiffs;

(3) that the plaintiffs' cause of action arose on 27th August 1915 and that their suit was, therefore, within time. **L** FIRM FATEH DIN ALLAH DITTA *v.* QUTAB DIN, 3 L. 7 **543**

——— **O. XXI, r. 58, ss. 47, 151**—*Objection application headed under ss. 47, 151—Appeal.*

An objection by the judgment-debtor that the property, against which the decree-holder has filed an application to execute his decree, is *waqf* property, is an objection under O. XXI, r. 58, Civil Procedure Code, even if the objection petition is headed as an application under sections 47, 151, Civil Procedure Code, and an order allowing such objection petition is not appealable. **Pat** NAZIR HUSSAIN *v.* MUHAMMAD EJAZ HUSSAIN, 3 P. L. T. 432 **438**

——— **O. XXI, r. 63**—*Suit by unsuccessful claimant to establish right to attached property—Burden of proof.*

Where a member of a firm knowing that the firm had failed, executed deeds transferring his property to his wife and his son, the Court would be justified in applying the principles of section 53 of the Transfer of Property Act, and presuming that the alienations were fraudulent, and were executed with the object of delaying and defeating his creditors. **L** AI BAI *v.* KAHAN SINGH, 3 L. L. J. 198 **876**

——— **O. XXI, rr. 66, 90**—*Execution of decree—Sale—Failure to state estimated price in proclamation—Irregularity—Substantial injury—Second appeal—Point taken for first time.*

The mere omission to state in a sale proclamation the estimated price of the property to be sold does not amount to material irregularity within the meaning of r. 90 of O. XXI of the Civil Procedure Code.

A material irregularity in the publication or conduct of a sale would not justify the setting aside of the sale in the absence of proof that substantial injury to the applicant had resulted therefrom.

A point taken for the first time in second appeal deserves no consideration. **L** MUHAMMAD NIZAM-UD-DIN *v.* AMIN-UD-DIN **885**

——— **O. XXI, r. 72**—*Decree-holder purchasing property without permission—Purchase, whether void.*

A purchase by a decree-holder who has not obtained permission to bid at an execution sale is neither void nor a nullity but is only to be avoided on the application of the judgment-debtor or some other person interested. The sale would be set aside if the property has not been realised to the best advantage. The conduct of a decree-holder or the fact that he had applied for permission to bid and been refused would not make much difference, for although that would be a fact which the Court might take into consideration in determining whether the sale should be avoided or not, even then it is doubtful whether it would be of any importance, as the question would not be whether the decree-holder had been contumacious, but whether the property had been really realised to the best advantage. **P C** RADHA KRISHNA *v.* BISHESHWAR SAHAY, 8 P. L. T. 529; 16 L. W. 190 **914**

——— **O. XXI, r. 84**—*Execution of decree—Sale—Failure to deposit 25 per cent. of purchase-money—Irregularity.*

The failure by an auction-purchaser at a sale held in execution of a decree to deposit 5 per cent. of the purchase-money at the time of the sale, as required by r. 84, O XXI, ivil Procedure Code, is a mere irregularity which does not affect the validity of the sale unless it can be shown that substantial injury is thereby caused to the judgment-debtor. **A** INAIT ULLAH *v.* PUNJAB NATIONAL BANK LTD, LYALLPUR **427**

——— **O. XXI, r. 89**—*Tender of money with application to set aside sale—Tender, whether application—Limitation Act (IX of 1908), s. 4, applicability of.*

The terms of section 4 of the Limitation Act are wide enough to cover an application of every kind, which a man is called upon to make in Court.

A tender of money made with an application under O XXI, r. 89, for the setting aside of a sale is in itself an application offering to pay the money and is, therefore, governed by section 4 of the Limitation Act **A** DURGA PRASAD *v.* BABU LAL, 20 A L J 645; 4 U. P. L R. (A.) 117 **321**

——— **O. XXI, r. 90**—*Execution of decree—Sale not proclaimed by beat of drum—Paucity of bidders—Irregularity.*

Where owing to the failure of the decree-holder to deposit the necessary charges, an execution sale is not properly announced and the omission results in a paucity of bidders, the irregularity must be taken to have caused substantial injury to the judgment-debtor and the sale will be set aside on that ground. **L** NAND LAL *v.* TOLA RAM **752**

——— **O. XXI, r. 91**—*Execution of decree—Sale—Purchase-money, refund of, when can be obtained.*

Where after a sale in execution of a decree, the auction-purchaser discovers that the judgment-debtor had no saleable interest in the property sold, he must get the sale set aside under O. XXI, r 91 of the Civil Procedure Code, before he can obtain the right to ask for a refund of the purchase-money. **B** BALVANT RANGNATH *v.* BALA MALU, 2 BOM. L. R. 308 **360**

——— **O. XXI, r. 100**, application under—Limitation *See* RES JUDICATA **663**

——— **O. XXII**, applicability of—Legal representatives not brought on record—*Bona fide* mistake. *See* SHAMILAT LAND **306**

——— **O. XXII, r. 4 (3)**—*Death of one of several defendants—Legal representative not brought on record—Suit, when does not abate as a whole*

When one of two or more defendants dies and no application is made under Order XXII, rule 4(3), the suit abates as against the deceased defendant. The question, whether the suit abates as a whole, would depend upon whether the suit can be proved in the absence of the legal representatives of the deceased defendant If the latter had no joint interest with the other defendants and the interests of the several defendants can be discriminated, the abatement of the suit with respect to the deceased defendant will not result in the dismissal of the entire suit. **C** SARAT KAMINI DASI *v.* CHAITANYA CHANDRA PROHORAJ **290**

——— **O. XXII, rr. 4, 9**—*Appeal—Death of respondent—Abatement—Application to set aside abatement—Sufficient cause—Ignorance of death.*

An application, purporting to be made under O. XXII, r of the Civil Procedure Code, which is made after expiry of the period for making it, may be treated as having been made under r. 9 of the Order.

Mere ignorance of the death of a party is not a sufficient excuse to entitle an applicant to the benefit of r. 9 of O. XXII, Civil Procedure Code **L** CHUNI LAL *v* KALA KHAN, 4 L. L J 171 **596**

——— **O. XXII, r. 9 (2) (3)**—*Abatement, when set aside.*

An abatement ought not to be set aside as a matter of course or lightly. The plaintiff must satisfy the Court that he had a sufficient cause for not applying in time to set aside the abatement and bring a legal representative of the deceased defendant on the record SARAT CHANDRA SARKAR *v* MAIHAR STONE AND LIME CO., LTD., 40 C. 6 **917**

——— **O. XXIII, r. 1**—*Permission to file suit, whether must be express—Order granting permission, whether can be questioned after it has become final—Probate and Administration Act (V of 88), s 55, proceedings under—O. XXIII, r 1, application of.*

Under O. XXIII, r. , of the Civil Procedure Code it is not necessary that the permission mentioned therein should be given in express terms, it is sufficient if the grant of permission can be implied from the order, read with the application on which it was made.

The propriety of an orde under O XXIII, r , of the ivil Procedure Code, granting permission to withdraw with liberty to bring a fresh suit cannot be questioned after the order has become final

Plaintiffs applied for Probate of a Will, but subsequently asked for permission to withdraw the application saying that they intended to file a regular suit on the basis of the Will The Court passed an order permitting the withdrawal and dismissed the application, On the filing of the regular suit objection

was taken under O XXIII, r , of the Civil Procedure Code :

Held, (1) that O. XXIII, r 1, of the Civil Procedure Code was not applicable to Probate proceedings ;

(2) that even if it were held to be applicable, the order passed by the Court permitting the withdrawal must be read with the application on which it was passed and must be construed as giving permission to the plaintiffs to file the suit L BANWARI LAL v KISHEN DEVI, L. L. J 242 100

——— **O. XXIII, r. 3**—*Dekkhan Agriculturists' Relief Act (XVII of 1879), s 2—Suit on pro-note against agriculturist—Admission by defendant—Court, jurisdiction of, to inquire into nature of admission*

Where in a suit to recover upon a promissory note against an agriculturist, to whom the provisions of the Dekkhan Agriculturists' Relief Act apply, the defendant admits the whole of the plaintiff's claim and asks the Court to pass a decree in accordance with such admission, r 3 of O XXIII of the Civil Procedure Code does not oust the Court of its jurisdiction from going behind the transaction and inquiring into the nature of the admission so as to satisfy itself whether the admission is true and made by the debtor with a full knowledge of his legal rights as against the creditor.

Per Shah, J.—The provisions of O XXIII, r. 3 of the Civil Procedure Code, wherever they are applicable, must be given effect to even in cases which are governed by the Dekkhan Agriculturists' Relief Act. B GOTURAM RADHAKISAN v. BANKU DODHU, 24 BOM. L R. 85; 46 B. 56) 253

——— **O. XXXIV,** *application of—Mortgage suit—Preliminary instalment decree by consent of parties—Decree ordering foreclosure on default—Final decree, whether to be obtained before proceeding to execution—Time or payment, enlargement of*

When a preliminary decree for payment by instalments, whether extending over more than six months or not, is passed by consent in a mortgage suit ordering foreclosure on default, the plaintiff is not only entitled but is bound to apply for a final decree before proceeding to execution and a Court has the same powers in regard to enlarging a time for payment allowed by such a decree as it has with any other mortgage-decree

The mere fact that a preliminary decree in a mortgage suit makes the sum due payable by instalments and not in a lump sum, to be paid on a specified day, does not take it out of the provisions of O. XXXIV of the Civil Procedure Code. 273

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——— **O. XXXIV, rr. 5 (2), 8 (4); O. IX, r. 13, O. XVII, r. 3** *Application for final decree—Notice to defendant whether necessary—Discretion of Court—Enlargement of time.*

Under the Code of Civil Procedure of 1908, the proceedings in a mortgage suit between the preliminary and the final decree are a part of the trial of the suit itself, which does not end till the final decree is passed.

When plaintiff in a mortgage suit makes an application under O XXXIV, r 5 or 4, Civil Procedure Code, for a final decree, it is not legally necessary that notice of the application should be served on the defendant or even issued to him before the final decree is passed, and although it is just and proper to give notice to the defendant, yet the passing of a final decree without notice to the defendant is not an illegality or even an irregularity which would affect the decree in any way, nor is the Court bound by O IX, r , to set aside such a decree though it may do so if it considers that the absence of notice constitutes "sufficient cause" for the absence of the defendant within the meaning of that rule in that particular case.

Under r. 3, O. XVII, of the Civil Procedure Code it is discretionary with the Court to pass a final decree in a mortgage suit when the defendant fails to comply with the terms of the preliminary decree, but by O XXXIV, r. 3 (2) and , this discretion is taken away when the plaintiff applies for a final decree which the Court is bound to pass unless the defendant appears and shows good cause for an enlargement of time 202

N ANNAJI v. FAKIRA

——— **O. XXXIX, r. 2**—*Temporary injunction, nature of.*

An injunction under r. 1 of O XXXIX of the Civil Procedure Code whether it is one restraining a party from altering the position of affairs or directing it to restore the conditions which prevailed at the time the cause of action arose, must not go further and must not create totally new state of things

Whether or no an injunction in mandatory form or a "true" injunction in mandatory form is within the scope of O XXXIX, it never is if it creates a totally new set of conditions. L LAHORE ELECTRIC SUPPLY CO, LTD, v BOMBAY MOTOR AND CYCLE CO., LAHORE 742

——— **O. XLI, r. 1**—*Receiver—Jurisdiction to appoint—Declaratory suit Power of Court to remove a party from possession.*

Where a Single Judge of the High Court finds that a case is a fit one for the appointment of a Receiver, a Division Bench of the High Court will not interfere with the Single Judge's discretion, unless it is satisfied that the discretion has been improperly exercised and contravenes any principles of law

A Court has a right to proceed under O. XL, r 1, Civil Procedure Code, where it appears to be just and convenient to do so

A Court is not debarred from appointing a Receiver of property, forming the subject-matter of a declaratory suit, in which possession of the property is not to be awarded to one party or the other, as the object of the appointment of the Receiver is, to protect the property and to maintain the status *quo ante* pending the disposal of dispute between the parties: nor is a Court debarred under O XL, r 1 of the Civil Procedure Code, from removing one of the parties from the possession of the property L AMARNATH v TEHAL KAUR, 4 U P. L R L 7 383

——— **XLI, r. 10**—*Order rejecting appeal for failure to furnish security for costs, if appealable—Pauper appeals—Application of O. XLI, r. 10 to such appeals.*

Civil Procedure Code—1908—contd.

No appeal is competent from an order, under r, 10 of O XLI, Civil Procedure ode, rejecting an appeal for failure to furnish security for costs

O. XLI, r 10 is, however, not applicable to pauper appeals and an Appellate ourt exercising powers under the rule in case of pauper appeals acts illegally and with material irregularity. **L** NAZIM *v.* ABDUL HAMID, 3 L. 30; 4 U. B. L. R. (L.) 67; 68 P. L. R. 1922 **256**

——— **O. XLI, r. 10**—*Security for costs, appeal dismissed for failure to furnish—Court, power of, to extend time for furnishing security.*

Where an appeal has been rejected on account of the appellants' failure to furnish security for costs within the time allowed by the Court, it is not open to the ourt rejecting the appeal to extend the time for giving security. The appeal having been finally disposed of, no extension of time can be granted for doing any act relating to the appeal. **C** HARI BHABINI DEBI *v.* NARENDRA NATH ROY **883**

——— **O. XLI, r. 22**—*Cross-appeals—Appeal filed beyond time, whether can be treated as cross objections.*

Where a defendant files a cross-appeal, after the period for appealing has expired, he is entitled under O. XLI, r. 22 of the Civil Procedure Code to have his appeal treated as cross-objections to the plaintiff's appeal. **L** BAWA SINGH *v.* THAKUR SINGH, 4 U P. L. R. (L. 80 **418**

——— **O. XLI, r. 23,** application of—Appeal. *See* REMAND **713**

——— **O. XLI, r. 25,** *order under, if interlocutory—Interference by High Court, if competent*

It is only in very exceptional cases that the High Court should exercise its revisional powers of interference with interlocutory orders An order under O. XLI, r 25, Civil Procedure Code, is not, strictly speaking, an interlocutory order but it should be interfered with only in exceptional cases, as it is not a final order. Where, however, the order is unnecessary, it should be interfered with. **L** ALLAH BAKHSH *v.* LAL KHAN, 2 L. L. J. 642 **269**

——— **O. XLI, r. 23**—*Remand, objection to finding on, not filed Court, discretion of, to allow objection to be taken at hearing.*

Where a party to an appeal fails to file objections to a return to an order of remand under O XLI, r 26 of the Civil Procedure Code, it is discretionary with the Court to permit such objections to be taken at the hearing of the appeal. **L** PARTAB SINGH *v* ACHHAR SINGH, 3 L. L J 2 0 **846**

——— **O. XLI, r. 27**—*Additional evidence, admission of, in appeal—Appellate Court, discretion of—High Court, interference by.*

The power vested by r. 27 of O XLI of the Civil Procedure Code in an Appellate Court to admit additional evidence is purely discretionary, and where, in exercise of that discretion, an Appellate Court declines to allow the production of additional evidence, the High Court will not interfere on the ground that the Appellate Court has acted with material irregularity in the exercise of its jurisdiction. **C** HARI CHARAN KARANJAI *v.* BAHAR SHEIKH **252**

Civil Procedure Code—1908—contd.

——— **O. XLI, r. 27**—*Additional evidence at the appellate stage—Discretion of Court*

The admission of evidence in appeal is largely a matter of the discretion of the Court, and not is entirely a matter of right. **C** NAYAJAN ALI *v.* MIDNAPORE ZAMINDARY CO LTD. **770**

——— **O. XLI, r. 27**—*Fresh evidence, admission of, in a Court of Appeal—Exclusion of such evidence.*

Fresh evidence should not be admitted by an Appellate Court in order to enable it to decide the case in favour of a particular party.

But if a party is allowed to produce a document and also to adduce oral evidence to show how it fell into his hands, it is not open to the opposite party to have the existence of the document considered and the oral evidence excluded, for if the fresh evidence is to be excluded the whole of it must be excluded. **N** BHAIRONSINGH *v.* HINDUSINGH **237**

——— **O. XLII,** *as amended by High Court—Appeal, second, memorandum of, unaccompanied by First Court's judgment—Presentation, validity of*

The presentation of a memorandum of second appeal to the Lahore High Court unaccompanied by a copy of the judgment of the Court of first instance, as required by r added by the High Court to O XLII, of the Civil Procedure Code, is not a valid presentation. **L** DYALA *v* HIRU, 3 L. L. J. 255 **670**

——— **Sch. II, cl. 3, O. XXIII, r. 3**—*Arbitration—Reference through Court—Reference cancelled by parties—Arbitrator appointed out of Court—Application to file award as adjustment—Suit on award—Fresh reference to arbitration, effect of, on earlier arbitration proceedings.*

In a suit for dissolution of partnership, an order was passed under clause 3 of Schedule II, Civil Procedure Code, referring the matters in dispute to two arbitrators Later, the parties informed the Court that they had cancelled this reference and had privately appointed *T.* alone as the sole arbitrator. *T.* delivered his award on 18th April 1919. On 5th August 1919 plaintiff applied to file the award as an adjustment under O. XXIII, r. 3, of the ode On the 18th March 19 0 the parties, alleging that contentions had been raised against the award by some of the defendants, applied for the appointment of *T* as arbitrator through the Court The Court appointed *T.* as arbitrator who was to submit the award before the 15th April 19 0 *T.* was unable to submit his award by that date so that the arbitration proceedings fell to the ground On 7th November 920 plaintiff sought to continue his application under O XXIII, r. 3:

Held, that upon a proper construction of the application of th March 9 0, and the order thereon, the previous arbitration proceedings were considered as at an end, as the parties had agreed to a fresh arbitration of a character different to the previous arbitration, although the arbitrator was the same: that the parties were relegated to their original position that, therefore, the application in question could no longer be entertained and that the suit must continue **B** KHIMCHAND NAROTAMDAS BHAVSAR *v.* BHOGILAL HIRACHAND SHAH, 24 BOM. L. R. 361 **913**

Civil Procedure Code—1908—concld.

——— **Sch. II, cls. 5, 17**—*Reference to arbitration without intervention of Court—Refusal of an arbitrator to act—Right to obtain order of reference from Court—Fresh arbitrator, appointment of.*

Where a party goes to arbitration in a case in which if it had refused to do so, an order of reference would have been made under paragraph 17, Schedule II of the Civil Procedure Code, he cannot dispute the right of the other party to obtain from the Court an order of reference under that provision of the Code when a difficulty arises at a later stage of the proceedings which has not been provided for by the parties, as for instance, where one of the arbitrators refuses to act. In such a case the Court is competent to appoint under paragraph 5 a fresh arbitrator in place of the one who has declined to act. A FAZAL ILAHI v. PRAG NARAIN, 20 A. L. J. 327; 4 U. P. L. R. (A) 156 **739**

——— **cl. 15 (1) (a)**—*Private inquiry held in presence of parties—Private inquiry—Award based on hearsay and conjecture—Award.*

An award based on an inquiry made by arbitrators from the neighbours of the parties in the presence of the latter, cannot be said to be based on a private inquiry and must be upheld though it is clearly based on hearsay and conjecture. L BUDH RAM v. CHANDU **866**

Companies Act (VI of 1882), ss. 150, 166—*Payment order, assignee of, right to enforce*

A person to whom the Liquidator of a Company has transferred a payment order made by the Court under section 0 of the Companies Act, 1882, against a contributory, is entitled to invoke the summary jurisdiction of the Court for the purpose of recovering the money due from the latter: the fact that the Company has been finally dissolved would not prevent the assignee from seeking relief from the Liquidation Court, and render it necessary for him to bring an action for the recovery of the money. L PARDUMAN SINGH v. PIONEER JEWELLERY CO LTD., 8 L. L. J. 382 **443**

Compromise, judgment based upon, value of. *See* PUNJAB PRE-EMPTION ACT, s. 7 **71**

Compromise by Counsel—*Withdrawal by client—Consent order perfected—Court's discretion—Acquiescence by client.*

Counsel has an apparent authority to compromise in all matters connected with an action and not merely collateral to it and if he acts within his apparent authority and the other party has no notice of any limitation or restriction on that authority, the client will be bound by the agreement made by his Counsel and embodied in some order or judgment of the Court.

Per *Das, J.*—Where a consent is given by a Counsel under some misapprehension as to the wishes of his client, the latter may withdraw it before the consent order is drawn up and perfected, but not afterwards.

The Court has very large discretion in the matter before the order is drawn up. But once the order is actually drawn up and perfected the discretion is at an end.

The mere fact that a consent order is hard is no ground for reviewing it.

Compromise by Counsel—concld.

The Counsel of a party to a suit entered into a compromise agreeing to deposit a certain sum of money in Court under the mistaken belief that he had the permission of his client to do so. The client who was present in Court stood by without making any protest, and even tried to raise up the required sum. Failing, he applied to set aside the consent order after the same had been drawn up and perfected:

Held, that the order could not be set aside as not only the application had been made long after the consent order had been perfected but the applicant, in so far as he had tried to raise the sum required had acquiesced in the same. Pat NILMONI CHAUDHURI v KEDAR NATH DAGA, 3 P. L. T. 71 **96**

Construction of agreement—*Agreement for sale—Unqualified agreement—Mortgage, inoperative—Charge, conversion into—Transfer of Property Act (IV of 1882), s. 100.*

Where an owner of land receives a sum of money and delivers possession of the land to the payer in lieu of interest with the agreement that if the money is not paid, the latter would be entitled to call upon him to convey the land outright, there is no unqualified agreement to sell on the part of the owner of land.

Section 100 of the Transfer of Property Act does not enable a mortgage to be converted into a charge if it cannot operate as a mortgage by reason of non-compliance with the formalities prescribed by the law. L B MAUNG PO NGWE v YACOOB ALLY 11 B. R. 39 **652**

Construction of document—"Amla," *meaning of*

here the arrears of rent of a plot of land leased to the defendant were to be recovered from the "*amla*" standing on the plot:

Held, that the word "*amla*" was intended to mean the actual building or superstructure on the land and not merely the materials. L ABDAL SAMAD v. MUNICIPAL COMMITTEE, DELHI **939**

——— *Contract—Provision not to claim damages in case of breach—Party committing wilful breach, whether protected.*

A contract for sale of goods provided *inter alia* that "If you are not in a position to deliver the goods or if there be any dispute in respect of the goods or if the company do not give delivery for any reason the utmost that will be the result will be that the '*Soda*' will be cancelled but we shall not ask for damages arising from the same from you in any way." Defendant gave delivery of certain bales but refused to give delivery of the balance without giving any reason. Plaintiff sued for damages:

Held, that the defendant was not entitled merely to say that the contract was off because he did not wish to deliver any more goods under it, that the clause meant that some reason must be given by the defendant, and that, consequently, the plaintiff was entitled to damages. B CHUNILAL DAYABHAI & Co. v AHMEDABAD FINE SPINNING & WEAVING Co., 24 BOM. L. R. 205 **223**

Document to be interpreted as a whole—Interpretation to be consistent.

If a consistent interpretation can be placed on all the clauses of a document it should be adopted in

Construction of document—concld.

preference to any other which might lead to inconsistent results. O MUHAMMAD YAQUB KHAN v MUHAMMAD SHAHID ALI KHAN, 9 O L. J. 16?; 25 O. C. 21 **556**

——— Mortgage-deed, interpretation of. *See* HINDU LAW—WIDOW **16**

——— *Surety bond—Personal liability—Document capable of intelligible interpretation—Extrinsic evidence, admissibility of, to affect its meaning*

A trading Company took certain advances from a Bank, the plaintiff in the suit, and by way of security the defendants who were Directors of the Company executed a surety bond in the form of a letter addressed to the Bank, the material portion of which ran as follows: "In consideration of your allowing the Company to overdraw sums not exceeding rupees fifty thousand on the security of the said Company demand pro-note in your favour we hereby pledge for the re-payment on demand of the said overdraft" In a suit by the plaintiff to make the defendants personally liable, the defendants contended that they had given the surety bond as Directors of the Company and sought to adduce evidence to prove by reference to other transactions entered into by them that they had not pledged themselves personally:

Held, that the only construction that could be put upon the letter was that the defendants had made themselves personally liable:

(2) that as on the face of it there was no difficulty in giving the letter an intelligible meaning as constituting a personal pledge, no extrinsic evidence was admissible to affect its meaning. P C PANNA LAL v NIHAL CHAND, 26 C. W. N. 747; (1922) M. W. N. 378; 43 M. L. J. 66; 3 C. L. J. 5; 16 L. W. 80; 24 BOM. L. R. 971; 31 M. L. T. 129; 2 P. L. R. 1922 **423**

Construction of power—Power to execute mortgage, whether includes power to incur loan—Power to sign, whether includes power to mortgage. *See* REGISTRATION ACT, s. 33 **315**

Contract, *repudiation of—Deposit—Earnest—Forfeiture.*

A purchaser who repudiates the contract on his part forfeits the deposit money and is not entitled to its refund even if the other party has not suffered any loss.

A deposit serves two purposes—if the purchase is carried out it goes against the purchase-money, but its primary purpose is that it is a guarantee that the purchaser means business

Even when there is no clause in the contract as to forfeiture of the deposit, if the purchaser repudiates the contract he cannot get back the money as the contract has gone off through his default

In the absence of any specific provision the question whether the deposit is forfeited depends upon the intent of the parties to be collected from the whole instrument.

A deposit is not merely a part payment but is also an earnest to bind the bargain and creates by the fear of its forfeiture a motive in the payer to perform the rest of the contract. C MANGOBINDA DUTTA v. BAISOGOMAFF **714**

——— *, suit for, breach of Contract involving mutual obligation—Plaintiff must prove his readiness to perform his obligation on date of performance.*

Contract—concld.

Where a contract imposes mutual obligations upon the contracting parties and one of the parties sues for damages for a breach of the contract he must show that, on the date fixed for the performance of the contract, he was ready and willing to perform his part of the bargain A MOHAMAD ISMAIL KHAN v. HASAN ALI KHAN, 4 U. P. L. R. (A.) 37 **602**

Contract Act (IX of 1872), s. 24, application of. *See* AGRA TENANCY ACT **793**

s. 25 (3)—*Acknowledgment of barred debt Implied promise to pay—Limitation Act (IX of 1908), s 9—Renewal of barred debt*

A document renewing a debt which had already become barred by limitation, cannot operate as an acknowledgment under section 19 of the Limitation Act

An unconditional acknowledgment of a barred debt cannot be given effect to as giving rise to an implied promise to pay within the meaning of section 25 (3) of the Contract Act. C PANCHANAN PODDAR v KHITISH CHANDRA **298**

——— **ss. 59, 60**—Appropriation towards principal or interest *See* APPROPRIATION OF PAYMENTS **606**

——— **s. 62**—*Contract—Subsequent agreement after breach, validity of—English and Indian Law*

Section 62 of the Contract Act applies even where a subsequent agreement has been come to between the parties after breach of the original contract.

Per *Ayling, Offg. C J*—There is no justification for restricting the operation of section 62 on the mere fact that it would otherwise contravene a somewhat technical rule of English law. Section 62 was admittedly enacted in direct antagonism to English Law. Why should not section 62 be accepted on its face meaning in spite of a similar antagonism?

Per *Odgers, J.*—It is highly improbable that of these two sections, section 62 and section 68, the latter should constitute a clear modification of the English law as to the requirement of consideration, while the former should be held by implication and without any suggestion to that effect in the wording itself to import the highly technical doctrine of accord and satisfaction.

If section 62 were only intended to apply before breach, why does it not say so?

Courts should not engraft on the plain meaning of the provisions of enactments, limitations founded on technical rules of English law and pleading, especially in cases where such limitations are not suited to the conditions prevailing in this country. M K M. P. R. N. M. FIRM v. THEPERUMAL CHETTY, 16 L. W. 667; (1921) M. W. N. 861; 42 M. L. J. 236; 45 M. 180 **905**

——— **s. 62**—*Novation—Insufficiently stamped hundi given in renewal of prior hundi—Creditor, whether can fall back upon prior hundi.*

Where an insufficiently stamped *hundi* is given in renewal of a prior *hundi* and a suit on the basis of the subsequent *hundi* is not maintainable, the creditor can fall back upon the prior *hundi*. Section 62 of the Contract Act is no bar to his doing so.

The test in a case of this kind is whether the original cause of action exists independently of the *hundi* subsequently executed, if it does the creditor

Contract Act—contd.

can ordinarily sue on it, otherwise not. L SUNDAR DAS v. PURAN SINGH, 11 P. W. R. 1922 **856**

——— **s. 65** - *Contract declared to be void—Payment made under contract, recovery of.*

A portion of an occupancy tenancy was mortgaged to one *H.* for Rs. 410, and the remainder was mortgaged to the landlords for Rs. 820. Plaintiff purchased the mortgagee rights of *H.* and subsequently purchased the occupancy rights of the tenant He then applied to the Revenue Authorities for redemption of the mortgage in favour of the landlords and obtained an order directing redemption. In pursuance of this order he deposited Rs. 8 0 which were paid to the landlords. Subsequently the landlords sued for cancellation of the sale in favour of the plaintiff and obtained a decree whereunder they recovered possession of the tenancy. Plaintiff thereupon sued the landlords for recovery of the amounts which he had paid to *H.* and to the landlords :

Held, (1) that the plaintiff could not recover the money which he had paid to *H.*

(2) that under the provisions of section 65 of the Contract Act the plaintiff was entitled to recover from the landlords the money which he had paid to them under the sale which had been declared to be void. L BADLU v. SHEO CHAND, 56 P. L. R. 1922 **367**

——— **s. 70**—*Hindu reversioner, whether a person lawfully interested in making payment to save property from sale under the Bengal Public Demands Recovery Act (III of 1913).*

A Hindu reversioner is not a person lawfully interested in making a payment to save a property in the hands of the widow from sale under the Public Demands Recovery Act His direct interest accruing only upon the widow's death, he cannot be said to be a person lawfully interested at the moment of making the deposit so as to bring him within the purview of section 70 of the Indian Contract Act. C GOPESWAR BANERJEE v. BRAJA SUNDARI DEBI, 25 C. W. N. 1029; 49 C. 470 **40**

——— **s. 72**—*Forbearance to sue or to enforce claim, whether valid consideration.*

If an intending litigant *bona fide* forbears a right to litigate a question of law or fact which it is not vexatious or frivolous to litigate, he does give up something of value and that is good consideration for a contract. A GULAB CHAND v KAMAL SINGH, 20 A. L. J. 285; 44 A. 424; 4 U P. L. R A. 154 **4**

——— **s. 74**—*Contract—Penal terms—Test—Chit fund—Special relation between stake-holder and subscribers—Bond, execution of, by prize-winner for payment of future instalments—Provision for forfeiture of dividend, interest and premium in default of any instalment and liability for whole amount with enhanced interest, whether penal—Instalment bond—Failure to enforce terms on some defaults—Waiver.*

The test to determine the penal nature of the terms of a contract is, whether the terms are unreasonable as a whole and whether in fact they are so unreasonable that the parties never contemplated that they should receive effect

A stake-holder of a chit fund stands in a special relation to its subscribers by reason of the fact that he alone is liable to each subscriber and there is no liability between the subscribers *inter se* ; and without punctual payments by the individual subscribers the stake-holder cannot discharge his liabilities to the successful bidders as they arise. Such relation justifies stringency in the conditions of payment by subscribers and, in particular, in the rate of interest provided for in cases of default.

Where a successful bidder at a chit fund executes a bond to the stake-holder for an amount representing the sum total of future instalments payable by him which provides that, in default of payment of any instalment, the executant would not only forfeit the dividend, interest and premium but become liable to pay the entire amount immediately with enhanced interest at the rate of 18 per cent. per annum the stipulations are neither unreasonable nor penal.

The waiver by a creditor to enforce the terms of an instalment bond on the falling due of a few instalments does not affect his right to use the coercive measures provided therein in cases of future default. M VAITHINATHA IYER v. GOVINDASWAMI ODAYAR, (1922) M. W. N. 203; 42 M. L. J 551 **995**

——— **s. 91**—Delivery to Railway Company of goods sold—Railway, whether agent of buyer—Suit for damages for breach of contract. *See* CIVIL PROCEDURE CODE, s. 20 **888**

——— **s. 108, Excep. I**—*Hirer of goods with option of purchase—Option not exercised—Sale—Purchaser, liability of.*

Where the hirer of goods with the option of purchasing the same, sells the goods without exercising that option, the purchaser is liable in trover to the owner, and cannot invoke in aid the provisions of Exception (1) to section 108 of the Contract Act even though he acted in perfect good faith. L AHMAD JAN v. SINGER SEWING MACHINE CO, OF RAWALPINDI, 3 L. L. J 249 **638**

——— **s. 230 (1)**—*Principal and agent—Agent acting for foreign principal—Personal liability of agent—Presumption—Time of essence of contract.*

Plaintiffs ordered certain goods from defendant which the latter undertook to supply. Plaintiffs knew that the defendant would have to order the goods from Japan, but they looked to the defendant alone for the performance of the contract. The correspondence between the parties contained occasional references to the dealer in Japan but there was nothing to show that the plaintiffs were dealing with the latter. There were certain clauses in the indents, however, which provided that as regards the outturn of goods, the defendant was not to be held responsible Owing to late shipments plaintiffs had to pay a certain amount as surcharge and they sued the defendant for the recovery of that sum :

Held, (1) that there was nothing to show that the defendant was acting only as an agent or a scribe for the dealer in Japan and that, therefore, he was personally liable on the contracts

(2) that even if the defendant was acting as an agent for a foreign principal the presumption contained in section 230 of the Contract Act had not been rebutted. L FAZAL ILAHI v. IMPERIAL CHEMICAL CO., DELHI **157**

Contract Act—concld.

——— **s. 247**—*Partnership based on contract—Minor, whether can create.*

Although under section 247 of the Contract Act a minor may be admitted to the benefits of a partnership, and, if so admitted, his share is liable, but where the partnership is based on contract, the privilege conferred by the section does not give him the power to create a firm, that is to say, a partnership based on contract must be in existence before he can be admitted to its benefits, for he cannot be admitted to what does not exist. **L** MUHAMMAD RAFIQ *v.* QAMAR DIN, 4 U. P. L. R. (L.) 63 **95**

——— **ss. 247, 239**—*Minor, admission of, as partner—Proof—Plea and issue, absence of—High Court, power of, to set up new case—Partner, minor whether can become.*

In order to bring section 247 of the Contract Act into play, it must be proved that the minor has been admitted to the benefits of the partnership, but where the fact is neither pleaded nor made an issue at the trial, it is not open to the High Court, without inviting specific evidence, specially directed to the point, to hold the admission proved, and thus set up a new case in appeal.

A person under the age of majority cannot become a partner by contract, and so, according to the definition of the term "firm" in section 239 of the Contract Act, he cannot be one of that group of persons called a firm. **P C** SANYASI CHARAN MANDAL *v.* KRISHNADHAN BANERJI, 30 M. L. T. 228; 20 A. L. J. 409; 24 BOM. L. R. 700; 35 C. L. J. 498; 43 M. L. J. 41; (1922) M. W. N. 334; 49 C. 560; 26 C. W. N. 954; 16 L. W. 536 **124**

——— **ss. 257, 259**—*Obligation of partner to render true accounts—Notice to produce accounts—Non-compliance—Presumption—Evidence Act (I of 1872), ss. 66, 114 (g), 164.*

Section 257 of the Contract Act makes it obligatory upon each partner to render true accounts and full information of all things affecting the partnership to any partner or his legal representatives. The occasion for this in a suit for accounts upon dissolution of partnership will, however, arise after the preliminary decree is made. At that stage each partner should be served with the notice contemplated by section 66 of the Indian Evidence Act to produce such accounts and papers as may be in his custody. If he omits to produce the books and the books are proved to be at the time in his custody or under his control, the presumption recognised in Illustration *(g)* to section 114 of the Indian Evidence Act may be applied. In such circumstances secondary evidence will become admissible and the party who has withheld the document will not be able to use the original document as evidence at a later stage without the consent of the other party or the order of the Court, as provided in section 164 of the Evidence Act. **C** PULIN BIHARI ROY *v.* MAHENDRA CHANDRA GHOSAL, 24 C. L. J. 405 **10**

Copyright Act (III of 1914)—*Copyright, infringement of—Test—Damages and compensation—Assessment.*

In an action for an injunction and damages for an infringement of plaintiffs' copyright, if it be found that even inaccuracies in both the works are identical, that references of significance in plaintiffs' work are reproduced in defendants' work but, by reason of absence of other matter, have no significance therein and there is identity not merely of information but of language, that leaves no doubt that the work of the defendants is a copy of the plaintiffs' in a very high degree.

In such a case a plaintiff would be entitled to the amount of the proceeds of the sales of the offending work and to general damages for infringement of copyright, probable loss of trade, advertisements, etc.

Where in such cases damages are not accurately calculable, they are damages at large. **L** KHOSLA BROTHERS OF LAHORE *v.* THACKER'S DIRECTORIES LTD OF CALCUTTA **983**

Costs—*Appeal.*

The question of costs cannot form the subject-matter of an appeal by itself unless some important principle is involved, but where an appeal is heard on its merits, it is open to the Court of Appeal to consider the question of costs. **B** DAYARAM PREMJI *v.* BECHARDAS DOONGERSEY, 24 BOM. L. R. 351 **936**

Court-fee—*Appeal insufficiently stamped—Mistake—Court, when will not extend time to pay proper fee.*

When by mistake a memorandum of appeal is insufficiently stamped, and the mistake is one which could not have been made if due care and attention had been exercised, the Court will not extend the time so as to allow the appellant to pay the proper Court-fee, and thus deprive the respondent of the valuable right which has accrued to him. **L** FATTEH SINGH *v.* BABU RAM, 3 L. L. J. 156 **130**

——— *Possession, suit for—Decree, subject to payment of certain sum—Appeal.*

Where a decree for possession is granted subject to the payment by the plaintiff of a specified sum, and the plaintiff appeals seeking the removal of this condition, the memorandum of appeal must bear a Court-fee stamp calculated on the amount required to be paid under the decree. It is immaterial in what form the suit was originally brought. **L** TIKKAN RAM *v.* BOSA RAM, 4 U. P. L. R. (L.) 77 **106**

——— *Suit for money against several defendants—Decree against one—Appeal—Decree sought against remaining defendants—Appeal, valuation of—Court-fee payable.*

Where in a money suit against a large number of defendants, the plaintiff obtains a decree against only one of them, and he appeals seeking to get a decree against the remaining defendants, he is not entitled to value his appeal as if he was suing for a mere declaration, namely, that the decree obtained by him was binding against the other defendants also. The appeal must be valued on the original claim and Court-fee paid on that amount on the memorandum of appeal. **B** ANNA NARAYAN PAVGI *v.* MADHYAMA STHITITILA PARASPARA, 24 BOM. L. R. 313 **364**

Court Fees Act (VII of 1870), s. 7, cl. (ix), Sch. I, Art. I. *See* APPEAL **968**

Criminal Procedure Code (Act V of 1898), ss. 87, 110, 118, 123, 406—*Applicability of s. 87—"Absconder," who is—Security required for period longer than one year—*

Criminal Procedure Code—contd.

Failure to furnish security—Procedure—Appeal—Reference to Sessions Judge.

Action under section 87 of the Criminal Procedure Code can be taken only when a Court has reason to believe that any person against whom a warrant has been issued has absconded or is concealing himself so that such warrant cannot be executed A persons however, who files a petition against the order issuing the warrant and takes steps to procure an order of a superior Court that he should be allowed to remain on bail after such warrant has been issued, can neither be said to be absconding nor concealing himself.

The provisions of section 123, Criminal Procedure Code, are clear on the point that if security is not furnished and security for a period of more than one year has been ordered, the case must be referred to the Sessions Judge, who alone is empowered to pass orders under that section for the imprisonment of the person who has failed to furnish security.

Obiter.—Though section 4'6, Criminal Procedure Code, is so worded that an appeal may be preferred under the section to the District Magistrate in every case by any person ordered to give security for good behaviour under section 118 by a Subordinate Magistrate, yet ordinarily it seems that the section is meant for cases in which a reference to the Sessions Judge is not necessary, *i e.*, where a man has been either ordered to furnish security for one year or having been ordered to furnish security for more than a year has furnished it and wants to appeal. In such cases he would go to the District Magistrate in appeal and there would then be no reference to the Sessions Judge, who could deal with such cases only as a Court of revision. **L** QAMAR DIN *v.* EMPEROR, 23 CR. L. J. 454; 65 P. L. R. 1922 **726**

——— **Ch. VIII**—*Order to produce sureties from within certain limits, legality of.*

In directing an accused person to produce sureties, a Magistrate has no authority to lay down any limits within which the sureties must reside. **A** RAGHUNANDAN PRASAD *v.* EMPEROR, 20 A. L. J. 520; 23 CR. L. J. 400 **352**

——— **s. 106 (3),** *order under, whether can be passed on appeal from order of Second Class Magistrate.*

An order requiring security under section 106 (3) of the Criminal Procedure Code cannot be passed by an Appellate Court in an appeal from an order of a Second Class Magistrate. **L** KARAM SINGH *v.* EMPEROR, 23 CR. L. J. 457 **729**

——— **ss. 107, 125, 406, 423—S. 107,** *applicability of—Bond for keeping the peace—Bond for good behaviour—Powers of District Magistrate in appeal—Instigating breach of peace—Direct evidence of specific incidents, relevancy of.*

Section 107 of the Criminal Procedure Code applies to persons likely to commit a breach of the peace themselves as also to those who merely instigate a breach of the peace or disturbance of public tranquility by others.

Under section 125, Criminal Procedure Code, a District Magistrate has power to cancel a bond for keeping the peace at any time, if he considers it ought never to have been taken at all, but he cannot alter or modify it. Under sections 406 and 423 of the Code he can alter or modify a bond for good behaviour only.

It is wrong to exclude from consideration direct evidence of specific incidents showing that the person to be bound down behaved as man of violent and aggressive temper. These are relevant to the question whether a man is likely to commit a breach of the peace or not and the evidence concerning those incidents is in no sense evidence of repute. **N** BAINES *v.* EMPEROR, 23 CR. L. J. 394 **346**

——— **s. 107 (2)**—*Security for breach of the peace—District Magistrate's power to proceed against a person outside his territorial jurisdiction.*

A District Magistrate acting in the exercise of his powers under section 107, Criminal Procedure Code, can pass an order against an accused person, residing outside the local limits of his jurisdiction, when the breach of the peace or disturbance is apprehended within the local limits of his jurisdiction. **A** SHEOBARAN DUBE *v.* EMPEROR, 20 A. L. J. 523; 23 CR. L. J. 396 **348**

——— **s. 110**—*Surety young and living at some distance from accused Ground for rejecting*

Where in a proceeding under section 110 of the Criminal Procedure Code the accused is required to furnish sureties, the mere fact that the surety offered resides at some distance away from the accused and is a young man, is no reason for refusing to accept him, if otherwise he is a fit and proper person to be surety. **O** EMPEROR *v.* PANCHU, 24 O. C. 292; 23 CR. L. J. 425 **585**

——— **s. 125**—*District Magistrate, power of, to cancel a bond for keeping the peace—Grounds for cancellation*

The only ground on which a District Magistrate can cancel a bond for keeping the peace or for good behaviour is that something has supervened since the date of the First Court's order which satisfies the District Magistrate that, in view of the facts since come to light, there is no longer any necessity for keeping the accused person under bond.

A District Magistrate taking action under section 125 of the Code of Criminal Procedure cannot treat an application made under that section as an appeal and reverse the order of the First Class Magistrate on the facts. If he considers the order to be wrong on the merits, he can exercise his revisional powers and submit the record to the High Court. But the cancellation of bonds contemplated by section 125 can only be on the ground that the bonds are no longer necessary. **A** NIZAMUDDIN KHAN *v.* MUHAMMAD ZIA-UL-NABI KHAN, 20 A. L. J. 521; 23 CR L. J. 398; 4 U P. L R A.) 142 **350**

——— **s. 133,** *proceedings under—Obstruction of public way—Defendant setting up title—Magistrate, jurisdiction of, if ousted—Discretion of Magistrate to require party to assert his claim by civil suit—Power of Magistrate to continue the proceedings on failure to do so Construction of Statutes*

Where in proceedings under section 133, Criminal Procedure Code, arising out of an alleged obstruction of a way used by the public, the defendant sets up a claim of right the Magistrate's jurisdiction is not ousted even though he finds that the claim is made in good faith.

If the Magistrate does not consider such a claim of title to be well-founded, though he considers it to be made in good faith, he can, in the exercise of his discretion, allow the defendant a reasonable time to assert his claim by a civil suit and if the latter does not go to the Civil Court within such time or fails there, the Magistrate can continue the proceedings under section 133, Criminal Procedure Code.

On its own facts the case of *Belat Ali* v. *Abdur Rahim*, 8 C. W. N. 143; 1 Cr. L. J. 70, was not wrongly decided.

Per *Sanderson, C. J.*—The rules laid down in English cases should not be taken to bind a Court in construing an Indian Act.

The proper course is, in the first instance, to examine the language of the Statute and to ask what is its natural meaning uninfluenced by any considerations derived from the previous state of the law and not to start with enquiring how the law previously stood, and then assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view. If a Statute, intended to embody in a Code a particular branch of the law, is to be treated in this fashion, its utility will be almost entirely destroyed, and the very object with which it was enacted will be frustrated. The purpose of such a Statute surely was that on any point specifically dealt with by it, the law should be ascertained by interpreting the language used instead of, as before, roaming over a vast number of authorities in order to discover what the law was, extracting it by a minute critical examination of the prior decisions.

Per *Teunon, J.*—There is no reason why in a codifying enactment such as the Code of Criminal Procedure, the Court should introduce any rule of interpretation borrowed from the English Law.

In proceedings under section 133, Criminal Procedure Code, when a claim of private title is asserted, the good faith or bad faith of the defendant raising this plea is immaterial.

Sub-section (2) of section 133 does not appear to favour the reference of parties to Civil Courts.

Per *Richardson, J.*—It is wrong in principle for any Court or Judge to impose fetters on the exercise by themselves or others of powers which are left by law to their discretion in each case as it arises. **C** RAM SAGAR MONDAL *v.* ALEK NASKAR, 26 C. W. N. 442; 35 C. L. J. 247; 23 Cr. L. J. 353; 49 C. 682 **177**

——— **s. 144,** order under, legality of, whether can be questioned. *See* PENAL CODE, s. 188 **200**

——— **s. 144,** *scope of—Magistrate, power of, to prohibit market—Disobedience of order—Offence.*

A Magistrate has power under section 144, Criminal Procedure Code, to issue a notice, prohibiting the holding of a new market on the same days as the old market is held, in order to prevent a breach of the peace but he has no powers under the section to pass a general order restraining the holding of a *hat* or market

A disobedience of a valid order under section 144, Criminal Procedure Code, is punishable under section 188, Penal Code, prosecution for which might be started either by sanction given under section 195 of the Criminal Procedure Code or by an order passed under section 476 of the Code, but the disobedience itself is not punishable under the said section unless that disobedience causes or tends to cause obstruction, annoyance or injury to any person lawfully employed. **Pat** PARMESHWAR RAI *v.* EMPEROR, 3 P. L. T. 263; (1922) PAT. 204; 4 U. P. L. R. (PAT.) 34; 23 Cr. L. J. 391 **205**

——— **ss. 144 (4), (5), 435, 439**—*Revision after expiry of two months—Order prohibiting doing of certain act till decision by Civil Court—Injunction—Jurisdiction—"Alter," meaning of*

A High Court will not decline to revise an order, passed under section 144, Criminal Procedure Code, after the expiry of two months from the date of the order It will examine the order to see whether it was passed with or without jurisdiction, and, if in its opinion it is a wrong order, it will express its views about it.

An order under section 144, Criminal Procedure Code, which is indefinite as to time and which prohibits a party from doing a certain act until the question in dispute is settled by a Civil Court, is in effect a perpetual injunction, and is, therefore, without jurisdiction.

The word "alter" in sub-section (4 of section 144, Criminal Procedure Code, does not mean substituting the name of one party for that of the other. **M** MUTHUKUMARASWAMI NADAR *v* MUHAMMAD ROWTHER, 30 M. L. T. 148; 15 L. W. 423; 42 M. L. J 352; (1922) M. W. N. 177; 23 Cr. L J. 404 **500**

——— **s. 145**—*Parties having good and valid claim to joint possession—Jurisdiction—Dispossession within two months, nature of Dispossession under decree, whether included.*

A Magistrate has no jurisdiction to take proceedings under section 145 of the Code when a party has a good and valid claim to joint possession.

Semble.—For the purpose of a decision under section 145 the dispossession within two months must be forcible and wrongful dispossession, and possession delivered under a decree would not be a dispossession of that character. **Pat** RAMPARITAR SINGH *v* KASIM ALI KHAN, 23 Cr L. J. 379 **203**

——— **ss. 145, 435 (3)**—*Proceedings under section 145—Dispute, finding as to, whether necessary—Revision—High Court, power of interference of.*

Section 45 of the Criminal Procedure Code does not require a Magistrate to give in his final order a finding that there is a likelihood of a breach of the peace. After he has made an order in writing under sub-section (1 of section 145, the only matter which he has to determine is the question of the possession of the disputed property.

Having regard to the provisions of section 453 (3) of the Criminal Procedure Code the High Court has no power to interfere in revision with an order under section 1 of the Code, even though such order was made without affording the aggrieved party an opportunity of producing evidence, having had no notice that the case would come up on a certain date. **L** JHANDA RAM *v.* TOPAN RAM, 23 Cr. L. J. 4 4 **584**

——— **ss. 154, 298**—*Trial by Jury—Misdirection—First information—Value of statement made to Police in ordinary course.*

Criminal Procedure Code—contd.

It is a misdirection on the part of a Judge to lay before the Jury the purport of a statement which is neither on the record nor proved.

A statement made in the ordinary course to a Police Officer is not evidence at all and cannot be considered or proved as first information. **Pat** DASRATH SINGH *v.* EMPEROR, 23 CR. L. J. 406 **502**

——— **ss. 164, 342**—*Confession—Duty of Magistrate recording confession—Memo. of enquiry—Cross-examination of accused, whether competent.*

In all cases in which a confession is recorded by a Magistrate it is advisable that he should record a memorandum of enquiry showing what steps he has taken to fully satisfy himself that the accused person is confessing voluntarily.

The mere absence of such a memorandum, however, would not render a confession, otherwise duly recorded, inadmissible.

Under section 342, Criminal Procedure Code, it is not competent to the Court to cross-examine the accused. **L** UMAR DIN *v.* EMPEROR, 3 L. L. J. 287; 2 L. 129; 23 CR. L. J. 388 **340**

——— **ss. 177, 179**—*Penal Code (Act XLV of 1860), s. 417—Cheating—Offence committed at one place—Loss caused at another place—Jurisdiction.*

Loss is not a necessary element of the offence of cheating. There must be intention to cause wrongful loss or wrongful gain, but it is not essential that loss should be caused. Therefore, it is the Court within whose jurisdiction the offence is committed, and not the one within whose jurisdiction loss in caused, that is competent to try a case under section 417, Indian Penal Code. **L** RAGHBIR SARAN *v.* THE KURAKSHETAR MOTOR SERVICE COMPANY, THANESAR, 23 CR. L. J. 447 **623**

——— **s. 195**—*Proceeding for sanction taken in Civil Court—Court, whether has power to give costs.*

The powers of the Civil Procedure Code as to costs cannot be imported into a criminal proceeding

A proceeding for sanction under section 195 of the Criminal Procedure Code, though taken in a Civil Court, relates to a criminal matter and the Court has no power to give costs as there is no provision in the Criminal Procedure Code for awarding costs in such a matter **C** BHOLA NATH KHANRA *v.* PURNA CHANDRA BANERJEE, 25 C. W. N. 661; 23 CR. L. J. 458 **730**

——— **s. 195**—*Sanction — Munsif exercising Small Cause Court powers, whether subordinate to District Judge.*

A Subordinate Judge or a Munsif exercising the powers of a Small Cause Court is subordinate to a District Judge for the purposes of section 195 of the Criminal Procedure Code. **L** BHAG SINGH *v.* EMPEROR, 23 CR. L. J. 480 **832**

——— **s. 195**—*Sanction to prosecute, whether ends of justice require—Penal Code (Act XLV of 1860), ss. 191, 193, 199.*

On the 18th July 1919 the petitioner filed a written statement in a suit against him in which he denied the execution of a hand-note. On the 6th of November of that year in the course of certain criminal proceedings the petitioner was examined as a witness and there he admitted that as a matter of fact he had executed the hand-note. Sanction having been given for his prosecution under section 199, Penal Code, the present Rule was obtained:

Held, that the only question was whether the ends of justice required that there should be a prosecution of the petitioner in respect of the written statement filed on the 18th July 1919 and that on the whole after the lapse of time the ends of justice did not require that there should be a prosecution in respect of what may be spoken of as the petitioner's temporary lapse from probity not persisted in but rather apparently repented of. **C** TRAILOKYA NATH *v.* RADHARANJAN, 25 C. W. N. 886; 23 CR. L. J. 580 **204**

——— **s. 197**—*Forest Ranger removeable from office by Conservator, sanction under s. 197 for prosecution of, if necessary*

A Forest Ranger in the Central Provinces is not a public servant not removeable from his office without the sanction of the Government of India or the Local Government. Consequently the previous sanction of the Government to prosecute a Forest Ranger for an offence committed by him in his official capacity is not necessary under section 197, Criminal Procedure Code. **N** KRIPASINGH *v.* EMPEROR, 23 CR. L. J. 397 **349**

——— **s. 199**—*Penal Code (Act XLV of 860), ss. 494, 497, 498—"Husband of the woman," meaning of—Marriage dissolved before complaint, effect of.*

The words "the husband of the woman" in section 199 of the Criminal Procedure Code are simply intended to point to the particular person who has the right to start proceedings in respect of the offences mentioned in the section, and a man does not cease to be "the husband of the woman" within the meaning of that section merely because the marriage tie has been dissolved subsequent to the commission of the offence complained of. In other words, the dissolution of the marriage tie does not take away from the complainant the right to lodge a complaint in respect of an offence committed before the marriage tie was dissolved. **L** DHANNA SINGH *v.* EMPEROR, 23 CR. L. J. 462 **734**

——— **ss. 202, 203, 204**—*Complaint—Preliminary enquiry by Police declaring complaint to be false—Magistrate directing regular trial and sending for charge sheet—Order ultra vires—Civil matter—Criminal Courts, jurisdiction of.*

Where a Magistrate directs an inquiry by the Police under section 202 of the Criminal Procedure Code, into a complaint, and the Police submit a report that the case is false; that the matter in dispute between the parties is one for the Civil Courts to determine, and that a Civil suit between the parties relating to that matter is pending, the Magistrate has no jurisdiction to direct the submission of a charge sheet, merely because in his opinion it is desirable to ascertain the truth **Pat** RAMPABITAR SINGH *v.* KASIM ALI KHAN, 23 CR. L. J. 403 **499**

——— **s. 233**—*Joint trial for perjury under section 193, Penal Code—Illegality.*

The joint trial of several persons for perjury under section 193 of the Penal Code is illegal. **L** LACHHMAN SINGH *v.* EMPEROR, 23 CR. L. J. 439 **615**

Criminal Procedure Code—contd.

——— ss. 233, 239—*Joint trial of thieves and persons in possession of stolen property—Legality.*

The theft of certain articles by one person and the dishonest possession of them by another knowing them to be stolen form one transaction even though the receipt is not simultaneous with the theft. The joint trial of such persons, therefore, is not bad in law under the provisions of section 239, Criminal Procedure Code. **A** ANWAR *v.* EMPEROR, 20 A. L. J. 96; 44 A. 276; 23 CR L J 414 **510**

——— ss. 233, 537, *application of—Property, stolen, recovered from accused separately—Joint trial —Illegality.*

Where stolen property is recovered from the possession of several persons at different times, there should be a separate trial under section 411 of the Penal Code, of each of such persons. The joint trial of such persons is illegal, and the illegality is not curable by the application of section 537 of the Criminal Procedure Code. **A** JIWAN *v.* EMPEROR, 19 A. L. J. 8.5; 2 : CR. L. J. 409 **505**

——— s. 250, *whether applicable to enquiry under s* 107.

Section 250 of the Criminal Procedure Code is only applicable in a case instituted by complaint, or on information given to a Police Officer, or to a Magistrate whereupon a person is accused before a Magistrate of an "offence," and does not apply to an enquiry under section 107 of that Code. **A** MANNU KHAN *v* CHANDI PRASAD, 20 A. L. J. 624; 23 CR L. J. 474 **826**

——— s. 263—*Judgment—No reasons given—Conviction illegal.*

Where no reasons whatever are given in support of a conviction, there is no compliance with the provisions of section 263, Criminal Procedure Code, and the conviction should be set aside. **O** EMPEROR *v.* MIAN JAN, 24 O. C. 293; 23 CR. L. J. 427 **587**

——— s. 307—*Reference — Verdict of Jury—Reasons for verdict—Sessions Judge to give reasons for his opinion—High Court's duty to consider evidence, etc.—Ground for setting aside verdict of Jury.*

The verdict of a Jury must not be lightly disregarded by the High Court. Due weight must be given to it, and whenever it is set aside, it must be upon a very substantial ground and not merely upon the ground that another view of the evidence might have been taken.

In referring a case under section 307, Criminal Procedure Code, it is not sufficient for the Sessions Judge to say merely that he believes the evidence of witnesses on whose evidence the Jury has returned a verdict of not guilty; he should give reasons for his opinion in sufficient detail to enable the High Court to appreciate it and to give due weight to it.

On a reference under section 307, Criminal Procedure Code, the High Court has to consider the entire evidence in the case and to give due weight to the opinions of the Sessions Judge and of the Jury.

Per *Jwala Prasad, J.*—In making a reference, under section 307, Criminal Procedure Code, disagreeing with the verdict of the Jury, the Sessions Judge should ask for their reasons for the verdict.

Where the Sessions Judge and the Jury differ and there is a division in the opinion of the Jury, the High Court will consider not only the opinion of the majority but also of the minority of the Jury.

Per *Coutts, J*—The opinion of a Jury is its verdict and not the reasons on which the verdict is based.

The High Court is not bound to act in accordance with the verdict of the Jury even where it is unanimous. **Pat** EMPEROR *v.* PUNIT CHAIN, 3 P. L. T. 413; (1922) PAT. 218; 4 U. P. L. R. (PAT) 53; 23 CR. L J. 421 **531**

——— ss. 342, 364, 263, 264—*Summons-case—Intricate case—Summary trial—Examination of accused, whether essential—Plea of accused, record of, under section 263, whether enough—Postponement of cross-examination of witness by direction of Magistrate—Cross-examination, effect of not allowing —Local inspection by Magistrate—Magistrate's duty to put inspection note on record—Penal Code (Act XLV of 1860), s. 447—Criminal trespass—Possession, finding as to.*

Where the question in a case under section 447, Penal Code, is an intricate one dealing with the title and possession of the parties and the evidence led in the case by the parties is not convincing as to the exact location and the identity of the land, a summary trial is not proper and the case should be tried in the ordinary way.

Even in the trial of summons-cases an examination of the accused under section 342 is essential and obligatory and an omission to do so would vitiate the whole trial. Neither sections 263 and 264, nor any other provision in the Chapter for summary trials does away expressly with the requirement of sections 342 and 364 of the Code relating to the examination of the accused.

The plea of the accused under clause *(g)* of section 263 cannot possibly take the place of his examination under section 342, for the former occurs at the initial stage of the case and the latter after the termination of the prosecution evidence.

Under the procedure laid down for the trial of summons-cases, the accused has no right to postpone the cross-examination of any prosecution witness as in the case of the trial of a warrant case. But if the cross-examination is postponed in accordance with the direction of the Magistrate, the Magistrate is bound to give further opportunity to the accused to cross-examine the witness. Without such a cross-examination, the evidence of the witness is legally inadmissible.

There is nothing in law to prevent a Magistrate from making local inspection, but in order to give an opportunity to the accused to remove any wrong impression created on the mind of the Magistrate, it is fair that a note of the inspection should be placed on the record, and the Magistrate commits a grave irregularity particularly when without placing a note of the inspection on the record, he uses the information gathered locally as substantive evidence in the case.

Section 447, Indian Penal Code, requires it to be affirmatively and positively held that the complainant was in possession of the land in dispute with respect to which the criminal trespass is said to have been committed. **Pat** PARMESHWAR LALL MITTER *v.* EMPEROR, 3 P. L. T. 347; 23 CR. L. J. 440 **616**

Criminal Procedure Code—contd.

——— **ss. 342 (4), 526**—*Application by accused for transfer—Affidavit of accused, whether competent.*

When an accused person makes an application for the transfer of a case against him, he is not precluded by section 342 of the Criminal Procedure Code from making an affidavit in support of such application, nor would there be any bar to his being prosecuted under section 195 of the Penal Code for making a false statement in such an affidavit.

Semble:—The provisions of section 342 (4) of the Criminal Procedure Code that no oath shall be administered to an accused person evidently have reference only to the statement made by him in answer to questions put by the Court in accordance with sub-section 1 of that section. **L** GHULAM MUHAMMAD *v.* EMPEROR, 3 L. 46; 23 CR. L. J. 399; 4 U. P. L. R. (L.) 71 **351**

——— **s. 345**—*Assault—One transaction—Several accused—Compromise with one—Effect.*

Where several persons join in committing an offence, and the complainant compounds the case with one of them, the case should be treated as compounded in respect of all. **Pat** SAROJ KUMAR MUKHERJI *v.* EMPEROR, 23 CR. L. J. 432 **592**

——— **ss. 367, 424**—*Judgment perfunctory—Illegality.*

Where a District Magistrate dispopses of an appeal against an order under section 110, Criminal Procedure Code, passed in a case in which 42 witnesses were examined for the prosecution and 103 for the defence, in a few lines, making only some general observations on the volume of evidence, the judgment is perfunctory and not in accordance with law, and should be set aside. **A** SONEHRI *v* EMPEROR, 19 A. L. J. 921; 23 CR L. J. 378 **202**

——— **ss. 367 (5), 439**—Mitigated sentence—Reasons—Enhancement of sentence after 9 months. *See* OFFENCES PUNISHABLE WITH DEATH **613**

——— **s. 417**—*Appeal against acquittal—Principles governing interference by High Court.*

The High Court will not interfere in a judgment of acquittal unless the lower Court has been perverse in its judgment or taken such unreasonable and distorted conclusions of the facts as to cause a miscarriage of justice.

Per *Ross, J.*—The mere fact that an inadmissible piece of corroborative evidence was brought on the record, through a technical error, cannot stand in the way of conviction by the High Court.

Per *Jwala Prasad, J.*—The reason that another Tribunal or other Judge might have arrived at a view other than that formed by the Trial Court is not a reason for disturbing a verdict of acquittal arrived upon a full consideration of the circumstances and evidence in the case. **Pat** EMPEROR *v.* KUNJA DUSADH, 3 P. L. T. 896; 23 CR. L. J. 410 **506**

——— **s. 439**—*Accused acquitted—Judgment of acquittal recorded—Case "not false" according to Magistrate's own impression—Direction that case be entered as 'true' in Police register—Magistrate's own impression and direction, recorded as part of judgment—Revision—High Court's power to expunge—Judicial or executive order—Government of India Act, 1915 (5 & 6 Geo. V, C. 61)—Acquittal—Not guilty—Judicial functions—Executive powers—Evidence of character—Admissibility of judgment of acquittal for injuring character of acquitted person.*

In a case of extortion against a Police Officer the Trying Magistrate, finding the prosecution evidence as insufficient and unconvincing and the defence evidence as more convincing, recorded a judgment of acquittal but added that his own impression was that the case was "not false" and that it should be entered as "true" in the Police register. The Police Officer sought in revision that that part of the Magistrate's judgment which cast a slur upon his character and was inconsistent with the verdict of acquittal may be expunged:

Held, (1) that, the order of the Magistrate being a judicial one, the High Court had power to deal with it under section 439, Criminal Procedure Code, and that it had also power to deal with it under its general superintendence under the Government of India Act;

(2) that as a judicial order the order objected to was illegal and inconsistent with the judgment of acquittal that as an executive order it had no business to be in a judgment: and that, therefore, whether executive or judicial, it should be expunged from the judgment.

No suggestions of any kind can be made against the accused when a verdict of not guilty is recorded except that of establishing his complete innocence.

Even a judgment of acquittal, merely upon the benefit of doubt being given to the accused by reason of suspicious circumstances in the case of the prosecution is entitled to be regarded as a complete exoneration of the accused.

A Magistrate exercising judicial functions has to divest himself for a moment of his executive powers and has to forget himself that he has to deal with the person before him as an executive authority.

Judgments of acquittal are not admissible in evidence even in a case where the character of the person is directly under enquiry under section 110 of the Code of Criminal Procedure; far less can it be permitted to be used by the Magistrate in this case for the purpose for which he recorded it in his judgment, namely, to throw a slur upon the character of the Sub-Inspector for executive or administrative purposes. **Pat** BIRNARAYAN SINGH *v.* EMPEROR, 3 P. L. T. 239; 23 CR. L. J. 371 **195**

——— **s. 439**—*Accused merely summoned—Revision—High Court, power of, to quash proceedings—Penal Code (Act XLV of 1860), ss. 499, Excep. (9), 500—Defamation—"Pichhlag" and "lawaris," whether defamatory.*

Where an accused person is only summoned and nothing further is done by a Subordinate Court, the High Court has power to quash the proceedings at that stage if it is apparent that grave injustice would be done if the proceedings were allowed to continue.

Petitioner, who was a candidate for the post of *lambardar*, made a statement concerning respondent, a rival candidate for the post, that he was not the son of the deceased *lambardar* but was a *pichhlag* and *lawaris*. Respondent filed a complaint against petitioner under section 500 of the Penal Code,

Criminal Procedure Code—contd.

in pursuance of which a bailable warrant was issued against the petitioner to appear and answer the charge Petitioner applied to the Sessions Judge to quash the proceedings and his application being rejected he moved the High Court in revision:

Held, (1) that the High Court had power to interfere in revision and quash the proceedings.

(2) that the words '*pichhlag*', and '*lawaris*', did not mean illegitimate and were not defamatory;

(3) that even if they had amounted to defamation the case would have been covered by Exception (9 to section 499 of the Penal Code, the allegation having been made by the petitioner in an application made by him *bona fide*. **L** THAKARIA *v.* PURAN SINGH, 23 CR L. J 429 **589**

——— **s. 476**—*"Such Court," meaning of—Court of Subordinate Judge, whether permanent Court.*

The use of the words "such Court" in section 476 of the Criminal Procedure Code makes it clear that the Court empowered to take action under that section is the same Court before which the offence has been committed or under whose notice the offence has been brought in the course of a judicial proceeding.

The Court of a Subordinate Judge is a permanent Court. Therefore, a Subordinate Judge is competent to continue an enquiry under section 476 begun by his predecessor. **L** TARA CHAND *v.* EMPEROR, 23 CR L. J. 451; 65 P. L. R 1922 **723**

——— **s. 514,** *proceedings under—Civil proceedings—Forfeiture of bond*—Prima facie *proof of forfeiture, necessity of—Notice to show cause issued on Police report—Evidence on oath taken afterwards—Proceedings, whether vitiated—Prejudice, question of, whether material.*

Proceedings under section 514 of the Criminal Procedure Code are of the nature of Civil proceedings, in which the provisions laid down in that section must be most carefully observed.

Under section 514 of the Criminal Procedure Code, before issuing an order calling upon a person who is subject to a bond to show cause why he should not forfeit it, the Magistrate is bound to have before him sufficient proof that a good reason exists for making the order and the section requires that the grounds of such proof must be recorded.

Therefore, where a Magistrate calls upon a person subject to a bond to show cause under section 514, Criminal Procedure Code, merely on a Police report and takes evidence on oath after the order is issued, he acts without jurisdiction, and the proceedings must be set aside even though, as a matter of fact, the person is not prejudiced in any way by the procedure adopted. **Pat** KRISHNA NARAIN SINGH *v.* EMPEROR, 3 P. L. T. 381, 23 CR. L. J. 478 **830**

——— **ss. 517, 520**—*Order by Stationary Sub-Magistrate under s. 517—Appeal, forum of.*

An appeal from an order passed under section 517 of the Criminal Procedure Code by a Stationary Sub-Magistrate directing the return of the subject-matter of a charge to the complainant, lies to a District Magistrate and not to a Sub-Divisional Magistrate inasmuch as the latter exercises appellate powers only on delegation by the former. **M** JOGI VENKIAH *v.* STATION HOUSE OFFICER OF NARSAPUR, 42 M. L. J. 401; 30 M. L T 251; (1922 M. W. N. 191; 15 L. W. 534; 23 CR. L. J. 387 **339**

Criminal Procedure Code—concld.

——— **s. 556**—*Provincial Insolvency Act (V of 1920), s. 69—Complaint preferred by District Judge against insolvent—Appeal, whether should be heard by him—Jurisdiction—Consent.*

The words "try any case" in section 556 of the Criminal Procedure Code are comprehensive enough to include the hearing of an appeal.

Where upon the allegations of an Official Receiver, a District Judge presents a complaint against an insolvent under section 69 (5) of the Provincial Insolvency Act, he is a party to the case, although he has little or nothing to do with the prosecution. Consequently, in the event of the insolvent being convicted, the District Judge would be disqualified, under section 556 of the Criminal Procedure Code, from hearing an appeal against the conviction as Sessions Judge.

The consent of a party concerned cannot affect the absolute disqualification imposed by section 556 of the Criminal Procedure Code. **L** MAMOON *v.* EMPEROR, 23 CR. L. J. 446; 61 P. L. R. 1922 **622**

Criminal trial—*Accused made to point out spot where certain incident occurred—Cross-examination of accused—Procedure.*

In a criminal case the accused put forward a defence, the principal incident of which was stated by them to have occurred on a certain spot in the neighbourhood of a village. In order to test the accuracy of the story told by the accused the Magistrate on his own motion took them to the neighbourhood of the village and made them point out the spot in turn In deciding the case he attached great importance to the fact that they did not all point out the same place. There was no evidence on the record as to what occurred when the Magistrate went to the spot and the Magistrate relied entirely on his own knowledge of the incident:

Held, (1) that in the absence of any evidence regarding this episode it must be totally ignored;

(2) that the conduct of the Magistrate in acting as he did verged dangerously near upon cross-examining the accused. **L** NURA *v.* EMPEROR, 23 CR L. J. 431 **591**

Custom—*Adoption—Brother's grandson—Naru Rajputs of Hoshiarpur Tahsil*—Riwaj-i-am, *entry in*—Baradarzada qaribi, *whether includes brother's grandson.*

Among Naru Rajputs of the Hoshiarpur Tahsil the adoption of a brother's grandson is valid by custom. The term *baradarzada qaribi* is wide enough to include a brother's grandson. **L** RAHMAT KHAN *v.* NAZIR AHMAD, 57 P. L. R. 1922 **374**

——— *Agriculturists—Alienation—Alienation to raise money for trade, validity of—Necessity—Borrower wanton and dissolute—Lender, whether justified to advance money for payment of land revenue.*

An agriculturist governed by the Customary Law is not entitled to alienate his ancestral land in order to raise money for the purpose of trade.

Where a borrower is shown to be a man of bad character who has squandered his income in extrava-

Custom—contd.

gance and wanton waste, the lender would not be justified in advancing him money for payment of Government revenue and other ordinary expenses of a Zemindar. L KABUL SINGH v. KALA SINGH, 3 L. L. J. 259 **737**

——— *Alienation by female—Heirs, right of, to challenge alienation—Compromise by female—Declaratory suit by heir and reversioner, maintainability of.*

As a general rule no female in possession of immoveable property acquired from her husband, father, grandfather, son or grandson otherwise than as a free and absolute gift can permanently alienate such property, and her sons and heirs have a right to control her dealings with the property.

A suit is maintainable by an heir and reversioner to have it declared that a compromise made by a female will not affect his right to succeed as heir and reversioner. L JHANDHA v. JIWAN **522**

——— *Alienation by widow—Compromise by husband's collateral—Consideration—Compromise, whether binding on successors of collateral.*

When doubtful questions of law or of fact have arisen between two parties and each of them has agreed to waive what he honestly believes to be his lawful claim in whole or in part, the transaction amounts to a compromise, the waiver or abandonment on either side furnishing the consideration, provided, of course, that both parties had equal knowledge of the facts and equal opportunities of ascertaining their rights.

Consequently, where a collateral entitled to object to an alienation enters into a compromise in good faith believing it to be the best in the circumstances and for the protection of the estate, the compromise is binding on his successors-in-interest. L JAI RAM v TELU, 1 L L. J. 133 **362**

——— *Alienation—Near reversioner's inaction—Acquiescence—Right of reversioner's son to contest alienation—Limitation.*

Where at the date of an alienation of ancestral property the son of a nephew of the alienor was in existence, under Customary Law, he has a right to contest the alienation independent of his father. Inaction on the part of the father to contest the alienation does not amount to acquiescence. L FEROZ v GHULAM SARWAR **379**

——— *Alienation—Necessity—Reversioner, suit by—Consideration, small portion of, without necessity—Sale, validity of.*

Where in a sale of ancestral property it is found that the sale is *prima facie* advantageous to the vendor as evidencing an act of good management on his part, and that only a small portion of the entire consideration,—in this case, one-sixth,—is without necessity, the sale should be upheld. L BIBU TENDEE v SAMANDA, 2 L. L. J. 669 **276**

——— *Alienation—Occupancy rights, alienation of—Landlord, consent of—Reversioners, right of, to contest alienation, whether affected.*

In a suit to set aside an alienation of occupancy rights where the plaintiff proves 1 that he is the reversionary heir, and 2 that if the land had been ancestral he could have contested the alienation, he is entitled to succeed.

Custom—contd.

The mere fact that the alienation of an occupancy right was consented to by the landlord does not deprive a reversioner of the right to question it. L BAGGU v. DANI, 3 L. 69 **38**

——— *Alienation—Succession—Sisters, when heirs—Burden of proving that sisters are not heirs—Sisters heirs among Tarar Jats of Chakwal, District Jhelum—*Riwaj-i-am *not opposed to general custom but not supported by instances, evidentiary, value of.*

The *onus* of proving that sisters are not heirs in the absence of all agnates is on the person who asserts this.

An entry in a *riwaj-i-am*, when not opposed to general custom, is a strong piece of evidence in support of a custom, even if it is not supported by instances.

Among the Muhammadan Tarar Jats of the Chakwal Tahsil, Jhelum District, sisters are heirs in the absence of all agnates and can, as such, contest the validity of an alienation—in this case a Will—by a widow. L AHMAD v. BANO, 3 L. 40 **629**

——— *Alienation—Will in favour of daughter—Will upheld on suit of testator's brother but daughter's power of alienation declared as restricted by first Court—Appellate Court declaring full powers of alienation*—Res judicata—*Unnecessary finding—Evidence—Will lost—Property alienated by daughter—Suit by collaterals.*

In 1880 a Will was made in favour of a daughter. In 1881 it was contested by the testator's brother and upheld by the Trial Court as valid with the further finding that the daughter would not be competent to alienate the property. On appeal by the daughter the lower Appellate Court held that she had full powers of alienation. No appeal was preferred against this decision. The daughter gave away the property and on her death her father's collaterals sued for its possession. The Will in her favour was not forthcoming:

Held, that the decision in the previous suit, although it did not operate as *res judicata*, was an important piece of evidence, that in the circumstances the validity of the Will could not be questioned and that the daughter took an absolute estate. L ANWAR KHAN v. NUR KHAN, 2 L. L. J. 666 **272**

———, *essentials of—Recent instances, whether sufficient proof.*

A custom should be universal, reasonable and, with some qualifications, immemorial. A number of instances which have recently occurred are not sufficient to create a custom in a trade: on the contrary, they show that it is entirely a modern idea.

Plaintiff employed the defendants who were grain agents at Hapur to purchase certain grain-pits for him and paid the advance money. The defendants purchased seven grain-pits but before the date of delivery to plaintiff sold four of them to another person. When the date of delivery to plaintiff came, the defendants refused to give delivery even of the remaining three pits, (which the plaintiff was willing to accept) unless the latter also agreed to take delivery of another four grain-pits which were different from those originally purchased for him. Upon this the plaintiff repudiated the entire contract and sued for the

Custom—contd.

return of the advance money. The defendants set up a trade custom in defence of their attitude:

Held, (1) on the evidence that no such custom was established;

(2) that even if the custom be taken to be established it was unreasonable and immoral in the sense that it was likely to lead to gross fraud, as it put an agent into a double capacity where his duty and interest must necessarily conflict and as such was contrary to the general principles of agency and could not be given effect to in a Court of Law. **A** KISHORI LAL *v.* JIWAN LAL, 4 U. P. L. R. (A.) 59 **231**

——— *Pre-emption—Pana* Chhajan, *Town Beri, Rohtak District—Proof of existence of custom in neighbouring* mohallas *only supplementary evidence —Judgment based on compromise, effect of.*

The custom of pre-emption does not obtain in Pana Chhajan of the town of Beri in the Rohtak District.

In suits for pre-emption in respect of property situate in a town, however probable and seeming the plaintiffs' case may be, he should never be relieved from the burden of proving the existence of the alleged custom in the special locality in which the property is situated, proof of its existence in neighbouring *mohallas* being at best only supplementary of the evidence required of the plaintiff.

Instances of the exercise of the right of pre-emption, of which the latest is 40 years' old are insufficient to prove the existence of custom

Obiter—A judgment based upon a compromise or confession, cannot be placed on the same footing as one in which after contest a custom was held to be proved or negatived. **L** RAMJI DAS *v.* MAM CHAND **953**

——— *Proof—Gift—Re-marriage of widow in donee's line—Collaterals of donor, rights of.*

Custom must be proved by evidence and Courts cannot deduce the existence of one custom from that of another. It is not the function of a Court to say what a custom ought to be, its duty is confined to enforcing such customs as are shown to exist.

The existence of a custom enabling the descendants of a donor to deprive the widow of the last male holder of the donee's family of her life-estate on her re-marriage cannot be presumed by analogy. A person relying upon such a custom must prove it.

The heirs of a donor may succeed eventually to an estate gifted by their predecessor, but their position is not necessarily the same as that of the heirs to an estate which has descended by succession from a common ancestor. The latter are members of the family of the deceased male holder, the former may not be.

The re-marriage of a widow means something more to the members of the family than to strangers Such a marriage might seem to the late husband's family equivalent to misconduct while by a donor's descendants it might only be regarded as an excuse for getting possession of the land. **L** DHANNUN *v.* BHAGWANI **555**

——— *Succession—Daughters v. collaterals of sixth degree—Burden of proof—Hindu* Jats *of Ludhiana District—*Riwaj-i-am, *entry in, value of.*

Custom—contd.

Among Hindu *Jats* of Ludhiana District collaterals of the sixth degree exclude daughters from succession.

Where a collateral is more distantly related than the fifth degree, the initial *onus* is on him to prove that he excludes the daughters and the more remote the collateral is the more heavily does the *onus* lie upon him.

In the case of collaterals related in the sixth degree the *onus* is not a very heavy one. An entry in the *riwaj-i-am* which says that the collaterals in the sixth degree exclude daughters is not opposed to general custom and is quite sufficient to shift the initial *onus* from the collateral to the other side. **L** DHAN KAUR *v.* SUNDER, 3 L. 184 **415**

——— *Succession—Hindu Sikh Jat, marriage of, with Muslim convert to Sikhism Collaterals, acquiescence of—Son born of marriage Legitimacy.*

K S, a Sikh landed proprietor, with the full consent of all his collaterals contracted a *chadar andazi* according to Hindu doctrines with a woman of the Arain caste, who had previously been converted to Sikhism: a son, *P S*, was born of this marriage and was acknowledged by the near collaterals of *K. S.* as the latter's legitimate son: after the death of *K S.* his near collaterals brought the present suit for possession of his estate on the ground that *P S.* was not his legitimate son:

Held, that the suit must fail, as the plaintiffs were not competent to deny the legitimacy of *K.S.* **L** LACHHMAN SINGH *v.* PARTAP SINGH, 3 L L.J 366 **937**

——— *Succession—Murderer's son, whether can succeed to estate of person murdered—Public policy.*

Not only is a murderer himself debarred from succeeding to the property of his victim but the disability extends to all those who claim *through* and not merely *from* him.

This principle is based upon public policy and has nothing to do with custom or the personal law of the parties. **L** JIND KAUR *v.* INDAR SINGH, 3 L. 0 4; 23 P. W. R 1924 **526**

——— *Succession*—Pagwand *and* Chundawand—*Jaswal Rajputs of Mauza Deoli, Tahsil Una, Hoshiarpur District—Succession, rule of, test for determining.*

Jaswal Rajputs of Mauza Deoli, in the Una Tahsil of the Hoshiarpur District, observe the *Pagwand* rule of succession.

In determing which rule of succession applies to a particular family, the safest guide is the rule which is proved to have been observed in the family. **L** NANAK CHAND *v* MUNSHI RAM **608**

——— *Succession to non-proprietor—Collateral in fourth degree.*

In the case of succession to a proprietor any collateral, however remote, would be entitled to succeed in default of a nearer heir, but where the question is one of succession to a non-proprietor remote collaterals are excluded

here a collateral of a deceased non-proprietor in the fourth degree claims to succeed to his immoveable property, the *onus* lies on him to prove that he is entitled to do so by custom. **L** SHER JANG *v.* MUNSHI RAM, 3 L. 33; 22 P. W. R. 1922 **964**

Custom—concld.

——— *Succession—Sunni Muhammadans - Wajib-ul-arz, construction of—Construction, whether may be influenced by principles of Muhammadan Law—"Qarib," meaning of.*

In a family of Sunni Muhammadans where succession is regulated not by the Muhammadan Law but by custom as recorded in the *wajib-ul-arz*, the entry in that document being—"*aur hissa malik mutvaffi ka woh shakhs pawega jo qarib hai*," the word "*qarib*," in the absence of words limiting the succession to relatives in the male line only, means that relatives "nearest in degree" succeed, and not those "nearer in degree through the male line."

Where among Muhammadans it has been proved that inheritance is governed not by the Muhammadan Law but by the custom a Court is not entitled to put a strained or limited interpretation on the words used in defining the custom merely because in some instances, if the words were interpreted in their ordinary sense, succession would not be in accordance with the rule of Muhammadan Law. O NIAMAT ALI v. ASHIQ ALI, 9 O. L. J. 127 **803**

——— *Usage—Burden of proof—Proof—Custom and election to abide by old law.*

It is of the essence of special usages, modifying the ordinary law of succession that they should be ancient and invariable; and it is further essential that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the Courts can be assured of their existence, and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends.

Obiter—In their essential characteristics, custom and an election to abide by the law of the old status differ fundamentally as sources of law P C MAHOMED IBRAHIM v SHAIKH IBRAHIM, 30 M. L. T. 85; 26 . W. N 793; 15 M 3 8; 43 M. L. J. 69; 36 C. L J 64; (1922 M. W. N. 470; 24 BOM. L. R. 44 **115**

Decree. *construction of.*

T. and *L* brought pre-emption suits The Court passed decrees in favour of both *T.* was held to have the prior right to pre-empt and was directed to pay the price of the property in suit within a specified time and get possession. If he failed his suit was to stand dismissed The decree in favour of *L.* stated that on *T.*'s default, he should get possession on making the required payment, and the vendee should pay him the costs of the suit *T* paid the amount and obtained possession. *L* sued out execution for costs:

Held, that the terms of the decree were quite clear and that under it the payment of costs to *L.* was made conditional on his being able to act on the decree and obtain possession. L KAKA SINGH v. LACHHMAN DAS, 3 L. L. J. 263 **740**

Defence of India Rules, 1915, r. 25 (1), (2) — *Non-cognisable offence — District Magistrate directing Superintendent of Police to take action—Chalan made by Subordinate Police Officer on authorisation of Superintendent of Police—Chalan, whether can be treated as complaint*

Where a District Magistrate in pursuance of authority conferred by a Government Notification

Defence of India Rules—concld.

authorises a Superintendent of Police to take action against a person for an offence under rule 25 (1) of the Defence of India Rules, of which offence the Police are not authorised to take cognisance, and on the authorisation of the Superintendent of Police, a Subordinate Officer makes a *chalan*, the *chalan* may be treated as a complaint. L KHUSHAL SINGH v. EMPEROR, 2 L L J 707; 23 CR. L. J. 385 **337**

Definitions:—

Abandonment. *See* LIMITATION ACT, SCH. I, ART. 142 **246**

Alter. *See* CRIMINAL PROCEDURE CODE, ss. 144 (4), (5), 435, 439 **500**

Amla. *See* CONSTRUCTION OF DOCUMENT **939**

Antecedent debt. *See* HINDU LAW **569**

Applicant. *See* LAND ACQUISITION ACT, ss 18, 25, 24 (1) **146**

Applying in accordance with law. *See* LIMITATION ACT, SCH. I, ART. 182 **538**

Award. *See* LAND ACQUISITION ACT, s 54 **408**

Baradarzada qaribi. *See* CUSTOM—ADOPTION **374**

By any other law for the time being in force. *See* CIVIL PROCEDURE CODE, s. 89, O. XXIII, R. 3 **123**

Capital employed in business. *See* EXCESS PROFITS DUTY ACT, ss. 4, 5 *(b)*, 6 (1) *(b)* **909**

Carries on business. *See* CIVIL PROCEDURE CODE, s 20 **69**

Discontinuance of possession. *See* LIMITATION ACT, SCH. I, ART. 142 **246**

Gradual, slow and imperceptible. *See* ALLUVIAL ACCRETIONS **1**

House property. *See* INCOME TAX ACT, s. 8 **781**

Husband of the woman. *See* CRIMINAL PROCEDURE CODE, s. 199 **734**

Impotency. *See* MARRIAGE, SUIT FOR ANNULMENT OF **949**

In the male line of descent. *See* C P. TENANCY ACT, s. 46 **229**

Interruption. *See* EASEMENTS ACT, s. 15, EXPL 2 **250**

Judgment. *See* LETTERS PATENT (LAHORE), CL 10 **388**

Machinery. *See* BENGAL MUNICIPAL ACT, s. 101 PROVISO **926**

Money due. *See* CIVIL PROCEDURE CODE, O VIII, R. 6 **326**

Patti or other sub-division. *See* PUNJAB PRE-EMPTION ACT, s. 15 *(c)*, SECONDLY **48**

Permanent settlement. *See* BENGAL TENANCY ACT, s. 50 (1), (2), APPLICABILITY OF **28**

Public demand. *See* BENGAL TENANCY ACT, 88, s. 104B **375**

Qarib. *See* CUSTOM—SUCCESSION **803**

Several. *See* PROBATE AND ADMINISTRATION ACT, s 92

Shawls. *See* RAILWAYS ACT, SCH II, CL *(m)* **852**

Definitions—concld.

Specially. *See* BENGAL TENANCY ACT, s. 29 **49**

Subject to. *See* SPECIFIC PERFORMANCE **433**

Such decision or entry. *See* KHOTI SETTLEMENT ACT, s. 21 **322**

Suit. *See* APPEAL—COURT FEES ACT, s. 7, CL *(ix)*, SCH. I, ART 1 **968**

Suit. *See* DEKKHAN AGRICULTURISTS' RELIEF ACT, ss 3, 15B **840**

Tenant. *See* BOMBAY RENT (WAR RESTRICTIONS ACT, s. 9 **130**

Total loss. *See* FIRE INSURANCE **777**

Wholesale cash price. *See* SEA CUSTOMS ACT, s. 30, CL. *(a)* **267**

Dekkhan Agriculturists' Relief Act (XVII of 1879), ss. 3, 15B—*Decree—Defendant becoming agriculturist after decree, effect of—"Suit," meaning of.*

A defendant who is not an agriculturist at the time a decree is passed against him, but becomes one thereafter, is not entitled to the benefit of section 15B of the Dekkhan Agriculturists' Relief Act.

The description of suit in section 3 of the Dekkhan Agriculturists' Relief Act, is not confined to the relief claimed in the suit, but also includes the status of the parties. **B** DEVU JETIRAM GUJAR *v.* REVAPPA SATAPPA SHINTRE, 24 BOM. L. R 370 **840**

——— **s. 10A,** *scope of*

The provisions of section 10A of the Dekkhan Agriculturists' Relief Act are not limited in their scope to suits of the description mentioned in section 3, clauses *(w)*, *(y)*, *(z)*; those provisions are applicable to every suit to which an agriculturist is a party, and in which there is some transaction in issue entered into by such agriculturist, or the person, if any, through whom he claims, which is of such a nature that the rights and liabilities of the parties thereunder are triable wholly or in part under Chapter III of the Act. **B** HALLAPPA KALLAPPA *v.* IRAPPA GIRIMALLAPPA, 24 BOM. L. R. 406 **844**

——— **s. 12**—Suit on pro-note against agriculturist—Admission by defendent—Court, jurisdiction of, to inquire into nature of admission *See* CIVIL PROCEDURE CODE, O XXIII, R 3 **253**

——— **ss. 12, 13**—*Account—Amount due under bond—Larger amount cannot be awarded as result of account.*

A debtor, owing to his seeking the relief afforded by the Dekkhan Agriculturists' Relief Act, should not be made to pay more than he is obliged to pay according to the terms of his bond **B** VITHALDAS BHAGWANDAS *v.* MURTAJA HUSEIN, 24 BOM. L. R. 247; 46 B. 764 **151**

Divorce Act (IV of 1869), s. 19—Impotency, meaning of—Consummation, practical impossibility of. *See* MARRIAGE **949**

Documents, *part legal and part illegal, enforcement of.*

Although a party cannot ask the Court to make a new contract in place of that which is illegal, but where in the same instrument there are distinct engagements by which a party binds himself to do certain acts, some of which are legal and some illegal, the performance of those which are legal can be enforced although the performance of those which are illegal cannot. **Pat** GRANT, W. M. *v.* EKLAL JHA, 3 P. L. T. 586 **49**

Easement—*Eaves, projection of, over another's land—Title to land, if acquired—Easement if established within 20 years—Injunction, when to be refused.*

Where the plaintiff had allowed the defendant's eaves to project and rain-water to be discharged over his land for twenty years, all that the defendant could acquire by prescription would be an easement imposing the burden on the servient tenement of having that projection over it; he could not acquire a title to the plaintiff's land even up to the line of his projections.

A plaintiff is entitled to seek relief by means of an injunction against a party seeking to establish an easement against him within 20 years and his acquiescence would not, as a rule, disentitle him to the grant of an injunction. But where on account of the acquiescence the cost of obeying the injunction would be very much greater than it otherwise would have been, or even prohibitive, the Court ought to refuse it. **B** KASHIBHAI KALIDAS *v.* VALLABHAI WAGJIBHAI, 24 BOM. L. R. 305 **356**

——— *Light and air, obstruction of—Injury—Injunction the rule—Damages the exception—Re-roofing of dominant tenement—Easement not affected*

If the erection of a building completely blocks a window and causes total obstruction of light and air, it is *prima facie* an injury of a serious character and a mandatory injunction should issue In such a case, injunction is the rule and damages the exception.

The mere fact that it is possible for the owner of the dominant tenement to neutralise the effect of the obstruction of light by re-arranging or altering his own building is no ground for affording him a money compensation.

If a room has existed for over 20 years, the mere fact that it has been re-roofed recently would not deprive its owner of an easement which had been acquired and the latter is *prima facie* entitled to be maintained in his enjoyment of the said easement.

The grant of an injunction is purely a matter of discretion, to be exercised in a judicial manner **L** THAKAR DAS *v.* ABDUL HAMID, 2 L. L. J. 701 **288**

——— *Right of way, once established, whether can be altered.*

When once a right of way is defined, it cannot be altered, and the dominant owner is entitled to exert his strict rights unless he can be induced to consent to a deviation. **B** DHUNDIRAJ BALKRISHNA BHALINKAR *v.* RAMCHANDRA GANGADHAR KALE, 24 BOM. L. R. 437 **413**

——— *Right to take water from tank—Claim based upon lost grant—Interruption of right for more than two years from date of suit—Limitation Act (IX of 1908), s. 26.*

The provisions of section 26 of the Limitation Act are applicable where plaintiff sues for a declaration of a right of easement on the basis of prescription but it has no application where the claim is based upon a lost grant. **C** GURU PROSANNA ROY *v.* FUL CHAND MONDAL **244**

Easements Act (V of 1882), s. 15, Expl. 2—*"Interruption," meaning of—Acquisition of easement of light and air—Interruption.*

Where in the course of acquiring by prescription an easement of light and air for certain windows of a building, the building is burnt down, but the owner begins immediately to re-build it and places windows exactly in the same position as the old ones, he will be regarded as having enjoyed the access of light and air continuously, and will be entitled to protection after twenty years from the first building. Any delay in re-building, however, might be evidence of an intention not to resume the user.

An interruption in user owing to a building being burnt down and having to be re-built is not an interruption within the meaning of Explanation (2) to section 15 of the Easements Act as the interruption in such a case is not owing to the act of some person other than the claimant. B RATANLAL BHOLARAM v. GULAMHUSEN ABDULALI, 24 BOM. L. R. 83; 45 B. 448 **250**

Ejectment suit—*Parties—Person in actual juridical possession as well as the person under whom he holds, both, whether necessary parties—Both made parties but relief claimed only against the person in actual juridical possession—Jurisdiction of Court to give decree—Suit for proprietary possession—Decree for* mokarrari *interest, whether can be granted.*

If the plaintiff in an ejectment suit can make out a legal title to land, he is entitled to maintain a suit against the person in actual juridical possession of such land for its recovery without making the person under whom the latter claims to hold, a party to the suit *Kashi* v. *Sadashiva*, B. 22, relied upon, and where both the person in actual juridical possession as well as the person under whom he holds the property are defendants in the suit but the plaintiff does not choose to claim any relief as against the latter, the Court is competent to give a decree to the plaintiff for possession only as against the former, *i.e.*, the person in actual juridical possession.

Where in an ejectment suit the plaintiff claims possession of proprietary interest in the property in suit, a Court is competent to give him a decree in respect of the *mokarrari* interest, although he never claimed possession of that interest. **Pat** BHAGWATI KUER v. JAGDAM SAHAY, 3 P. L. T. 24 **597**

Equitable mortgage—*Deposit of title-deeds—Equitable mortgage, whether enforceable in the Punjab—Sub-mortgagee, whether bound to implead original mortgagor in suit on mortgage—Registration Act (XVI of 1908), s. 17 (1) b—Letter depositing title-deeds after mortgage effected, admissibility of, without registration.*

As security for a loan defendants executed a pro-note in favour of the plaintiff and at the same time handed over a number of title-deeds, some of which related to their own property, and some to property mortgaged to them. They also signed and delivered to the defendants a letter which opened as follows: "We, under this writing, deposit with you as security 12 deeds relating to property of the value of Rs 8,5 7 mentioned in the list in lieu of a pro-note for Rs. 8,0 0 in respect of which a separate pro-note has been executed to-day." In a suit on the pro-note to recover the amount thereof and for sale of the properties it

Equitable mortgage—concld.

was urged, *inter alia*, (1) that there was no such thing as an equitable mortgage in the Punjab; (2) that the original mortagagors should have been impleaded as defendants in the suit, and (3) that the letter with which the title-deeds were deposited required registration, and not being registered it was inadmissible to prove the existence of a mortgage:

Held, (1) that an equitable mortgage by the deposit of title-deeds was recognised, and could be enforced in the Punjab;

(2) that the suit could proceed without impleading the original mortgagors as defendants: and

(3) that inasmuch as the equitable mortgage by the deposit of title-deeds had been effected before the letter was written and as the letter did not embody the terms of the contract, but was written with the object of being used only as evidence of a fact from which the contract was to be inferred, it did not come within the description in section 17 of the Registration Act, and, therefore, it did not require to be registered to render it admissible. L FIRM MOTI RAM-MOHAN LAL v BHARAT NATIONAL BANK, LD., DELHI, 3 L. L. J. 373 **421**

Estoppel, *principles of—Lease for building purposes—Presumption of permanency.*

Where the owner of a plot of land by his own act or representation creates or induces in the mind of his tenant a mistaken belief that he has a permanent interest in the land and may safely build thereon and the tenant, relying upon the act or representation so made, treats his interest as permanent and incurs expense in building which he would not otherwise have done, the owner cannot afterwards be heard to deny the truth of that which he represented

Estoppel may arise by reason of either a declaration, an act or an omission, but in either case there must be an intention on the part of the person, against whom the estoppel operates, to cause or permit a belief in the mind of another. In the case of a mere omission no such intention can well be imputed unless the true facts are known to the person whose omission is in question, but where there is a deliberate declaration or act causing or permitting such belief and inducing another to act upon it, it must be presumed that such declaration or act was intended to have its ordinary and natural effect upon the mind and actions of the other party.

Obiter.—Where a lease has been granted for building purposes and no term is specified in the instrument, if the buildings contemplated or in fact erected are of a permanent nature, the presumption is that the interest granted was a permanent one But no such presumption can outweigh the actual terms of the lease itself. **Pat** RALLI v. FORBES, 3 P. L. T. 467; (1922) PAT. 204; 4 U. P. L. R. (PAT.) 43 **744**

Evidence—*Attesting witness denying attestation—Other evidence, whether can be relied on—Document proof of*

In order to prove a document an attesting witness was called, who stated that he was not an attesting witness, that he put his name as a witness after the execution of the document. The Appellate

Evidence—concld.

Court found as a fact relying upon the evidence of other witness that the attesting witness who said that he had not seen the execution did, as a matter of fact, see it and was an attesting witness, that the document was executed in the presence of that witness :

Held, that, having regard to the findings arrived at, the document was proved. **C** SASHIMUKHI DASI *v.* MONMOHINI DASI **87**

——— *consistent with allegation of plaintiff and denial of defendant – Plaintiff must fail.*

Where the undoubted evidence is consistent both with the allegation of the plaintiff as with the denial of the defendant, the plaintiff must fail. **Pat** RAMESHWAR NARAIN SINGH *v.* RIKNATH KOERI **451**

——— *Document not valid for purpose intended, whether can be used as evidence.*

The mere fact that a document may not be valid for the purpose for which it was intended would not prevent it from being used as evidence of an admission by a person executing it where its execution has been admitted and proved. **Pat** GRANT, W. M. *v* EKLAL JHA, 3 P. L. T 486 **49**

——— Evidence of character—Admissibility of judgment of acquittal for injuring character of acquitted person. *See* CRIMINAL PROCEDURE CODE, s. 43 **195**

——— Ex parte *rent-decree—Evidence of relation of landlord and tenant – Evidence Act (I of 1872), ss. 11, 13—Relevant fact – Ejectment suit by landlord – Defendant claiming occupancy rights as being in possession for 12 years after abandonment by recorded tenant—Rent-decree obtained by landlord against heirs of recorded tenant within 12 years of suit, admissibility of.*

An *ex parte* rent-decree obtained by a landlord against the heirs of a tenant which is satisfied by payment of the decretal amount is evidence sufficient to show that, at the date of the decree, the heirs were paying rent and occupying the position of tenants

In a suit by a landlord to eject the transferee of a non-transferable occupancy holding where the defendant alleges that he is entitled to remain in possession on payment of rent on the ground that he has been in possession for more than 12 years after the abandonment of the tenancy by the previous tenant, an *ex parte* decree obtained by the landlord against the heirs of the latter within 12 years of the suit is admissible in evidence to show that there was no abandonment of the tenancy at the date of the decree. ANUKUL CHANDRA DHAR *v.* KAMALA KANTA ROY **787**

——— *Interested persons—Corroboration.*

As a rule, the evidence of persons who are vitally interested in the result of a case ought not to be acted upon, unless that evidence receives corroboration from surrounding circumstances. **Pat** CHANDRAMA KUER *v.* RANGAYAN **57**

——— Tradition—Oral tradition, value of. *See* RELATIONSHIP **264**

Evidence Act (I of 1872)—*Evidence of accomplice, corroboration of—Law in England and India – Corroborative evidence, nature of—High Court, powers of—Joint trial—Plea of accused in defence, effect of Prosecution, failure of, to appreciate motive, effect of*

The law in India regarding corroboration of an accomplice's evidence does not differ from the English Law

Confirmation of an accomplice's evidence does not mean that there should be independent evidence of that which the accomplice relates or his testimony would be unnecessary. The corroboration must be by some other evidence than that of an accomplice. One accomplice's evidence is not corroboration of the testimony of another accomplice. Evidence in corroboration must be evidence which implicates him, that is, which confirms, in some material particular, not only the evidence that the crime has been committed but also that the prisoner committed it. The nature of the corroboration will necessarily vary according to the particular circumstances of the offence charged.

The corroboration need not be direct evidence that the accused committed the crime it is sufficient if it is merely circumstantial evidence of his connection with the crime

The High Court has only to see whether there is any corroboration of the accomplice's evidence. Whether it is strong or slender need not be gone into in revision.

The plea that an accused is likely to make in defence has no bearing on the question whether a joint trial may legally be held or not.

The failure of the prosecution to appreciate the motive which actuated the commission of an offence cannot affect the merits of the case, if it is otherwise sufficiently proved. **N** KISAN RAGHUJI *v.* EMPEROR, 23 CR. L. J. 591 **343**

——— **s. 32**—*Dying declaration—Proof.*

Witnesses should not be allowed to prove a dying declaration as if it were a substantial piece of evidence in the case The relevant fact to be proved is the statement made by a deceased person admissible under section 32 of the Evidence Act and that statement is not the document made by the Magistrate but the verbal statement made by the deceased person.

The only way of proving a dying declaration is by the evidence of some witness who heard it made, the witness being at liberty to refresh his memory by referring to the note made by him or read over by him at or about the time the statement was made. **L** KUNJ LAL *v* EMPEROR, 23 CR. L. J. 417; 4 U. P. L. R (L) 83 **577**

——— **s. 32 (2)**—*Entry in* choukidar's *diary recording death of a person—Entry written not by* choukidar *but by third person – Admissibility of the entry in evidence after* choukidar's *death.*

Entries made in the diary of a deceased illiterate *choukidar* not by the *choukidar* himself, but by other person at his instance are not admissible under section 32 (2) of the Evidence Act unless it is established that it was the duty of that person in the ordinary course of business to make the entries. **Pat** CHANDRAMA KUER *v.* RAMGAYAN **57**

——— **s. 32 (2) (6)**—*Family pedigree kept by family chronicler, admissibility of*

A family pedigree kept in the ordinary course of business by a family chronicler prepared by the chronicler from time to time from the information

Evidence Act—concld.

supplied by the members of the family is admissible in evidence under section 32 2, of the Evidence Act, and is also admissible under section 32 (6) as having been kept by a person engaged by the members of the family to keep a record of the family events before them. B MOHANSING UMED RAMOL v. DALPATSING HANBAJI, 24 BOM. L. R. 289; 46 B. 753 **235**

——— **s. 63**—Document admitted as secondary evidence by Trial Court—Appellate Court, whether may question its admissibility. *See* APPELLATE COURT **628**

——— **ss. 65, 91**—*Secondary evidence—Contract reduced to writing—Promissory-note.*

The language of section 91 of the Evidence Act is uncompromising, and whenever the terms of a contract are reduced to writing and that writing is, for any reason, inadmissible in evidence, the promisee must lose his remedy The test is whether there is a complete cause of action independently of the document which is inadmissible.

Where a suit is based on a promissory-note which is alleged to have been lost, but the loss is not proved, secondary evidence of the promissory-note cannot be given and the suit must be dismissed. L RAM SARAN DAS v. TULSI RAM **565**

— **s. 92**—*Pro-note purporting to be executed after settlement of accounts—Evidence to prove that accounts were not taken.*

Where it is stated in the body of a pro-note that the sum mentioned in it has been arrived at after taking accounts between the parties and that it is payable on demand, the executant of the note cannot give evidence to prove that, as a matter of fact, the document was not executed after the settlement of accounts. A SRI RAM v SOBHA RAM-GOPAL RAI, 20 A. L. J. 315; 4 U. P. L. R. (A.) 153; 44 A. 321 **513**

——— **s. 108**—*Presumption as to date of death, whether any.*

Although a person who has not been heard of for seven years is presumed to be dead, there is no presumption as to the time of his death, and if any one seeks to establish the precise period at which such person died, he must do so by actual evidence. A HAMRUP GIR v. LAL CHAND MARWARI, 3 P. L. T. 52 **401**

——— **s. 114 Ill. (e).** *See* PENAL CODE, ss. 147, 333 **721**

Excess Profits Duty Act (X of 1919), ss. 4, 5 (1), 6 (1) (b)—*Income Tax Act (VII of 1918), ss. 12 (1), 14 (1)—Assets of firm consisting of money invested in public companies and in Government securities, if can be treated as capital employed in business of firm—"Capital employed in business," meaning of.*

The expression "capital employed in the business" in the first proviso to section 6 (1), (b) of the Excess Profits Duty Act, includes capital of a firm invested by them in the course of their business in Government securities or in shares in public companies. Such investments must consequently be included in the capital computation both for the accounting period and "the standard years."

Per *Richardson, J.*—Neither on principle nor by reason of any specific provision contained in either the Excess Profits Duty Act or the Income Tax Act, does such capital cease to be the capital of a firm employed in the business, because it is so invested or because, in the case of the sharer, the dividends under the Income Tax Act are taxed at the source and are not, when paid to the firm, part of their taxable income. C MARTIN & CO. v. SECRETARY OF STATE FOR INDIA, 25 C. W. N. 875 **909**

Execution, *step-in-aid of—Payment out of Cour—Application for record of same.*

An oral application by a decree-holder to record a payment made to him out of the Court by the judgment-debtor is a step-in-aid of execution N NARAYEN RAO v. BALKRISHNA **899**

Execution of decree—*Court, duty of.*

Obiter—It is the duty of a Court executing a decree to look, in the first instance, at the decree, and if the terms of the decree are clear and unambiguous, the Court is bound to give effect to it, even though it may regard its provisions as erroneous. L KAKA SINGH v. LACHMAN DAS, 3 L. L. J. 263 **720**

——— *Executing Court, duty of—Court cannot go behind decree.*

A Court executing a decree must take the decree as it stands. It has no power to go behind the decree, in other words, it cannot entertain any objection as to the legality or correctness of the decree, the reason being that a decree though it may not be according to law, is binding and conclusive between the parties, if it is not appealed from.

Plaintiff obtained an *ex parte* decree against defendant. In execution the defendant objected that the decree could not be executed inasmuch as the claim upon which the decree was based had been satisfied by an order of discharge passed in certain insolvency proceedings:

Held, that this objection should have been taken as a defence to the suit and could not be entertained in execution, inasmuch as the executing Court had no power to go behind or question the legality of the decree L RAM DAS v. NETTO, 6 P. L. R. 1922 **753**

——— *Limitation — Judgment-debtors who were described as parties but against whom execution was not asked for, if precluded from showing subsequently that the application was barred by limitation.*

A judgment-debtor who was not a party to a previous application for execution of a decree or to any order made upon it is not precluded from showing that the said application was barred by limitation and that, therefore, it was not in accordance with law. C SITANATH DAS v. KANAK PROBHA DEBI **879**

——— *Limitation — Objection not taken against previous application, whether can be taken against subsequent application—Joint family—Decree against managing member—Limitation Act (IX of 1908), Sch. I, Art 182, Explanation.*

An application for execution of a decree cannot be objected to on the ground that a previous application, to which no objection on the ground of limitation was taken, was barred by time

Three Hindu brothers carried on a joint business. A decree was obtained against the eldest brother and certain applications for execution of the decree were made against him and after his death against

Execution of decree—concld.

his legal representatives. Subsequently execution was applied for against the other brothers also :

Held, that the brothers being joint and carrying on a joint business, the decree against the eldest brother must be taken to have been passed against the firm and that previous applications for execution, therefore, operated to save limitation. **L** KIDAR NATH *v.* RADHA KISHEN **56**

——— *Sale—Decree set aside—Auction-purchaser, rights of.*

A *bona fide* purchaser, who is not the decree-holder or any person claiming through him, at an auction sale in execution of a valid decree, acquires a valid title to the property purchased by him, which is not affected by the fact that the decree is subsequently set aside at the instance of a party thereto. **L** TARA CHAND *v.* ABDUL AHAD **894**

Execution sale—*Ancestral property—Sale by Civil Court, whether void.*

A sale of ancestral property by a Civil Court is not void in law. **A** DALIP NARAIN SINGH *v.* PARMAOTI BIBI, 17 A. L. J. 982; 42 A 58 **931**

——— *Ancestral property, sale of—Property described as non-ancestral by judgment-debtor—Suit to set aside sale—Substantial injury.*

Where to the knowledge of the judgment-debtor property attached in execution of the decree is treated as non-ancestral and is described as non-ancestral in the written pleading presented by him before the Execution Court that Court is within its jurisdiction in putting up the property for sale. If it turns out that the description was mistaken, a suit to set aside the sale would fail unless it is established that the judgment-debtor has really suffered substantial injury. **A** BHATELAY CHUNNI LAL *v.* CHAKKERPAN, 20 A. L. J. 281; 44 A 280 **934**

——— *Several judgment-debtors—Property sold as belonging to one of them—No objection by the rest—Sale confirmed—Execution purchaser, bona fide—Suit for possession by remaining judgment-debtors—Estoppel—Person not party to decree, position of.*

Where judgment-debtors allow an execution sale of the whole of their property to proceed without raising any objection of insufficient description or to the effect that part ought to have been sold instead of the whole, the sale cannot afterwards be set aside at their instance on those grounds

Thus where in execution of a decree against certain persons, their joint property is put up for sale as belonging to one of them and the rest who are present at the sale knowing that the execution purchaser is ignorant of the true state of affairs and has no means of finding out the real facts, stand by and allow the sale to take place and be confirmed without lifting a hand to assert their title, they are estopped afterwards, especially after a lapse of three or four years, to question the sale by a suit for possession.

A person whose property is sold in execution of a decree against another to which he was not a party is not bound by the sale when there is nothing to show that the judgment-debtor was the ostensible owner with his consent, either express or implied. **O** ABDUL RAZZAQ *v.* MUHAMMAD HAJJAM, 9 O. L. J. 181. **797**

Family agreement, *binding nature of.*

A family settlement is binding on the parties thereto because the object of such settlement is the reconciliation of existing differences and the avoidance of future disputes. **O** MUHAMMAD YAQUB KHAN *v.* MUHAMMAD SHAHID ALI KHAN, 9 O. L. J. 160; 25 O. C. 21 **556**

Ferry franchise, *whether can be acquired by prescription—Grant from Government—Presumption.*

A ferry franchise cannot be acquired by mere prescription. Facts must be proved from which, if there is no direct grant from the Government, it could be implied that such grant was actually made. **B** SHAMA DURGAJI *v.* GANGADHAR NARAYAN, 24 BOM. L. R. 445 **419**

Fire Insurance—*Contract of insurance—Contract of indemnity—Contract between insurer and insured—Third party even if mortgagee cannot sue on insurance policy—"Total loss," meaning of—Salvage—Mortgagee, when entitled to benefit of insurance—Prohibitory order, issue of, by telegram.*

A contract of insurance is a contract of indemnity. It is a contract by the insurer to indemnify the insured against the loss that he may suffer in certain conditions. It is not a contract to indemnify any other persons, and there is no privity of contract between the insurer and any third party. Therefore, a third party, even if he is a mortgagee of the insured property, cannot sue on the policy unless the right of the insured to sue has been assigned to him by a proper and legal assignment.

A 'total loss' means the destruction of the property or injury to it to such an extent as to render the insurer liable to pay the total sum insured.

When the insured has been indemnified to the full extent for a total loss, any salvage belonging to the insured is presumed, under such circumstances, to have been abandoned, and anything that may remain of the property belongs to the insurers to reimburse themselves so far as they can by selling the salvage for what it will fetch. That is an essential element in a contract of insurance.

Apart from Statute, the mortgagee is not *prima facie* entitled to the benefit of an insurance effected on the property by the mortgagor. In order to entitle the mortgagee to any claim on the policy there must be a covenant not only to insure but to insure for the benefit of the mortgagee or to apply the policy moneys in reinstatement or otherwise for the benefit of the mortgagee

Obiter—Courts are forbidden to issue prohibitory orders by telegram **L B** P. V. CHETTY FIRM *v.* MOTOR UNION INSURANCE CO, 11 L. B. R. 204 **777**

Government of India Act, 1915, (5 & 6 Geo. V, c. 61), s. 107. *See* CALCUTTA RENT ACT, 1920 **302**

Guardians and Wards Act (VIII of 1890), s. 29—*Sale by guardian of minor's property—Permission of Court—Punjab Pre-emption Act (I of 1913), s 3 (5) (a), application of*

In the case of a sale by the guardian of a minor's property where the terms of the sale are settled between the parties privately but in order to complete it permission of the Court is obtained under section 29 of the Guardians and Wards Act, the sale is completed by the guardian privately and cannot be said to have been effected in pursuance of an order of a Civil Court. Clause 5 *(a)* of section 3

Guardians and Wards Act—concld.

of the Punjab Pre-emption Act prohibiting a claim for pre-emption does not, therefore, apply to a case like this. L HAR KISHEN SINGH v. KALA RAM, 2 L. L. J. 261 **924**

——— **ss. 34 (d), 47**—*Order directing guardian to deposit money due to minor—Appeal—Revision.*

An order under section 34 *(d)* of the Guardians and Wards Act, directing a guardian to deposit into Court the money due to the minor is not subject to appeal, but the High Court may interfere in revision to correct a mistake apparent on the face of the record. L RADHA KISHEN v. KHUSHI RAM **309**

——— **s. 41 (2)**—*Guardian, discharge of—Essential of valid discharge.*

In the absence of an express order discharging him, the guardian of a minor is not relieved of his liability to render accounts. An order that nothing is due from the guardian according to the account filed by him does not operate as a discharge. L JAGAT SINGH v. SUNDAR SINGH, 3 L. L. J. 364 **935**

Hindu joint trading family—*Dayabhaga School—Distinction between ancestral business and one started after ancestor's death—New business started by Karta—Insolvency—Adjudication of adult members—Debt contracted for purposes of new business—Liability of minor's share*

The distinction between an ancestral business and one started after the death of the ancestor, as a source of partnership relations is this that in the one case these relations result by operation of law from a succession on the death of the ancestor to an established business, with its benefits and obligations; while in the other case they rest ultimately on contractual arrangement between the parties.

In a joint trading family governed by the Dayabhaga School of Hindu Law, the share of a minor is not liable for debts contracted for the purposes of a new business started by the *Karta* or manager of the family. On adjudication in insolvency of the adult members of the family, such minor's share does not vest in the Receiver If, however, any of the new firm's assets get into the possession of the minor, the Receiver is entitled to realise them for the benefit of the general body of creditors, an individual creditor cannot, in any event, realise those assets for his own benefit and without adding the Receiver as a party. P C SANYASI CHARAN MANDAL v. KRISHNADHAN BANERJI, 30 M. L. T. 228; 20 A. L. J. 409; 24 BOM. L. R. 700; 35 C. L. J. 498; 43 M. L. J. 41; (1922) M. W. N. 364; 49 C. 560; 26 C. W. N. 954; 16 L. W. 536 **124**

Hindu Law—Adoption—*Bombay Presidency—Widow, right of, to contest adoption made by her husband—Jains—Adoption—Ceremony, nature of*

In the Bombay Presidency a Hindu widow is not competent to contest an adoption made by her husband, and is bound to accept all the implications of an adoption made by him valid or invalid.

Per *Macleod, C J.*—Amongst Jains an adoption is more a secular than a religious ceremony, and is not looked upon in the same way as amongst the regenerate classes B CHIMABAI MALGAUDA PATIL v. MALLAPA PAYAPPA, 24 BOM. L. R. 489 **654**

Hindu Law—contd.

——— **Alienation** *by widow—Compromise decree, whether binding on reversioner—Burden of proof—Reference to Full Bench—Hypothetical questions.*

By the Full Bench.—In an action against a Hindu widow on a contract made by the widow, a compromise by which she makes over the estate stands on no different footing from a conveyance by her of the property; and the burden of proving that the compromise is binding on the reversioner is on the alienee.

Per *Schwabe, C. J.*—By the Hindu Law, a widow in possession of property inherited from her husband has a life-interest with power to alienate for necessaries. The reversioners are protected by the rule that if she does alienate the onus is on the alienee to show that the alienation was, in fact, for necessaries.

An order of reference to a Full Bench should not ask hypothetical questions or ask the Full Bench, so to speak, to give a dissertation on general principles of law but to do what is quite enough for any Judge to do, to answer the question which directly arises in the case before the Court

Per *Coutts Trotter, J.*— here a widow represents the estate it would be unreasonable to deny her the same discretion to avoid useless litigation as would be vested undeniably in a male manager.

But that must be subject to this qualification that where the obligation sought to be enforced against the estate is one of her own creation, she stands in exactly the same position with regard to the justification of the compromise as she does with regard to that of her original contract, and is clothed with no higher authority and no less degree of responsibility by the accident that she has superadded to her character of a widow in possession that of a litigant.

The rule that a widow, as representing the estate, can effectually settle claims arising out of the acts of others is a salutary one—*ut sit finis litium.* But to give her the same power in relation to her own acts would be to make her, as it were, a judge in her own cause

Per *Kumaraswami, J.*—In considering the question as to whether a compromise arrived at by the widow is binding on the reversioners, the main consideration is whether the suit or claim against the widow is a suit or claim arising out of a contract or transaction entered into by her husband with strangers who claim against the estate or whether the suit is upon a contract or transaction which is entered into by the widow herself. In the former case there can be little doubt that she represents the estate and a *bona fide* compromise by her would bind the reversioners In the latter case there is always the question as to whether she acted in her individual capacity or whether she acted as representing the estate. This question has to be solved in cases where the suit proceeds to trial by the evidence adduced in the case and the findings on the issues. A mere allegation by the plaintiff that the widow acted for the estate or a mere assertion by her that she so acted would not by itself show that she acted in her representative capacity or that the decree is binding on the reversioners.

Hindu Law—contd.

In cases of compromise where the suit is on a contract by the widow or in cases where the cause of action is personal to her, she cannot, by simply consenting to a decree, make that which can only bind her life-interest if the matter rested merely on a contract or conveyance, bar the reversioners. If there was no decree, the onus would clearly be on the alienee to show necessity and the recitals in the document would not by themselves prove necessity.

A widow cannot do what is beyond her legal powers by simply going to Court and filing a compromise petition or consenting to a decree.

A widow's action in alienating her husband's estate for her private debt or for a purpose which under Hindu Law would not amount to necessity is beyond her powers, and she cannot take advantage of her representative capacity to validate a purely personal transaction. The interposition of a decree by consent would not make any difference as to the onus of proof in such cases. **M** NALLA TIRUPATIRAJU *v.* NANDIKOLLA VENKAYYA, 15 L. W. 395; 30 M. L. T. 181; 42 M. L. J. 392; (1922) M. W. N. 2[illegible]7; 45 M. 50[illegible] **479**

——— **"Antecedent debt"**—*Debt secured by mortgage of joint property, whether antecedent—Son's pious obligation to pay father's debts—Doctrine, whether can be invoked during father's lifetime*—Mitakshara—*Alienation by co-parcener.*

Under Hindu Law a debt to be "antecedent" must not only be antecedent to the alienation in time but must have been incurred wholly apart from the ownership of the joint estate or the security afforded or supposed to be available by such joint estate.

Therefore, a mortgage which is at its date an invalid deed in so far as it purports to encumber the joint family property cannot, on the principle of "antecedent debt," become a just and valid consideration for an alienation by the father of a Hindu joint family.

The doctrine of the "pious obligation" of a Hindu son to pay his father's debts cannot be invoked during the father's lifetime Thus, the grandson's assets cannot be made liable for his grandfather's debts while the father is alive.

According to the Mitakshara Law, joint family property cannot be the subject of a gift, sale or mortgage by one co-parcener except with the consent, express or implied, of all the other co-parceners Any deed of gift, sale or mortgage granted by one co-parcener on his own account of or over the joint family property is invalid, the estate is wholly unaffected by it, and stands entirely free of it. **P** CHET RAM *v.* RAM SINGH, 3 P. L. T. 363; 31 M. L. T. 50; 43 M. L. J. 9; 16 L. W. 89; (1922) M. W. N. 455; 4 U. P. L. R. (P. C.) 64; 44 A. 368; 3 P. L. R. 1922 **569**

——— ——— *Pre-emption decree, money required for—Mortgage of ancestral property to pay off the decree—Ancestral property, liability of*

A pre-emption decree merely gives the decree-holder the option of acquiring certain property at a certain price. He is not thereby laid under any obligation to acquire that property Consequently money required to satisfy such a decree is not an antecedent debt due from the decree-holder, and, therefore, if the decree-holder hypothecates joint ancestral property in order to take advantage of the decree, the hypothecation is not binding on the family property as having been made to pay off an antecedent debt.

To give true effect to the doctrine of antecedency in time, there must be real dissociation in fact. **A** CHATUR BHUJ *v.* GOBIND RAM, 4 U. P. L. R. (A.) 43 **668**

——— **Dayanandis,** *whether Hindus.*

A Dayanandi, that is to say, a follower of Pandit Dayanand Saraswati, the founder of the Arya Samaj, is a Hindu. **Pat** SURAJ JOTE KUER *v.* ATTAR KUMARI, (1922 PAT 235; 8 P. L. T. 65[illegible] **550**

——— **Endowent**—*Income of village credited to temple for 60 years but not regularly*—Debutter *property.*

The fact that for the last 60 years credits, varying in amounts, have been made, not regularly every year but only in certain years, from the income of a village to a temple, is insufficient to prove that the village is *debutter* property **N** MUKUNDSINGH *v.* PREMDAS **258**

——— ——— *Manager of trust refusing to act—Founder's widow taking up management—Appointment by widow of another manager under Will, validity of.*

A Hindu by a Will created a trust in favour of an idol and appointed a manager for the purpose and assigned to the managers of another temple the right of interfering in case of a breach of trust. The manager appointed by the Will did not take upon himself the duties of that office, whereupon the widow of the founder took possession of the property and continued to manage it till her death: during her lifetime, however, she executed a Will whereby she appointed a relative of hers to succeed to the office of manager in her place. The reversioner of the original donor questioned the power of the widow to make the appointment:

Held, per *Walsh, J.*—The widow as the heir to her husband could not create an interest beyond her lifetime and consequently had no right to bind a reversioner by appointing a manager to act after her death. No special rights having been bestowed upon her by the original deed of endowment, she had no such right under either Hindu Law or custom

Per *Piggott, J.*—Though the widow, as representing the estate of the deceased, could make an appointment to inure beyond her lifetime, she had no right virtually to appoint herself as manager and then to endeavour, by means of a testamentary disposition, to take effect after her death, to continue this management in favour of relatives of her own. **A** GOSWAMI PURAN LALJI *v.* RAS BEHARI LAL, 20 A. L. J. 527; 4 U. P. L. R. (A.) 119 **328**

——— **Gift**—*Widow—Alienation.*

The proposition that under the Hindu Law in the case of a gift of immoveable property to a Hindu widow, she has no power to alienate unless such power is expressly conferred, is not accurate, as it is possible by the use of words of sufficient amplitude to convey in the terms of the gift itself the fullest

Hindu Law—contd.

rights of ownership including the power to alienate. **P C** RAMACHANDRA RAO v RAMACHANDRA RAO, 0 M. L. T. 154; 26 C. W N 7 3; 45 M. 320; 5 O. L. J. 545; 16 L. W. 1; (1922) M. W. N. 359; 20 A. L. J. 684; 43 M. L J. 78; 24 BOM. L. R. 963 **408**

——— **Joint estate**—*Separation in mess—Possession of one co-sharer, whether adverse to other co-sharers.*

In the case of a joint estate, the fact that the co-sharers are separate in mess, would not render the possession of one co-sharer adverse to the others. **C** HEMANGINI DASI v. SITAL MONDAL **300**

——— **Joint family**—*Alienation by father—Suit to set aside alienation by son—Burden of proof—Refund of purchase-money—Possession.*

A son in a joint Hindu family is entitled to set aside an alienation by his father of ancestral property which has not been effected for the payment of an antecedent debt or for any family necessity. He is not bound to prove that the purchase-money was taken by the father for immoral purposes.

In such a case the son can maintain a suit for joint possession of the property alienated, being himself a co-parcener in the property. **L** KALI CHARN v. JAGGU **89**

——— ——— *Alienation, invalid, suit to set aside—Manager, position of—Individual members, position of—Individual members to sue only for their own shares.*

Although the manager of a joint Hindu family can, in the case of an alienation of the family property, sue to recover the entire property on behalf of the family, individual members of the family cannot claim to do so but can, only maintain a suit in respect of their own shares. **O** MAHESH DAT v RAM ASRE, 9 O. L. J. 138; 4 U. P. L. R. (J. C.) 38 **814**

——— ——— *Debt—Legal necessity, want of, for stipulated rate of interest—Issue, whether must be raised in pleadings*—Onus.

In a suit to enforce a debt incurred by the manager of a joint Hindu family, if the plea of want of necessity of the particular rate of interest at which the money was borrowed is to be taken in addition to that of want of necessity for the debt itself, it must be raised in the pleadings. The facts necessary to prove legal necessity for the debt may be entirely different from those which may be necessary to prove the necessity for borrowing money at the particular rate of interest, and unless the plea is taken in the pleadings, the only onus which remains on the plaintiff is that of proving that the borrowing of the money was justified by legal necessity. A defendant cannot be allowed to raise the plea for the first time in appeal. **Pat** AITHAN GOPE v. KHAKHAR SAHU, 3 P. L. T. 367 **790**

——— ——— Decree against managing member. **56**
See EXECUTION OF DECREE

——— ——— *Manager, whether sufficient party in proceeding against family*

Where the members of a joint Hindu family are properly and effectively represented in a suit by the managing members, a Court is not bound to set aside the execution proceedings, where substantial justice has been done, merely because every existing member of the family was not made a party to the suit **O** SAT DEO v JAI NATH, 9 O. L J. 141; 4 U. P. L. R. (J. C) 43 **808**

——— **Joint family**—*Members holding land in specified shares—Specific shares entered in Revenue Records—Separation.*

Where one member of a Hindu family, in a suit to contest an alienation by another member of his share in the family property, admits in the plaint that the property was held by the members of the family in certain specific shares, such admission, coupled with an entry in the Revenue Records that the property was held in equal shares by the members of the family, is evidence of a separation having taken place between such members, and is inconsistent with the position that the property was held by the members of the family as co-parceners, for until partition takes place the shares of the several co-parceners in a joint Hindu family cannot be defined. **L** DATA RAM v. BADLU, 4 U. P. L. R. (L.) 62 **148**

——— ——— Sale by father—Son, whether can pre-empt. *See* PRE-EMPTION **76**

——— ——— *Separation between sons—Arbitration—Mother not party—Maintenance allowed to mother instead of share—Mother, whether bound—Contract—Enforcement by third person deriving benefit—Heir of third person, position of—Contract Act (IX of 1872), s 37.*

In a joint Hindu family consisting of a mother, her son and a grandson by a predeceased son, the last two wishing to separate, referred the matter to arbitration, and under the award which followed, divided the property among themselves, undertaking to contribute equally a certain sum for the maintenance of the mother The latter did not recognise this arrangement and lived for the rest of her life with her son On her death, the latter, as the heir to his mother's *stridhana*, sued the grandson for the arrears of maintenance:

Held, (1 that the mother being entitled to a third share under Hindu Law and being no party to the arbitration, was not bound to accept the maintenance allotted to her:

(2) that the mother not being privy to the contract of arbitration could not have brought a suit for the maintenance allowed to her under it:

(3) that, therefore, her son was debarred from suing for the same under section 37 of the Contract Act. **L** DIWAN CHAND v. BISHEN DAS, 2 L. L. J. 255 **919**

——— ——— *Separation — Proof — Intention—Share specified in Will.*

An unequivocal declaration by a member of a joint Hindu family of his intention to be divided in status is sufficient to effect a severance of the co-parcenary body without an agreement between all the co-parceners being required.

The execution of a Will by a member of a joint Hindu family in which he specifies his share in the joint family property, is sufficient to effect a severance. **L** JUMMA RAM v. MANSAB RAI **812**

——— **Math**—*Alienation by Mahant—Suit to set aside—Cause of action—Property, vesting of, in idol and in Mahant, distinction between—Different causes of action — Legal necessity — Direct proof impossible—Recitals in sale-deed, value of—Mahant, whether "trustee."*

Hindu Law—contd.

Where property is vested in a juridical person and such property is transferred by a person who is only the representative and manager of that juridical person, such transfer is a direct challenge upon the title of the juridical person, and there is adverse possession to the right of that person from the date of the transfer, and a suit to contest such a transfer must be brought within 12 years from that date. But where the property is vested in the Mahant or *shebait*, the act of alienation is not a challenge upon the title of the juridical person, though the property may be endowed property, in the sense that its income has to be appropriated to the purposes of the endowment, and there is no adverse possession so long as the person making the alienation is alive, the possession of the alienee becomes adverse when a new title comes into existence which is capable of maintaining a suit and which has not approved of, or acquiesced in, the alienation.

Where in respect of a deed of sale proof of necessity has become almost impossible, the recitals in the deed that there was representation as to the existence of necessity, coupled with such evidence as will establish that the circumstances were such as to justify a reasonable belief that an enquiry would have confirmed the truth of the representation that there was necessity of which the recital is evidence, will be sufficient evidence to support the deed. **Pat** RAMRUP GIR *v.* LAL CHAND MARWARI, 3 P. L. T. 52 **401**

—— **Minor**—*Alienation of minor's property by de facto guardian for benefit of minor—Document attempting to alter rule of succession, validity of—Construction of document—Document disinheriting son, nature of—Registration Act (XVI of 1908), s. 17.*

A document recited that from the date of its execution the executant ceased to have any connection with one of his sons, that the latter would have no concern with any of the former's property, and that after the death of the former and his wife the latter would have no rights as a son of the former, and that his other sons would perform the funeral ceremonies :

Held, (1) that the recital that the disinherited son would not have the rights of a son after the executant's death referred to rights of a religious character and not to rights in the property ;

(2) that the meaning of the document was that the son was to lose all his rights in the father's property from the date of the execution of the document;

(3) that the document was not a Will, and being unregistered was not admissible in evidence :

(4) that, apart from the question of registration, the document, inasmuch as it contained no mention of a gift of the property being made to any person, and purported to alter the rule of Hindu Law regarding succession, was void.

An alienation of the property of a Hindu minor by his *de facto* guardian found to be for the benefit of the minor is valid and cannot be questioned in second appeal. **L** MADAN LAL *v.* LABHU RAM **431**

—— *girl — Guardian for marriage—Paternal uncle—Mother.*

Hindu Law—contd.

Under the Hindu Law, the mother is, after the father, the guardian of her minor daughter and her right to select a bridegroom for the girl is prior to that of the paternal kindred. **L** JIWANI *v.* MULA RAM, 3 L. 24 67 P. L. R. 922 **253**

—— **Partition**—*Family property — Purchaser of one item, whether can sue for partition of that item—General partition.*

It is not competent to a purchaser of a particular item of joint family property to sue for a partition of that particular item, without suing for partition in which the whole family property would be included and all the necessary parties joined.

Where the whole of the family property has been conveyed to strangers whether by joint action between the members of the family or by separate actions against which no dispute is raised, a suit may lie by one stranger against another stranger for the partition of a particular item of property in dispute **B** ISHRAPPA GANAP HEGDE *v.* KRISHNA PUTTA SHANKAR HEGDE, 24 BOM. L. R. 428 **833**

—— **Partition suit**—*Grandson, whether necessary party—Grandson, whether can claim partition*

In a partition suit under the Hindu Law grandsons although proper parties are not necessary parties, as their interests are fully represented by their father.

In this case in an appeal against a preliminary decree for partition on the ground that the grandsons were not made parties the High Court, holding that this was not a fatal defect, directed the lower Court to bring them on the record and allot to them separate shares if they wanted.

Obiter.—Under Hindu Law a grandson can claim partition as against his grandfather **Pat** DIGAMBAR MAHTON *v.* DHANRAJ MAHTON, 3 P. L. T. 238 **156**

—— **Succession**—*Posthumous son, rights of—Alienation by widow, if binding—Analogy of adopted son—Analogy of family settlement, application of.*

The right of succession, under Hindu Law, is a right which vests immediately on the death of the owner of the property and cannot under any circumstances remain in abeyance in expectation of the birth of a preferable heir. To this fundamental rule there is an apparent exception in the case of a child already conceived and in the womb of its mother who will, on his birth, divest the estate of any person with a title inferior to his own who has taken in the meantime.

The title of a posthumous son relates back to the time of the death of his father.

The rights of an after-born son in the case of a disposition of the estate by his mother before his birth should be determined on the analogy of his rights in the event of a partition before his birth. Consequently a posthumous son would not be bound by an alienation by his mother of his paternal estate before his birth.

The analogy of a family settlement being binding on the minors is not applicable to such a case, nor is that of an adopted son's rights to question previous act of the adopting widow.

Obiter dicta — An unborn child is supposed to be born when it is for its benefit to be so considered but this fiction does not apply when the advantage accrues to third persons.

Hindu Law—contd.

An alienation made by the widow for legal necessity before adoption is valid and will bind the adopted son: but an alienation made without such necessity is good only up to the date of adoption; after that date, the alienee has no power to retain the property as against the adopted son and must deliver it to him. The rights of the adopted son are, for this purpose, deemed to spring into existence at the moment of his adoption and displace the rights of the widow; they do not await the determination of the widow's estate by her death as in the case of reversioners. **C** KUSUM KUMARI DASI v. DASARATHI SINHA, 34 C. L. J. 323 **210**

——— **Surrender** *by widow in favour of daughter—Insignificant portion of husband's property not included—Acceleration of daughter's inheritance.*

A relinquishment by a Hindu widow in favour of her daughter does not fail to accelerate the inheritance in favour of the latter simply because an insignificant portion of the husband's property is not included in the gift. **N** SUPDI v. MARUTI **960**

——— ——— *of estate by widow—Reservation of absolute estate in portion for maintenance—Validity of surrender.*

A surrender by a widow of her husband's estate is not invalid merely because she bargains for an absolute estate in a portion of the estate for her maintenance, so long as the lands allotted to her for maintenance are not in excess of her requirements for maintenance and the transaction is otherwise fair.

A reservation for maintenance to be valid need not be only of a life-estate. **M** KARUPPA GOUNDAN v. MUDALI GOUNDAN, (1922) M. W. N. 259; 43 M. L. J. 36 **397**

——— **Widow**—*Alienation — Alienation set aside—Alienee, right of, to refund of consideration money*

If it has been proved that a sale by a widow having a limited interest has benefited the estate by the payment of debts which were binding on it, although the amount paid may not amount to the whole of the consideration money received for the property sold, the Court, when it sets aside the sale, will direct payment to the alienee to the extent of the benefit received by the estate, and it must follow that if the consideration money for the sale is found intact at the death of the widow, the estate has benefited to that extent, so that if the reversioner after the widow's death wishes to have the sale by her set aside, he can only succeed if he restores the money. **E** JETHABHAI DAVE v. GOVINDRAM JOSHI, 24 BOM L. R. 443 **658**

——— ——— *Alienation—Legal necessity—Burden of proof.*

A Hindu widow cannot sell more than her own interest unless there is legal necessity and in case of a sale by the widow the onus is on the purchaser to prove that the sale is for necessity. **B** MOHANSING UMED RAMOL v. DALPATSING KANBAJI, 24 BOM. L. R. 289; 46 B. 703 **235**

——— ——— *Maintenance—Liability of purchaser of deceased husband's property.*

Where a Hindu widow is entitled to receive maintenance out of the estate of her deceased husband, the person who has succeeded to the estate cannot, if he seeks to defraud the widow, by any device in the way of parting with the estate or changing its form, get rid of the liability which has come to him along with the advantage derived from his survivorship, and a transferee taking from him with reason to suppose that the transaction is one originating not in an honest desire to pay off debts, or satisfy claims for which the estate is justly liable, and which it cannot otherwise well meet but in a design to shuffle off a moral and legal liability would, as sharing in the proposed fraud, be prevented from gaining by it, but if, though he knows of the widow's existence and her claim, he buys upon a rational and honest opinion that the sale is one that can be effected without any furtherance of wrong, he has, as against the widow, acquired a title free from the claim which still subsists in full force as against the recipient of the purchase-money. **L** BHAGAT RAM v. SAHIB DEVI, 3 L. 55; 21 P. W. R. 922 **848**

——— **Widow,** *usufructuary mortgage by—Property let out to tenants - Death of widow—Rents, unrealised, by the mortgagee - Accretions—Presumption — Construction of document - Mortgage-deed, interpretation of—Hindu widow - Mortgage with personal liability—Liability, whether enforceable after her death—Transfer of Property Act (IV of 1882), s 68 (a).*

The presumption whether a Hindu widow dealt with the income of her deceased husband's estate as to make it an accretion to the corpus or not, must depend upon the circumstances of every case

Where a Hindu widow creates a usufructuary mortgage of any property let out to tenants, rents actually fallen due at her death, though remaining unrealised by the mortgagees, cannot be treated as accretions to her husband's estate as in the real sense those rents—being transferred to the mortgagees must be considered to have been already spent by the widow, thus leaving no doubt as to her intention to treat them as personal property.

Apart from any question of Hindu Law the mortgagees, in such a case, being really the landlords up to the date of the widow's death, rents fallen due during that period must be held to be due to them and not to their successors whoever they may be.

Where a Hindu widow executes a mortgage of property belonging to her husband but declares that the mortgagee would, if and whenever deprived of the same, be entitled to recover the mortgage-money from her personal property, the words are wide enough to include the enforcement of the personal liability even after her death In a clear contract of this nature it is not necessary to interpret it in the light of the law of mortgages, although that law itself, as laid down in section 68 *(a)* of the Transfer of Property Act, would support this view. **O** CHHANNU LAL v. RAJ KUAR, 9 O L. J. 24 **16**

Hindu reversioner, whether a person lawfully interested in making payment to save property from sale under the Bengal Public Demands Recovery Act (III of 1913). *See* CONTRACT ACT, s. 70 **40**

Hindu widow—*Alienation without legal necessity—Alienee building on land alienated, position of—Transfer of Property Act (IV of 1882), s. 51, application of.*

Hindu Widow—concld.

A mortgagee of a piece of land from a Hindu widow who advances the loan without making proper enquiries about there being any legal necessity for the same, and builds a house upon the land, cannot, when the mortgage is declared invalid, claim the cost of the house inasmuch as he did not act in good faith, but he may be allowed to take away his materials. **A** HANS RAJ *v.* SOMNI, 20 A. L. J. 524; 4 U. P. L R (A.) 118 **314**

——— *Conversion—Re-marriage—Forfeiture of life-estate.*

A Hindu widow's right to succession is based on the ground that she is half of the body of her deceased husband and that she is capable of conferring spiritual benefits on him. When she re-marries she ceases to be half of the body of her late husband or to be able to confer spiritual benefits on him and she becomes the wife and half of the body of her new husband. The reason, therefore, for her keeping the estate of her deceased husband disappears **Pat** SURAJ JOTE KUER *v.* ATTAR KUMARI, (1922) PAT. 235; 3 P. L T. 551 **550**

Hindu Widows' Re-marriage Act (XV of 1856), s. 2, *whether includes Hindu widows after conversion.*

A Hindu widow after conversion and subsequent re-marriage forfeits her rights to her husband's property.

Section 2 of the Hindu Widows' Re-marriage Act (XV of 1856 includes all persons who being Hindus become widows.

The Hindu Widows' Re-marriage Act applies even to those sects of Hindus, in which widow re-marriage is recognised. The Act validates the marriage of a Hindu widow and still deprives her of her property.

Even in the case of those classes of Hindus amongst whom widow re-marriage is recognised, a widow would lose her rights to her husband's property, unless it is established affirmatively, that by custom the recongition of re-marriage carries with it the right to retain the deceased husband's estate **Pat** SURAJ JOTE KUER *v.* ATTAR KUMARI, (1922) PAT 235; 3 P. L. T 551 **550**

Hindu Will—*Construction—Provision for worship of family idols—No gift to idols*—Shebaitship—*Destination of property*—Res judicata.

The Will of a Hindu testatrix was addressed to her grandson and directed that out of the income of certain specific property, he should perform the worship of the family idols and that the balance of the income should be divided between the representatives of the three branches of her own family. There was no provision for the worship of the idols after the death of the grandson. On the death of the grandson, administration proceedings were taken and it was decided that out of the produce of the houses belonging to the estate of the testatrix, the worship of the idols should be performed and that the surplus should be paid equally to the three branches of the family. This was adopted in a decree of 1888 to which the respondents' branch was a party:

Held, (1) that there was no gift of the whole property to the idols;

Hindu Will—concld.

(2) that no heritable *shebaitship* was established;

(3) that the representatives of the three beneficiaries under the Will were entitled to the residue absolutely and in equal shares;

(4) that the gift being a private trust section 92 of Civil Procedure Code did not apply and, therefore, the establishment of a scheme for its administration was inappropriate; and

(5) that the order in the administration suit was binding on all the parties and operated as *res judicata*.

P C GOPAL LAL SETT *v.* PURNA CHANDRA BASAK, 20 A. L. J. 625. 43 M. L. J. 116; 36 C. L. J. 57; 49 C. 459; 24 BOM. L. R. 937 **531**

Imperfect partition—*C. P. Tenancy Act (XI of 1898), ss. 46, 47—Transfers of holding less than Rs. 100 in value — Registration — Transfer, whether vitiated by fraud—Remedy to set aside transfer.*

When two co-proprietors of a village divide up the *sir* land between them, to hold portions of it separately, they make an imperfect partition of that village, each has a separate *patti* comprising the *sir* land he holds in severalty, and the whole of the rest of the village forms what is called a *shamilat patti*.

The mention in section 47 of Act XI of 1898 (C. P. Tenancy Act of the provisions of section 46 includes the provisions of both sub-sections (3) and (5) of that section and does not refer to those of sub-section (3) only and that section 47 applies to transfers in which the consideration is above Rs 100, as well as to those of less value provided no question of fraud arises, which will vitiate any transaction of itself.

The proper remedy of a landlord to set aside a transfer of an occupancy land by a tenant, not vitiated by fraud, is by an application by him under section 47 of the Tenancy Act and not by a civil suit. **N** CHUNGA PRASAD *v.* PHULWA **121**

Income Tax Act (VII of 1918), s. 8—*"House property," meaning of—Interpretation of fiscal and taxing Statutes—Occupation of house rent-free, whether "income."*

The business premises, built by a Company for their own use as a shop, godown and office and occupied by themselves for carrying on their business there, are not assessable as "house property" under section 8 of the Income Tax Act (VII of 1918.

Per *Robinson, C J.*—The expression "house property" conveys the idea of buildings used for residential purposes. The word "house" does not mean any building erected for the use of man and, therefore, does not include all buildings of any description.

It is for the Crown to show that business premises fall within the expression "house property" The Crown seeking to recover the tax, must bring the subject within the letter of the law, otherwise the subject is free, however much within the spirit of the law the case might appear to be There can be no equitable construction admissible in a fiscal Statute the benefit of the doubt is the right of the subject.

Obiter.—The occupation of a house rent-free is not income.

Per *Maung Kin, J.*—The ordinary meaning of the word "house" is a building used for human habitation or as the dwelling place of human beings and when it is used with other words, as in "coffee-house," "play-house," "ware-house," the previous word is regarded as the defining prefix indicating a meaning different to the ordinary meaning of the general word "house". The word must, therefore, be construed as a dwelling house unless, reading the Statute as a whole, the context directs a departure from that meaning.

In Statutes of taxation the imposition of a duty must be in plain terms Such a Statute must be construed strictly and the onus lies upon the rown to show that the person whom it is sought to tax falls clearly within its operation

If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be In other words, if there be admissible, in any Statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing Statute, where simply the words of the Statute must be adhered to

The benefit of the doubt is the right of the subject. **L B** MESSRS. ROWE & CO *v.* SECRETARY OF STATE, 11 L B R 2-9 **781**

——— **ss. 31, 32, 33, 34**—*Agent, who may be—Agent must be in receipt of income - Indian Company, whether an agent of its share-holders resident outside British India.*

Six persons, residing out of British India, were share-holders in an Indian Company, the income of which arose and accrued in British India. The profits due to those six share-holders were sent out to them by the Company, which on being assessed on the income of those six share-holders as the agent of the non-resident persons, objected that it could not be so assessed :

Held, per *Woodroffe and Greaves, JJ.* (*Ghose, J.* dissenting that, under the circumstances of the case, the Company was neither an agent for, nor in receipt of income on behalf of, the six non-resident share-holders.

Sections 31 and 34 of the Income Tax Act (VII of 1918) should be read together and not disjointly The latter section merely defines who may be included as an agent under the former section.

To render an agent liable for income-tax for a person residing out of British India whether section 31 or section 34 be looked at, in either case the former must be in receipt of income on behalf of the latter within the terms of section 31.

Per *Ghose, J*—A Company incorporated according to law, is an artificial legal person having an existence separate from its corporators There is, therefore, no legal impediment to a Company being agent for any of its share-holders. The relation, however, of share-holder and Company is not in itself the relation of principal and agent.

The agent of a non-resident person need not be in receipt of income on behalf of such person. The

mere fact of agency is sufficient to make him liable to be assessed in respect of the income of the principal

Section 34 gives merely an extension of the meaning of the term "agent" as including persons who are treated as such and who may be assessed under section 31 (1) although such persons are not really agents. section 34 should be read in connection with the preceding section rather than with section 31. Section 34 refers to cases where the non-resident person has no agent in British India appointed by himself and, therefore, it becomes necessary to find a person who should be "deemed to be an agent" only for the purpose of the Income Tax Act.

Section 34, Income Tax Act, was enacted for the purpose of assessing the income of non-resident persons when they have not appointed agents residing in British India who might be assessed under section 31 (1). **C** IMPERIAL TOBACCO CO OF INDIA LTD. *v.* SECRETARY OF STATE FOR INDIA, 26 C. W N. 743; 4 C. 721 **902**

——— **s. 51 (1)**—*Business of Company—Buying and selling land—Question of fact—Decision of Revenue Authorities final—Reference—Jurisdiction of High Court.*

The question whether, for purposes of the income-tax, the main object of a Company is the purchase and sale of land, or whether the real object is the development of land and the sale of land is only a subsidiary object in short, the question, whether the business of a Company is the buying and selling of land, is a simple question of fact, on which the decision of the Revenue Authorities is final, and the High Court has no power to decide whether their findings of fact are incorrect, since they do not involve any question regarding the interpretation of any of the provisions of the Income Tax Act. **L B** AHLONE LAND CO. LTD. *v.* SECRETARY OF STATE FOR INDIA, 11 L. B. R. 309 **633**

Indian Soldier's (Litigation) Act (IX of 1918), s. 11—*Limitation Act (IX of 1918), s 6.*

In order to obtain the benefit of the provisions of section 11 of Act IX of 1918, the person claiming the benefit must show that he was absent serving under war conditions before the limitation to institute a suit expired **L** FEROZ *v* GHULAM SARWAR **379**

Injunction—*Discretion—Duty of Court—Injury to defendant*

In dealing with suits for injunction the Court has to consider in each case not merely whether the plaintiff's legal right has been infringed or even materially infringed, but also whether, under all the circumstances of the case, he ought to be granted an injunction as the proper and appropriate remedy for such infringement.

Where a suit for injunction is prompted by a desire to cause injury to the defendant, the Court will refuse to grant an injunction. **L** RAM CHANDRA *v.* RAGHBIR SINGH, 4 U. P. L. R. (L.) 69 **299**

Instalment decree——*Failure to pay one instalment—Subsequent instalments paid—Payment, appropriation of—Court, duty of.*

Where a decree directs payment of a certain sum of money by instalments, it is the duty of the Court, when instalments are paid, to appropriate them

Instalment decree—concld.

to the earliest instalment unpaid. The debtor cannot allow such earlier instalment to remain unpaid, unless at the time he makes the payment, the instalment was already barred by limitation. **B** HANMANT TIMAJI DESAI *v.* RAGHAVENDRARAO GURURAO DESAI, 24 BOM. L. R. 410 **847**

Interest—*Penal character—Competency of a Court to grant relief.*

A Court is competent to grant relief whenever the rate of interest appears to be of a penal character, *i. e.*, so unconscionable and extravagant that no Court shall allow it.

In this case a stipulation of 25 per cent. compound interest on a seed-grain debt, which was to run for 16 years, was considered unconscionable and 3 per cent. simple interest was allowed instead. **N** HOOKAMCHAND *v* NIDHANSING **245**

Interlocutory order—*Appeal—Jurisdiction, defect of—Failure of justice—Revision—Decrees, preliminary and final—Appeal from preliminary decree only not maintainable.*

No appeal lies from an interlocutory order, and if an Appellate Court entertains an appeal from such an order it acts without jurisdiction and any order passed by it is bad

The High Court is not bound to interfere on the revision side even when there is a defect of jurisdiction unless failure of justice has directly resulted from such a defect,

After a final decree has been made, whether or not an appeal has been preferred against the preliminary decree, it is the duty of the party aggrieved by the final decree to prefer an appeal against the final decree and an appeal, therefore, against the preliminary decree, without challenging the final decree cannot be entertained. **L** GANDA RAM *v* SUNDAR LAL, 7 L. L. J. 673 **278**

Interpretation of Statutes—*Hardship.*

It is a well-established rule that Courts ought not to be influenced by any notion of hardship in exceptional or individual cases in interpreting a Statute **C** IMPERIAL TOBACCO CO OF INDIA LTD *v.* SECRETARY OF STATE FOR INDIA, 26 C. W. N. 745; 49 C. 721 **902**

Joint owner *effecting in good faith valuable improvements upon common property — Equitable consideration upon partition.*

If a joint owner has in good faith effected valuable improvements upon the common property at his own expense, equity takes that fact into consideration upon a partition and in some suitable way makes an allowance to him therefor, in addition to his rateable share of the property. **C** JAGGANNATH MARWARI *v.* CHANDNI BIBI, 34 C. L. J. 432; 26 C. W. N. 65 **31**

Joint trial—Plea of accused in defence, effect of. *See* EVIDENCE ACT **343**

Judgment based upon compromise, value of. *See* PUNJAB PRE-EMPTION ACT, s. 7 **71**

Jurisdiction *of Civil Courts, when ousted.*

In cases where the action of the Revenue Authorities is wholly unauthorised, section 37 of the Public Demands Recovery Act, 1913, does not oust the jurisdiction of the Civil Court to make a declaration, to issue an injunction or otherwise to grant adequate relief. **C** PRATAP CHANDRA JANA *v.* SECRETARY OF STATE FOR INDIA, 35 C. L. J. 304 **375**

Khoti Settlement Act (I of 1880), s. 21—*Entry in Settlement Register, whether final—Decision of Recording Officer, binding effect of—"Such decision or entry," meaning of.*

It is nowhere provided in the Khoti Settlement Act, 1880, that the mere entry in the Settlement Register of the name of a particular person as the occupant of a Survey Number is either final and conclusive, or that it is binding upon all parties concerned unless and until it is reversed or modified by a decree of the Civil Court.

Under section 21 of that Act, it is the *decision* of the Recording Officer which is made binding, and not a mere *entry* of a person's name in the Settlement Register.

The expression "such decision or entry" in section 21 of the Act means, such decision or the entry which is the result of such decision **B** RAJARAM SITARAM *v.* JAGANNATH GOVINDRAO YESHWANTRAO, 24 BOM. L. R. 323 **322**

Land acquisition—*Principle of assessing compensation—Potential value—Operative effect of special adaptability or future utility—Test.*

Tribunals assessing compensation must take into account, not only the present purpose for which the land is acquired, but also any other more beneficial purpose to which in the course of events it might, within a reasonable period, be applied, just as an owner might do if he were bargaining with a purchaser in the market.

The operative effect of special adaptability or future utility must be estimated, not by idle speculation and impractical imagination, but by prudent business considerations such as would weigh with an intending purchaser at the imaginary market which would have ruled, had the land been exposed for sale when it was subjected to compulsory acquisition.

Too much importance must not be attached to evidence of offers in ascertaining the market value of land; but the position is different where the question is, whether there is a market at all for a tract of land for use for a special purpose.

Per *Buckland, J.*—In assessing the compensation payable enquiry should be made as to what is the market value of the land when laid out in the most lucrative and advantageous way in which the owner could dispose of it. Whether or not the particular way in which it is claimed that the land if so laid out could be disposed to the best advantage to the owner is one appropriate to prevailing conditions is a question of fact to be decided according to the circumstances of each case **C** MOHINI MOHAN BANERJEE *v.* SECRETARY OF STATE FOR INDIA, 25 C. W. N. 1002; 34 C. L. J. 188 **25**

Land Acquisition Act (I of 1894), ss. 18, 25, 24 (1)—*Hindu widow—Claim for compensation at certain rate—Reversioners, whether can claim at higher rate—Land, valuation of—"Applicant," meaning of.*

Although under section 25 of the Land Acquisition Act claimants and their legal representatives are estopped from getting more from the Judge than what they claimed before the Collector, the reversioners of a Hindu widow, not being the legal representatives of the widow, are not bound by her acts on any principle of estoppel and can claim compensation at a higher rate,

Land Acquisition Act—contd.

The purpose for which land has been acquired is an element for consideration in estimating its value, though under section 24 (1) the Court is precluded from considering the increase of its value likely to arise from the use to which it will be put.

The word "applicant" in section 25 is used to describe the person who puts in a written application under section 18 for having his objection to the Collector's award referred for determination by a Civil Court. He is not necessarily identical with the person who makes a claim after notice under section 9. **M** GATTINENI PEDA GOPAYYA *v.* DEPUTY COLLECTOR OF TENALI, 5 L. W. 366; 42 M. L. J 298; (1922) M. W. N. 198; 45 M. 421 **146**

——— **s. 32**—*"Investment in the purchase of other lands," whether includes erection of buildings.*

Having regard to the definition of the expression "land," the words "invested in the purchase of other lands" in section 32 of the Land Acquisition Act as amended by the Calcutta Improvement Trust Act include the erection of buildings upon the land.

Where, therefore, a *debutter* property is acquired by the Calcutta Improvement Trust, the amount of compensation for that property must be paid over to the trustees if the President of the Trust is satisfied that the money would be invested by the trustees in the erection of buildings. **C** GANENDRA MALLICK, *In re*, 25 C. W. N. 597 **18**

——— **s. 54**—*No further appeal to Privy Council from award—"Award," meaning of—Dispute among persons interested in compensation money is not part of award—Decision of such dispute appealable to Privy Council.*

Under the Land Acquisition Act there are two perfectly separate and distinct forms of procedure contemplated. The first is that necessary for fixing the amount of the compensation and this is described as being an award.

When once the award as to the amount has become final, all questions as to fixing of compensation are then at an end; the duty of the Collector in case of dispute as to the relative rights of the persons together entitled to the money is to place the money under the control of the Court, and the parties then can proceed to litigate in the ordinary way to determine what their right and title to the property may be.

The award as constituted by Statute is nothing but an award which states the area of the land, the compensation to be allowed and the apportionment among the persons interested in the land of whose claims the Collector has information, meaning thereby people whose interests are not in dispute, but from the moment when the sum has been deposited in Court under section 31 2, the functions of the award have ceased; and all that is left, is a dispute between interested people as to the extent of their interests. Such dispute forms no part of the award.

From an award under the Land Acquisition Act an appeal lies to the High Court and there is no further appeal to the Privy Council. But a dispute as to the relative rights of the persons interested in the compensation money, fixed by the award, forms no part of the award and the right of appeal to the

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Privy Council from a decision of such a dispute is not taken away. **P C** RAMACHANDRA RAO *v.* RAMACHANDRA RAO, 30 M. L. T. 154; 26 C. W. N. 718; 45 M. 320; 35 C. L. J. 545; 16 L. W. 1; (1922) M. W. N. 359; 20 A. L. J. 684; 43 M. L. J. 78; 24 BOM. L. R. 963 **408**

Landlord and tenant—*Adverse possession nature of.*

In a case between landlord and tenant, to render the possession of the latter adverse to the former, such possession must be actual, visible, exclusive, hostile and continued during the time necessary to create a bar under the Statute of Limitation, because the tenant's possession of land can commence to be adverse only when the title adverse to the landlord is asserted, or the landlord becomes aware of the encroachment. **C** JOGENDRA NATH SAHA *v.* JAGADINDRA NATH ROY, 34 C. L. J. 133 **170**

——— Biswi *mortgage—Right of redemption, extinction of.*

Where land held by a tenant is mortgaged to him by the proprietor in consideration of a sum of money, it is not unusual for the tenant to appropriate a portion of the rent, for which he was originally liable, towards interest due on his loan and to pay the balance to the mortgagor. *Biswi* is the name usually given in Eastern Oudh to such mortgages of land in sub-tenure. The sum representing the difference between the full rent and the interest of the money advanced, which is still payable to the mortgagor landlord, is called *paramsana.*

The extinction of the right of redemption of a mortgage of this kind does not destroy the right of the mortgagor or of his successor to claim the *paramsana* as rent, because the *paramsana* does not fall within the rights to which the mortgagee is entitled. It is payable to the mortgagor irrespective of the mortgage on account of the extra profits which the mortgagee derives from the occupation of the mortgaged property. A decree for arrears of this *paramsana* can be executed against the mortgagee tenant even after the landlord has lost the right to redeem the mortgage itself. **O** SAT DEO *v.* JAI NATH, 9 O. L. J. 141; 4 U. P. L. R (J. C.) 43 **808**

——— *Denial of landlord's title—Surrender of tenancy essential.*

Once the relationship of landlord and tenant has been established, the tenant must surrender possession before he can set up a claim to be the real owner. **L** ALLAH BAKHSH *v.* LAL KHAN, 2 L. L. J. 662 **269**

——— *Excess rent for excess area, suit for—Finding essential for disposal of suit — Bengal Tenancy Act (VIII of 1885), s. 52—Final Court of fact, duty of—Findings of fact to be clearly expressed —Appeal, second.*

In a suit for excess rent for excess area in respect of a tenancy the finding that there is nothing to show that at the inception of the tenancy rent was settled or that it was understood that rent should be settled by assessment on area, is not sufficient for the disposal of the controversy between the parties. The landlord's case does not depend on his being able to prove what had happened at the inception of the tenancy. If the landlord can show

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that since the creation of the tenancy rent had been assessed, and that when rent was last assessed the assessment was on the basis of a certain area and that the defendants are in possession of land on which no rent was assessed at the time, then the landlord is entitled to increase of rent. The Court should come to a finding whether or not there has ever been assessment of rent on the basis of area and, if so, whether that area is less than the land found to be held by the tenant at the time of the suit.

It is the duty of a Judge when sitting as a final Court of fact to state clearly in his judgment what his findings are; the High Court sitting in second appeal cannot deduce from casual statements in the judgment, findings of fact which are not clearly expressed. **C** JOGENDRA KISHORE ROY CHOUDHURY *v.* SHEIKH AKTAR **998**

——— *Bengal Tenancy Act (VIII of 1885), ss. 7, 105, 105A, 106, 109A—Fair and equitable rent, proceedings for settlement of—Questions as to extent of area and liability to enhancement of rent also decided—Appeal, second, to High Court, competency of.*

If in any proceeding under section 105 of the Bengal Tenancy Act questions as to the extent of area and liability to enhancement of rent have been investigated and determined, the order of the Settlement Officer, though in form an order which settles a fair and equitable rent, does in substance embody a decision of a question within the scope of section 105A and, consequently, of section 106. Such a decision is not one merely settling a rent within the meaning of section 109A and is consequently liable to be challenged by way of second appeal to the High Court.

Where the landlord seeks to have the rent of a tenure-holder enhanced under section 7 of the Bengal Tenancy Act, the first point for investigation is whether the rent is liable to enhancement. When this has been made out, the next point for determination is, whether there is a customary rate payable by persons holding similar tenures in the vicinity. It is only when this has been answered in the negative that the rent can be enhanced up to such limit as the Court thinks fair and equitable. **C** MIDNAPORE ZAMINDARY CO. LTD. *v.* SRIDHAR MAHATA, 36 C. L. J. 96 **775**

——— *Grant of waste land—Non-payment of rent until land is cultivated not illegal—Immediate payment of rent not necessary to create tenancy—Bengal Tenancy Act (VIII of 1885).*

There is nothing in the Bengal Tenancy Act which prevents the granting of waste land to a tenant with a stipulation that no rent shall be payable until the land is brought under cultivation.

Immediate payment of rent is not an essential factor in the creation of a tenancy. **Pat** CHATTER KUMARI DEBI *v.* PRATAPDHUJ SINGH **859**

——— Kabuliyat, *construction of — Stipulation making tenant liable for rent in case of encroachments —Landlord, whether precluded from suing for ejectment.*

Where a *kabuliyat* contains a clause that if upon a survey made by the landlord it is discovered that the tenant is in possession of an area of land in addition to that comprised in the *kabuliyat*, the tenant shall be liable to pay additional rent, the intention is not that the tenant is at liberty to annex adjoining land of the landlord, and thereby to create a tenancy in his favour in respect of such land even against the wish of the landlord, the object of the clause is to make the tenant liable to pay additional rent for the additional area if the landlord so desires. The landlord can still elect to treat him as a trespasser and sue him in ejectment. **C** ABDUL HOSSAIN *v.* AFSARUDDIN, 34 C. L. J. 481 **639**

——— *Rent, suspension of—Lessee in possession of portion of jote—Settlement taken of remaining portion knowing same to be in wrongful possession of third party—Lessor, failure of, to deliver possession of access portion, effect of.*

Where a lessor evicts a lessee from a part of the land demised, the entire rent is suspended. But where the lessee, being already in possession of a part, takes a settlement of an entire *jote*, knowing the excess portion to be in the wrongful possession of a third party, and the lessor never puts any obstruction in the way of the lessee's recovering possession and there is no question of *mala fides* on the part of the lessor, the entire rent should not be suspended and the lessee is liable to pay proportionate rent in respect of the land in his possession. **C** NARENDRA CHANDRA LAHIRY *v.* MANINDRA CHANDRA NANDI, 26 C. W. N. 826 **800**

——— *Tenant sub-letting in contravention of agreement—Tenancy, termination of, by notice—Sub-tenant, status of—Bombay Rent (War Restrictions) Act (II of 1918), s. 9—"Tenant," whether includes "sub-tenant"*

Where a tenant, contrary to the terms of his lease, sub-lets the premises, and the landlord by notice terminates the tenancy, the sub-lessee is a tenant on sufferance thereafter, and is liable to ejectment at the instance of the landlord.

The term "tenant" in section 9 of the Bombay Rent (War Restrictions) Act does not include a sub-tenant **B** SUGANCHAND SAVAICHAND *v.* MOTILAL DURGAPRASAD, 24 BOM. L. R 154 **130**

——— Zamindar, *power of, to interpose intermediate holder between himself and his tenant—Power of intermediate holder to realise rent from the tenant.*

A *Zemindar* or tenure-holder who has carved out a tenure or under-tenure, as the case may be, is competent to interpose between himself and his tenant, an intermediate holder who may realise the rent payable to himself by his original tenant.

A landlord who has created a tenancy is still competent to carve out another tenancy from the interest he has reserved and interpose the same between himself and his first tenant, subject to the qualification that he cannot thereby prejudice the position of the first tenant, take away or destroy the value or affect of the prior interest transferred, or, limit its extent or restrain its operation.

The defendants had been tenants under *S.* for a long series of years in respect of a *maurasi mokarari* holding. While thus in occupation as tenant, *S.* granted to the plaintiff a *maurasi mokarari* lease of a large tract of land inclusive of the defendant's holding:

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Held, that the plaintiff was entitled to recover from the defendants the rent of the holding which would have been otherwise payable by them to S. **C** JOHAR MULL BHUTRA *v.* BHUPENDRA NATH BASU, 34 C. L. J. 79; 49 C. 495 **108**

——— Zemindar's *right to create intermediate tenure between* zemindary *and* putni.

There is nothing to prevent a *zemindar* from creating a tenure between the *zemindary* and a *putni* which has already been created under it. **C** NILAMBAR GHOSH *v.* MIR MOHASANUDDIN, 34 C. L. J. 77 **105**

Lease, *construction of—Lease granted for fixed term to lessee and his sons, grandsons and lineage—Lessee dying before fixed term—Collaterals, whether can succeed*

A lease was granted of certain premises for forty years to the lessee and his sons, grandsons and lineage. On the death of the lessee before the expiry of the period, the lessor sued to recover the premises. The lessee's sister's sons resisted the claim. The lessor contended that the lease was only to the lessee and his wife and his direct descendants and that the collaterals were excluded:

Held, on the construction of the lease, that it was a lease to the lessee for forty years without any limitation and that, therefore, the plaintiff was not entitled to possession. **B** CHANDMAL KESARMAL *v.* VISHVANATH BALVANT SOHONI, 24 BOM. L. R. 300 **230**

——— *construction of—Lessee's right to build—Boundaries well-defined in the lease—Area in lessee's possession less than that stated in the lease—Encroachment, whether permissible.*

The portion of a lease which governed the lessee's right to build was as follows:—"You shall not be competent to make big excavations but you shall be competent to construct *pucca* wall, *pucca* privy and *pucca* plinth of the tin *ghur*":

Held, that reading the clause as a whole, it was the intention of the parties that the lessee's right to erect permanent structures should be limited to those specified in the condition, and that the condition amounted to a prohibition to build any other structures than those expressly mentioned.

The fact that the amount of land of which a lessee was given possession is less than the area stated in the lease, would give the lessee no right of encroachment beyond the well-defined boundaries given in the lease. **C** DINANATH DAS *v.* GOPAL CHANDRA DAS **90**

Legal Practitioners Act (XVIII of 1879), s. 13 (b) (f) *—Letter written by Legal Practitioner charging Judicial Officer with racial antipathy — Misconduct — Other reasonable cause.*

A Legal Practitioner wrote a letter to a Judicial Officer imputing feelings of racial antipathy to the latter and charging him with allowing such feelings to influence him in passing contrary orders against the Legal Practitioner in cases in which he appeared:

Held, that the letter did not fall within the purview of clause *(b)* of section 13 of the Legal Practitioners Act, inasmuch as it was not written by the Legal Practitioner in the discharge of his professional duty, but that it certainly fell within

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the purview of clause *(f)* of that section. **L** FAKHARUD-DIN, PLEADER, *In the matter of*, 23 CR. L. J. 408 **504**

——— **s. 14,** *interpretation of—Jurisdiction to entertain proceedings against legal practitioner—Enquiry before institution of proceedings—Formulation of charge.*

Section 14 of the Legal Practitioners Act empowers any Court in which a Pleader practises to consider a charge of misconduct made against him in such Court, and the section does not limit the consideration of the charge to the Court in which the misconduct is alleged to have been committed.

Per *Mookerjee, J.*—Section 14 of the Legal Practitioners Act does not specify the nature of the materials upon which the Court concerned may take action. There must, however, be enquiry supported by legal evidence, if proceedings are instituted.

In proceedings under section 14 of the Legal Practitioners Act it is essential that the charge must be formulated with precision so as to enable the legal practitioner concerned to meet the allegations against him. **C** RABINDRA CHANDRA CHATTERJEE, *In re*, 35 C. L. J. 520 **985**

——— **s. 28,** *application of—Suit by Pleader for fee based upon agreement -Fee, amount of, not fixed.*

Where a suit by a Pleader for fees against his client is based on an agreement he cannot succeed unless the agreement is both in writing signed by the party to be charged and filed as provided in section 28 of the Legal Practitioners Act. Consequently, no suit upon an oral agreement can succeed by virtue of the provisions of section 28. **C** BECHARAM LIHIRY *v.* SUDEBI DASI, 26 C. W. N. 709 **874**

Letters Patent (Cal.), cl. 15—*Order setting aside abatement if "judgment."*

A decision setting aside an abatement is a "judgment" within the meaning of clause 15 of the Letters Patent and is appealable **C** SARAT CHANDRA SARKAR *v.* MAIHAR STONE AND LIME CO., LTD., 49 C. 62 **917**

Letters Patent (Lah.), cl. 10—*"Judgment"—Order when 'judgment'—Suit dismissed by Trial Court as barred by limitation—Suit held within limitation by lower Appellate Court and remanded for trial on merits—Appeal against order of remand dismissed by Single Judge of High Court—Letters Patent Appeal—Limitation, whether matter of procedure or of substantive law—Civil Procedure Code (Act V of 1908), s. 104—Effect of section on appeal under Letters Patent.*

In determining whether an order constitutes a 'judgment' or not within the meaning of clause 10 of the Letters Patent, the Court must take into consideration the nature of the order and its effect upon the civil proceeding in which it is made. If it puts an end to the proceeding, or, if its effect, if it is not complied with, is to put an end to the proceeding, then it is a 'judgment.'

A suit was dismissed by the Trial Court as barred by limitation. The District Judge held that it was not so barred and remanded it for decision on the merits. An appeal against the order of remand was dismissed by a Single Judge of the High Court:

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Held, that the order of the Single Judge constituted a 'judgment' within the meaning of clause 10 of the Letters Patent.

Obiter dicta—(1) It is not necessary that a decision in order to constitute a 'judgment' must involve an actual decision on the right in controversy between the parties. While a mere formal order or an order merely regulating the procedure cannot be viewed as a 'judgment', it cannot be held that the words 'right' and 'liability' used in the definition of "judgment" given by Sir Richard Couch in *Justices of the Peace for Calcutta* v. *Oriental Gas Company, Limited*, 8 B. L R. 433; 17 W. R. 61, have reference only to the subsantive law and not to a matter of procedure.

(2) The determination of the question whether a person is entitled to institute a suit for possession within twelve years from a certain date is a determination of a right, more especially when it involves the determination of the acquisition of a prescriptive right by the person in possession.

(3) The object of the Legislature in enacting sub-section (2) of section 104, Civil Procedure Code, was to make it clear that there was no second appeal under the Code from the orders specified in sub-section (1) of the section Sub-section 2) was never intended to override the express provisions of the Letters Patent and to take away by implication the right of appeal conferred by those special provisons. **L** RULDU SINGH *v.* SAWAL SINGH, 3 L. 188 **388**

License, *revocability of—Easements Act (V of 1882), s. 60—C. P. Land Revenue Act (II of 1917), s. 203.*

A license in respect of an *abadi* plot is revocable at will by the grantor unless the licensee is protected by section 60 of the Easements Act or section 203 of the Land Revenue Act (II of 1917) or the *wajib-ul-arz* of the village. **N** RAJARAM *v.* MANOHARLAL **373**

Limitation Act (IX of 1871), s. 20—*Limitation Act (XV of 1877), s. 19—Acknowledgment not signed by all mortgagees, effect of.*

An Acknowledgment of the right of redemption, in order to save limitation, either under Act IX of 1871 or Act XV of 1877, should be made by all the mortgagees. If it is not signed by all mortgagees, it does not hold good even with regard to the shares of those who signed it, if the mortgage is indivisible. **L** NADAR SHAH *v.* ISHAR DAS **463**

Limitation Act (XV of 1877), s. 19. *See* LIMITATION ACT, 1871, s. 20 **463**

Limitation Act (IX of 1908), ss. 2 (5), 26. 28, Sch. I, Art. 144—*Right of fishery—Easement—Profit* a prendre—*Fishery, right of—Adverse possession.*

A right of fishery, of whatever nature, is not strictly an easement. It is either an interest in immoveable property or a profit *a prendre* which may be either in gross or appurtenant to a dominant tenement. In so far as a right of fishery is a mere profit *a prendre* which is not an exclusive right to the fishing it would clearly come within the provisions of the definition of 'easement' given in section 2 (5) of the Limitation Act If it is an exclusive right to the fishing, as in the case of a several fishery, it would amount to an interest in immoveable property within Art. 144 of the First Schedule of the Limitation Act, and adverse possession of such a right for 12 years would, by the operation of section 28 of the Act, extinguish the rights of the lawful owners.

A profit *a prendre* in the nature of an easement, which can be acquired by 20 years' enjoyment must be a right which does not exclude the acquisition of similar rights by others or bar the enjoyment of such rights by the lawful owners of the land. It may be either a personal right which is not transferable or one attached to a dominant tenement, as in the case of an easement properly so-called, which also cannot be transferred apart from the transfer of the dominant tenement. An exclusive right to the fishing in a particular locality, as in the case of a several fishery, is both transferable and heritable and is an interest in immoveable property and one which can be acquired by 12 years' adverse possession as against the lawful owner.

The question of a right of fishery in all cases must be determined by reference to the nature of the right claimed and proved to have been exercised. If it is a mere right to fish not excluding the lawful owner, it would appear to be an easement within the description of the word in the Limitation Act and can be acquired by 20 years' uninterrupted enjoyment. If it is an exclusive right of fishery it is an interest in immoveable property and can be acquired by 12 years' adverse possession involving an ouster of the rightful owner. Such a right contains all the essential elements of property and even if it may properly be described as a profit *a prendre* it has also the distinctive features of an interest in immoveable property. Even if section 26 of the Act should be applicable, this would not bar the operation of Art. 144 and section 28 if the right came under both descriptions. **Pat** HENRY HILL & CO. *v.* SHEORAJ RAI, (1922) PAT. 195; 3 P. L. T. 477; 4 U. P. L. R. (PAT.) 38 **954**

——— **s. 3, Sch. I, Art. 14**—*Plea of limitation raised in first appeal when to be given effect to.*

The plea of limitation can be taken at any stage of a case and under section 3 of the Limitation Act a Court of Appeal is bound to give effect to this plea when raised But in order that this plea may be given effect to when raised in appeal it is necessary that the facts showing that the suit is barred should be apparent on the record. **C** HEM CHANDRA ROY *v.* BIRAJA SUNDARY CHOWDHURANI **386**

——— **s. 4,** applicability of. *See* CIVIL PROCEDURE CODE, O. XXI, R. 89 **321**

——— **s. 12**—*Time requisite for obtaining copies, what is—Finding of fact.*

Under section 12 of the Limitation Act only the time from the date of making the application for copies up to the date on which the copies are ready for delivery can be excluded.

The finding of a lower Appellate Court as to the time requisite for obtaining copies is one of fact and cannot be attacked in second appeal. **L** BAWA SINGH *v.* THAKUR SINGH, 4 U. P. L. R. L.) 80 **478**

——— **ss. 14, 15**—*Exclusion of time—Debtor adjudged insolvent but adjudication subsequently cancelled—Suit by creditor.*

Limitation Act, 1908—contd.

When once time has begun to run against a plaintiff for the institution of a suit which he is competent to file, it will continue to run unless stopped by some provision of the Limitation Act.

Where after a debt has become due and payable and time has begun to run against the creditor, the debtor is adjudicated insolvent (but his petition is subsequently dismissed and the adjudication order cancelled) the time during which the insolvency proceedings were pending is not to be deducted in computing the period of limitation for a suit brought by the creditor **B** SIDHRAJ BHOJRAJ *v.* ALLI HAJI, **757**
24 BOM. L. R. 509

——— **s. 19**—Renewal of barred debt. *See* CONTRACT ACT, s. 25 (3) **298**

——— **s. 19, Sch. I, Art. 132**—*Mortgage—Property hypothecated—Covenant to pay interest yearly and on default whole amount—Cause of action.*

A mortgage-deed was executed in 1901; the mortgagor covenanted to pay interest year by year and the principal within three years of the date of execution: in case of default of payment of the annual interest the mortgagee was empowered to realise the principal and interest from the hypothecated property. No interest was paid at all. A suit on the mortgage was brought in 1916:

Held, that the suit was barred by time in the absence of any acknowledgment within section 19 of the Limitation Act, as the cause of action for the principal and interest arose on the first default in 1902. **A** RAM DAS *v.* MUHAMMAD SAYEED KHAN, 20 **160**
A. L. J. 346

——— **Sch. I, Art. 12,** *applicability of.*

Art. 12 of Schedule I to the Limitation Act refers to suits brought by parties to the decree which resulted in the sale, or by parties to the proceedings in which the sale took place, or by persons claiming through them, and does not apply to suits brought by persons who are not bound by the sale. Nor does it operate to bar a *defence.* **L** TARA CHAND *v.* ABDUL AHAD **894**

——— ——— **Arts. 61, 81,** *applicability of—General and particular articles—Suit to recover money paid as surety—Limitation*

An article in the Schedule to the Limitation Act containing a particular provision must be applied in preference to an article containing a general provision, wherever possible.

One *P*, a *gomashta* of the plaintiff firm stood surety for a judgment-debtor. Certain property of the firm was eventually held liable for the satisfaction of the decree. In order to save the property from sale, the plaintiff firm satisfied the decree and sued the defendant, the principal debtor, for recovery of the sum which they had paid:

Held, that the suit was governed by Art 81 and not by Art. 61 of Schedule I to the Limitation Act. **L** KUNJ LAL *v.* GULAB RAM, 55 P. L. R. 1922 **365**

——— ——— **Art. 62**—*Suit to recover money from son of late Pleader received for payment to plaintiff—Money received for plaintiff's use—Limitation.*

A suit to recover from the son and legal representative of the plaintiff's late Pleader a sum of money alleged to have been received by the latter out of court for payment to the plaintiff, falls under Art. 62 of the Schedule to the Limitation Act. **C** RAM HARI KAPALI *v.* ROHINI KANTA CHAKRAVARTY, **943**
35 C. L. J. 350

——— **Sch. I, Art. 85,** *applicability of—Open and current account.*

One essential to render Art. 85 of Schedule I to the Limitation Act applicable is, that each party must be capable of making a demand against the other during the currency of the account, and where this is not so, the requirements of the Article are not fulfilled, even though the account is current and open. **L** HARDIAL-RAM CHAND *v.* POKHAR DAS, **933**
3 L. L. J. 362

——— ——— **Arts. 97, 116**—*Mortgage, suit on Property not subject to sale—Money-decree, suit for, barred—Art. 97, application of*

Plaintiff sued for sale of a property mortgaged to him: the property was a cultivatory holding and was not liable for sale, so in his replication the plaintiff desired a money-decree. The period, however, for suing for such a decree had elapsed, and the claim was dismissed under Art 116 of the Limitation Act. The lower Appellate Court being of opinion that it was a case of a consideration which had afterwards failed, decreed the claim under Art. 97 of the Act holding that the date of the failure was the date of the proceedings in the First Court:

Held, restoring the decree of the First Court, that Art 97 had no application to the case as the property in suit being inalienable from the very inception of the mortgage, there never existed any consideration which could afterwards fail. **O** THAMMAN SINGH *v.* DALCHAND, 9 O. L. J. 171; 4 U. **595**
P. L. R. (J. C.) 40

——— ——— **Art. 118**—*Suit for possession on displacement of alleged adoption—Article, whether applicable.*

Per *Macleod, C.J.* and *Fawcett, J.* (*Shah, J.*, dissenting).—Suits for possession of immoveable property where the plaintiff cannot succeed except by displacing an adoption, are not governed by Art. 118 of Schedule I to the Limitation Act.

In view of the decision of the Privy Council in *Thakur Tirbhuwan Bahadur Singh* v. *Raja Rameshar Bakhsh Singh*, 33 I. A. 156; 8 BOM. L. R. 722; 10 C. W. N. 1065; 16 M. L. J. 440; 8 A. L. J. 695; 4 C. L. J. 405; 1 M. L. T. 265; 9 O. C. 377; 28 A. 727 (P. C.), the decision in *Shrinivas* v. *Hanmant*, 24 B. 260; 1 BOM. L. R 799; (2 IND. DEC (N. S.) 709 (F. B.), is no longer good law. **B** DODDAWA PURSHYA *v.* YELLAWA MALLAPPA BENI, 24 BOM. L. R. 58 **134**

——— ——— **Art. 120**—*Application for registry as* jenmi, *refusal of—Subsequent identical application by son after 14 years also refused—Declaratory suit—Cause of action—Limitation, terminus a quo.*

Where an application to be registered as *jenmi* of certain lands is refused by the Revenue Authorities, and a subsequent identical application, made some years afterwards, by his successor is also refused a suit to obtain a declaration that the plaintiff is the *jenmi* of the lands must be brought within the period of limitation prescribed by Art. 120, Schedule I,

Limitation Act, 1908—contd.

Limitation Act, the *terminus a quo* of such period being the date of refusal of the first application by the Revenue Authorities. The refusal to grant identical relief on the second application does not give a fresh cause of action **M** ANGATI PARAMBATH KANNIYALLI RATHA *v.* THEKKE ILLATH NEELAKHANDHAN, 15 L. W. 478; 42 M. L. J. 457; 30 M. L. T. 286; (1922) M. W. N. 260 **600**

——— **Sch. I, Art. 120**—*Declaration, suit for —Successive causes of action—Limitation.*

A person is not bound to bring a declaratory suit on any and every possible invasion of his title.

Plaintiff purchased the *shamilat* appertaining to a certain *khata* in 1879. In 1895 the *shamilat* of the village was divided into three plots, and one of these was partitioned, the remaining two being kept undivided. Plaintiff put forward a claim to a share in the plot which was partitioned but his claim was denied and he received no share out of that plot. He, nevertheless, continued in joint possession of the undivided plots of *shamilat* land and his enjoyment thereof was in no way interfered with. In 1914 fresh partition proceedings were started in respect of these plots, and plaintiff's right to a share in the *shamilat* was again denied. He now brought a suit for a declaration of his title :

Held, that, although the denial of his title by the defendants in 1895 gave the plaintiff a cause of action, he was not bound to sue for a declaration of his title, inasmuch as he continued in joint possession of the undivided plots of the *shamilat* land and that the defendants' denial of his title in 1914 gave him a fresh cause of action and his suit was, therefore, within limitation. **L** MUHAMMAD HANIF *v.* RATAN CHAND, 3 L. 43 **990**

——— ——— **Arts. 132, 116,** *applicability of.*

Art. 132, Schedule I to the Limitation Act, is wide enough to apply to all cases where there is an effective and binding charge upon immoveable property whether created under the Transfer of Property Act or otherwise.

Obiter.—A suit to recover rent reserved by a registered instrument is governed by Art. 116 of Schedule I of the Limitation Act. **L** ABDUL SAMAD *v.* MUNICIPAL COMMITTEE, DELHI **939**

——— ——— **Art. 134**—*Mortgage—Sale by mortgagee as ostensible owner—Valuable consideration, passing of—Vendee, status of—Mortgagor, suit by, to recover possession—Limitation.*

When a mortgagee sells the mortgaged property as an ostensible owner, and there is valuable consideration for the sale, the right of the purchaser becomes unassailable by the mortgagor by the lapse of 12 years from the date of the purchase, under Art. 134 of Schedule I to the Limitation Act, and the fact that the purchaser comes to know of his transferor being only a mortgagee soon after the purchase would not stop the running of the time in his favour. **B** KESHAV RAGHUNATH JOSHI *v.* GAFURKHAN DAIMKHAN BUBERE, 24 BOM L. R. 319 **308**

——— ——— **Art. 134**—*Purchaser from mortgagee of mere mortgagee rights as full proprietary rights, position of—Notice constructive, rule of—Special fact—Burden of proof—*Biswi *mortgage—Under-proprietary tenure subject to redemption—*

Limitation Act, 1908—contd.

Compromise terminating mortgage, effect of—Adverse possession.

A person who purchases a right which he honestly believes to be full proprietary right and which is so described in the deed of sale, can claim the benefit of Art 134, Indian Limitation Act, even though by the exercise of diligence he might have discovered that his transferor was only a mortgagee. Mere constructive notice without actual knowledge is not sufficient to deprive the purchaser of the benefit of the Article.

It is for the person who asserts that a transaction was something different from what on the face of it it purports to be, to substantiate that assertion, that is to say, a *special fact* must be proved by the party who relies on it.

Biswi mortgage is something like an under-proprietary tenure but it is subject to the right of redemption.

Though the general principle of law is that no act of the mortgagee can by itself change the character of the possession which was originally acquired yet, where both the parties have treated a mortgage as terminated, the case stands on a different footing.

Therefore, where under a compromise the equity of redemption is released by the mortgagor but the compromise is ineffecual for any defect of registration or otherwise, the possession of the mortgagee would be considered to be adverse from the date when the compromise was entered into. **O** BIJAI PARTAB SINGH *v.* RAGHURAJ SINGH, 9 O. L. J. 173; 4 U. P. L. R. (J. C.) 33; 25 O. C. 115 **572**

——— **Sch. I, Art. 134,** *whether applicable to alienations by Mahant.*

The endowments of a Hindu Math are not "conveyed in trust," nor is the head of the Math a "trustee" with regard to them, save as to any specific property proved to have vested in the head for a specific and definite object, and consequently Art. 134 of the Limitation Act does not apply where the head of a Math has alienated the properties not proved to be subject to a specific trust. **Pat** RAMRUP GIR *v.* LAL CHAND MARWARI, 3 P. L. T. 352 **401**

——— ——— **Art. 142**—*"Abandonment or 'discontinuance' of possession," meaning of—Adverse possession by successive trespassers—Continuous trespasses, without privity of title or devolution of interest—Suit for possession by persons claiming under real owner—Cause of action*

'Discontinuance' of possession within the meaning of Art. 142 of the Limitation Act takes place when the person in possession goes out and is followed into possession by another person.

In all cases where the person who was in possession at one time and discontinued possession or was dispossessed seeks to eject a person in possession, he must show that he was in possession within 12 years before the suit.

Time commences to run against the last full owner of property from the date when he was dispossessed and the operation of the law of limitation would not be arrested by the fact that, on his death, he was succeeded by his widow, daughter or mother or any other heir, as the cause of action cannot be prolonged by the mere transfer of title.

In order that the title of the true owner may be barred by the adverse possession of a trespasser or a series of trespassers the possession by them must be continuous, and so long as it is continuous it is immaterial whether they claim through one another or independently; but if a period of time should elapse, however short, after the abandonment of one trespasser who has not been in for the full statutory period and the entry of another the title of the true owner is, as from the time of such abandonment, restored to him without any entry or act done on his part, for the Statute does not apply to a case of a want of actual possession by the true owner, but only to cases where the owner is out of possession and another is in possession for the prescribed time.

Obiter:—Art. 141 of the Limitation Act applies to cases where the last full owner was in possession at the time of his death. **M** VANNAM RAMAYYA v. KUSURU KOTAMMA, (1922) M. W. N. 132; 30 M. L. T. 143; 42 M. L. J. 319; 45 M. 370 **246**

Sch. I, Art. 142—*Possession, suit for —Plaintiff dispossessed and out of possession—Burden of proof as to title and possession—Possession — User — Constructive possession—Presumption that in case of conflict of evidence possession goes with title, when arises.*

Where the plaintiff while in possession has been dispossessed and is out of possession at the date of suit the onus is upon him to prove that he was in possession and was dispossessed within 12 years of the suit.

In cases coming under Art. 142, although the plaintiffs' title is proved, the onus is not upon the defendant to show that the plaintiff lost his title by adverse possession on the part of the defendant.

It is now firmly settled beyond all probability of controversy that the plaintiff in an action for ejectment must not only prove his title but also his possession within 12 years of the suit.

Where definite evidence of acts of possession is forthcoming there is no difference between the proof of possession in the case of jungle, waste or uncultivated lands and in that of cultivated lands. But whereas in the case of cultivated lands the plaintiff will fail if he does not prove his possession within 12 years, in the case of jungle or waste lands, if he proves his title, there is a presumption in his favour where, having regard to the nature of the land, possession cannot be expected to be proved by acts of actual user and enjoyment. If, however, the plaintiff asserts that he exercised acts of ownership upon the land and adduces evidence in support of such assertion, he cannot, where such evidence is disbelieved by the Court, turn round and rely upon any presumption, because the case set up by him negatives the existence of circumstances which would give rise to the presumption, and is inconsistent with it.

Possession is not necessarily the same thing as actual *user* The nature of the possession is to be looked for, and the evidence of its continuance must depend upon the character and condition of the land in dispute.

Where the rightful owner proves possession until the land goes under water or otherwise becomes wholly incapable of enjoyment in the usual modes, he is deemed to be in constructive possession until the land emerges out of water and becomes capable of enjoyment in the usual mode and he is actually dispossessed by the defendant. No such presumption, however, arises in the case of a wrong-doer.

In cases where the land is not incapable of enjoyment, but may produce some profit, though trifling in amount and only of occasional occurrence as is often the case with jungle land, it would be unreasonable to look for the same evidence of possession as in the case of a house or a cultivated field. All that can be required is that the plaintiff should show such acts of ownership as are natural under the existing condition of the land, and, in such case, when he has done this his possession is presumed to continue so long as the state of the land r mains unchanged unless he is shown to have been dispossessed.

The presumption that in case of conflict of evidence, possession goes with the title, arises only where the evidence is equally strong on both sides and cannot be called in aid to give weight to evidence unworthy of credit any more than if no evidence at all had been given. **C** RAKHAL CHANDRA GHOSE v. DURGA DAS, 26 C. W. N. 724 **673**

Sch. I, Art. 182—*Execution—Application for transfer of decree to incompetent Court, whether according to law—Step-in-aid of execution—"Applying in accordance with law," meaning of.*

An application for the transfer of a decree for execution to another Court is a step-in-aid of execution, but in order to save limitation such an application must also be in accordance with law within the meaning of clause *(c)* of Art. 182.

An application asking the transfer of a decree to a Court not having pecuniary jurisdiction to try the original suit is not an application in accordance with law and, therefore, cannot save limitation.

Per *Jwala Prasad, J.*—The term "applying in accordance with law" means applying to the Court to do something in execution which by law that Court is competent to do. It does not mean applying to the Court to do something which either to the decree-holder's direct knowledge in fact or from his presumed knowledge of the law, he must have known the Court was incompetent to do.

The Patna High Court ought to follow a Calcutta ruling unless it is satisfied that the ruling is wrong.

Per *Bucknill, J.*—An application for transfer is primarily a step which saves limitation. But the transfer in order to be effective must be one which can be properly made by the transferring Court If that Court is not competent to make the transfer then there is no step in fact taken recognised by law which can save the commencement of the running of the limitation period. **Pat** AMRIT LAL v. MURLIDHAR, 3 P. L. T. 422; (1922) PAT 229 **538**

Art. 182—*Step-in-aid of execution—Instalment decree—Several instalments due—Application for recovery of one instalment, whether saves time.*

Where a decree directs instalments to be paid on particular dates an application which asks for the assistance of the Court for the recovery of one of

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several instalments due at the date of the application is a step-in-aid so as to start a new period of limitation with regard to all the instalments then due. **B** SITABAI ZUKAPPA MHETRE *v.* KESHAVRAO PARVATRAO KATE, 24 BOM. L. R. 284; 46 B. 7 9 **169**

———Sch. I, Art. 182, Explanation I —*Decree against principal and surety—Surety, liability of, only on default of principal—Decree, whether joint — Execution proceedings against principal, whether effective against surety.*

Where a decree in a suit against a principal and his surety directs that the surety would be liable when the money is not realized from the principal, and owing to the principal's insolvency an application for execution is made against the surety more than three years after the date of the decree but within three years from the date of the application for execution against the principal, it is not barred in accordance with Explanation I of Art. 182 of Schedule I to the Limitation Act, inasmuch as the principal and surety are not made liable under the decree for different portions of the subject-matter thereof but each is made liable for the whole decretal amount and, therefore, the decree is a "joint" one passed against both of them. **L** HONDA RAM *v.* FIRM SETH KANWAR BHAN-SUKH NAND, 4 U. P. L R. (L) 70 **301**

Lis pendens, doctrine of, applicability of. *See* PRE-EMPTION **304**

Local inspection by Magistrate—Magistrate's duty to put inspection note on record. *See* CRIMINAL PROCEDURE CODE, s 342 **616**

Lower Burma Land and Revenue Act (II of 1876), s. 56 (a)—*Sale in arrears of land revenue—Fraudulent sale—Sale caused by one co-owner—Remaining co-owner's rights, whether lost—Declaratory suit—Jurisdiction of Civil and Revenue Courts.*

A sale for arrears of land revenue obtained fraudulently must be considered a private sale, inasmuch as it has the appearance of a sale for arrears of revenue but is, in its essence, a private alienation.

A co-owner of land cannot be allowed to use the machinery of the Revenue Sale Law to defraud other co-owners, and if he does so the Civil Courts are competent to declare that the result of his conduct is not to place a fraudulent purchaser-in a better position than a buyer at a private sale.

Where one of the co-owners of land causes it to be sold fraudulently for arrears of land revenue and buys it himself in the name of his son at a nominal price, the remaining co-owners are entitled to have it declared by a Civil Court that they have not lost their rights in consequence of the sale, but that all that has been actually sold is the interest of the defaulting co-owner. In such a case the Civil Court is not asked to determine the validity of the revenue sale or to set it aside and, therefore, its jurisdiction to grant the declaration sought for is not ousted. **B** MA ZA *v.* MA MI, 11 L. B. R. 313 **636**

Maintenance, agreement to receive, whether bars claim. *See* PARTITION **356**

Maintenance grant, *nature of—Savings, when accretions.*

The substance of a maintenance grant is that it is the rents, issues and profits that are alienated and not the immoveable properties out of which such rents, issues and profits arise, which remain the property of the grantor and annexed to his estate.

In order that there may be accretion there must be an estate to which the accumulation may accrete. Therefore, where a female is in possession of certain villages not as a Hindu widow, but under a lease granted to her by her husband, she has no estate in the villages, but only a maintenance grant, and her savings or accumulations would vest in her heirs and not follow the properties from which they arose. **Pat** RAMESHWAR NARAIN SINGH *v.* RIKNATH KOERI **451**

Malicious prosecution, *action for—Evidence, necessary—Judgment of Criminal Court, whether sufficient.*

In an action for malicious prosecution the plaintiff has to prove, first, that he was innocent, and that his innocence was pronounced by the tribunal before which the accusation was made, and it is not sufficient to put in the judgment of the Court which acquitted him. **A** GOBERDHAN SINGH *v.* RAM BADAN SINGH, 20 A. L. J. 284 **65**

——— *Application for sanction to prosecute—Action for damages—Cause of action—Reasonable or probable cause, issue as to, stage at which, can be decided.*

The maintainability of a suit for malicious prosecution does not depend on there having been a prosecution in the sense in which the term is used in the Code of Criminal Procedure.

An application for sanction to prosecute is a preliminary or initial stage in a criminal prosecution, and whether it is made, according to law, to a Civil or Criminal Court, it can prove the basis of an action for damages for malicious prosecution. Therefore, an allegation in the plaint in such an action that the defendant maliciously and without just, reasonable or probable cause instituted proceedings for sanction and that the plaintiff was obliged to defend the case is sufficient to disclose a cause of action.

The issue as to reasonable and probable cause cannot be decided until after the plaintiff has adduced evidence in support of the allegations in his plaint. **C** NORENDRA NATH DEY *v.* JOTISH CHANDRA PAL **705**

——— *Suit for damages by discharged person—Limitation Act (IX of 1908), Sch. I, Art. 23—Discharge, whether "termination" of prosecution—Cause of action—Revision application, effect of.*

The discharge of an accused person is the termination of the prosecution, within the meaning of Art. 23 of Schedule I to the Limitation Act, because if no further proceedings are taken, the accused person is free of the charge made against him

The cause of action for a suit for damages for malicious prosecution instituted by a person discharged of an offence would arise immediately on his being discharged, and would not be suspended because further proceedings might be taken either by Government or by the complainant in order to get the order of discharge set aside; if a revisional application is successful and the criminal pro-

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ceedings are directed to be continued, then there is no longer any cause of action, because the plaintiff is no longer a discharged person, and he has to wait until the prosecution terminates in his favour before his cause of action arises again. **B** PURSHOTAM VITHALDAS SHET *v.* RAVJI HARI ATHAVLE, 24 BOM. L. R. 507 **754**

Marriage, *suit for annulment of—Indian Christians—Court, jurisdiction of—Fraud—Divorce Act (IV of 1869), s. 19—Impotency, meaning of—Consummation, practical impossibility of.*

Under section 19 of the Divorce Act, fraud, apart from fraud in obtaining the consent of a party, is not a ground for annulment of marriage.

Where in a suit for the annulment of a marriage under the Divorce Act the only evidence of fraud on the part of the defendant (wife) is that her father knew that, previous to the marriage, she was suffering from syphilis and that he concealed this fact from the plaintiff (husband), this would not amount to 'fraud in obtaining the consent' within the meaning of the words at the end of section 19, and consequently is not a good ground for annulling the marriage.

Though a party to a suit for the annulment of a marriage may be physically fit to consummate the marriage, yet where the consummation is a practical impossibility the Courts will interfere.

Where a husband is unable to consummate his marriage without the very gravest risk to his health and to that of any offspring who might be born of the connection, and this state of things is likely to continue and be permanent, it amounts to impotency on the part of the wife, and the suit of the husband for the annulment of marriage should be decreed. **C** BIRENDRA KUMAR BISWAS *v.* HEMLATA BISWAS 25 C. W. N. 706 **949**

Marz-ul-maut—Disposition of more than one-third share of property without consent of heirs, whether valid—What constitutes death-illness—Mixed question of law and fact. *See* MUHAMMADAN LAW—WAKF **77**

Math—*Succession — Designation of successor by* Guru—*Ceremony of initiation, necessity of.*

Where a person is very clearly designated by the *guru* of a *math* as his successor, the absence of the formal ceremony of initiation of that person during the lifetime of the *guru*, is no bar to that person's succession to the office. **B** KRISHNAGIRI TRIKAMGIRI *v.* SHRIDHAR KAVLEKAR, 24 BOM. L. R. 140; 46 B 655 **129**

Minor, admission of, as partner—Proof. *See* CONTRACT ACT, ss. 247, 239 **124**

——, *liability of—Guardian acting* bona fide *for his interest.*

A minor is bound by the act of his guardian done *bona fide*, and for his benefit in the management of his estate. **N** MANGULAL *v.* NANHI **806**

——, *transactions with—Partnership business—Presumption of benefit.*

In the case of a business undertaking managed by a father on behalf of his minor son, where transactions are carried out in the ordinary course of business, it is not necessary for a creditor to give specific evidence of benefit in each individual transaction, and the fact that the transactions were carried out in the ordinary course of business

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is sufficient to raise a presumption that they were for the benefit of the business. **O** WILAYAT HUSAIN *v.* PUTTU LAL, 25 O. C. 6 **982**

Mortgage—*Conditional sale — Foreclosure—Failure to make demand before notice.*

Courts will not presume that all formalities have been observed in foreclosure proceedings.

A mortgagee's omission to make a demand for the mortgage-money before notice is issued in foreclosure proceedings is a fatal flaw in the proceedings and renders them nugatory. **L** BAKHTAWAR *v.* MOOL CHAND **161**

——, *Contribution—Auction-purchaser of part of mortgaged property, liability of.*

An auction-purchaser in execution of a decree obtained upon a mortgage purchases the rights of the mortgagor and the mortgagee at the date on which the mortgage was made, and any subsequent equities or liabilities which arise in respect of the mortgaged property cannot attach to him inasmuch as he acquires the property free from any such liabilities or equities.

Where a portion of a mortgaged property has been sold, a suit for contribution for the mortgage-money can be brought only against the holder of the portion of the mortgaged property which has remained unsold and not against the auction-purchaser of the portion sold. **A** KARAMAT ALI *v.* GORAKHPUR BANK, LD, 20 A. L. J. 337; 44 A. 488; 4 U. P. L. R. (A.) 150 **29**

——, *Decree for possession by mortgagee—Second suit for possession—Possession under decree and subsequent dispossession, proof of—Cause of action.*

Where a mortgagee has obtained a decree for possession on the basis of the mortgage, a subsequent suit for possession by him or his legal representatives is not maintainable unless it is shown that possession was taken under the decree and that there was a subsequent dispossession. The reason is that two suits on the same cause of action will not lie. **L** HAR CHAND SINGH *v.* NARAIN SINGH, 2 L. L. J. 678 **281**

——, *Interest, general stipulation regarding payment of—Stipulation applicable till payment of mortgage-money.*

A general stipulation in a mortgage-deed that the mortgage-money shall bear interest at a certain rate without any limitation as to its currency should be treated as applicable to the entire period for which the mortgage-money might remain unpaid. **O** NAJM-UN-NISA *v.* RAGHUNATH, 25 O. C. 36 **963**

——, *Interest, high rate of—Provision, whether penal.*

Where there is no allegation of undue influence or fraud to make the provisions of section 16 of the Contract Act applicable the mere fact that the rate of interest provided for in a mortgage-bond is high is not sufficient to make the provision as to interest penal. **L** TOHLU MAL *v.* BUTA, 3 L. L. J. 184 **132**

——, *Prior mortgagee obtaining foreclosure decree and acquiring equity of redemption without making puisne mortgagee party to suit—Redemption—Puisne and prior mortgagees, right of—Redemption suit filed by puisne mortgagee—Prior mortgagee*

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prepared to redeem puisne mortgagee—Litigation to be regarded as two cross-suits—Prior mortgagee to be allowed redemption—Justice—Equity—Balance of convenience.

Where a prior mortgagee by conditional sale obtains a foreclosure decree and becomes the owner of the equity of redemption, without making the puisne usufructuary mortgagee a party to the suit, either of the mortgagees has a right to redeem the other; but if the puisne mortgagee sues to redeem the prior mortgagee and the latter is prepared to redeem the former, the litigation must be regarded as two cross-suits, and, having regard to the justice of the case, the equities of the parties and the balance of convenience, the prior mortgagee should be given a decree to redeem the puisne mortgagee. The puisne mortgagee should not be allowed to redeem the prior mortgagee, who, having become owner of the equity of redemption, might file a redemption suit the next day and redeem the puisne mortgagee. **A** PARASRAM SINGH *v.* PANDOMI, 20 A. L. J. 401; 44 A. 462; 4 U. P. L. R. (A.) 145 **533**

——— Property hypothecated—Covenant to pay interest yearly and on default whole amount—Cause of action. *See* LIMITATION ACT, s. 19, SCH. I, ART. 132 **160**

——— *Redemption—Right of person interested in part of property to redeem whole.*

A person who has any right to redeem, has a right to redeem the whole of the mortgaged property, and, unless there is a special bargain, he cannot be compelled to redeem only the parts in which he may be interested. **L** KABUL SINGH *v.* KALA SINGH, 3 L. L. J. 259 **737**

——— *Redemption—Term fixed—Mortgagee, protection of—Presumption.*

A mortgagor or a puisne mortgagee may redeem, at any time, unless it appears from the mortgage-deed or from other circumstances that the term was created in favour of the mortgagee as well as the mortgagor.

Where a mortgagee of land is to enjoy the usufruct in lieu of interest and pay the rent to the *malguzar* and there is a possibility of his not being able to realise any profit in some years, if any term for redemption is fixed, the same should be presumed to be for the interest of the mortgagee as well. **N** TUKARAM *v.* MANGAYA **900**

——— *Subrogation—Charge—Property mortgaged to have its sale by prior mortgagee set aside—Charge, keeping alive of—Priority.*

Where a subsequent mortgagee takes his mortgage and advances mortgage-money in order to satisfy, and the money advanced by him does in fact go to satisfy, a prior mortgage, there is a clear intention to keep alive the charge, and to that extent he has priority over the mesne mortgagee.

An owner of the property who is in the rights of a first mortgagee and of the original mortgagor as acquired at a sale under the first mortgage is entitled at a suit of a subsequent mortgagee who is not bound by the sale of the decree on which it proceeded to set up the first mortgage as a shield. **Pat** RAM NARAIN LAL *v.* SAHADEO SINGH, 3 P. L. T. 261 (1922) PAT. 174 **221**

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———, *suit on, if competent in the absence of the original deed.*

A mortgage suit based on a certified copy of the mortgage-deed is not competent without proving any ground for not producing the original. **N** BHAIRONSINGH *v* HINDUSINGH **237**

Mortgage-decree *obtained* before *but executed* after *money-decree—Property sold in execution of both decrees—Priority.*

After a mortgage-decree was obtained but before it was executed, a money-decree was obtained and executed and the mortgaged property was purchased in execution sale by the holder of the money-decree. Then the holder of the mortgage-decree executed his decree and purchased the same property himself:

Held, that the later sale, which was in execution of the mortgage-decree must prevail, inasmuch as the holder of the money-decree, having purchased the property when the mortgage-decree was in existence, must be taken to have purchased it subject to the mortgage charge. **Pat** CHAMAN LAL *v.* KAMARUDDIN MIAN **262**

Mortgage suit—Preliminary instalment decree by consent of parties—Decree ordering foreclosure on default—Final decree, whether to be obtained before proceeding to execution—Time for payment, enlargement of. *See* CIVIL PROCEDURE CODE, O. XXXIV **273**

Muafi khairati tenants, *different kinds of.*

Two classes of persons may be recorded as *muafi khairati* tenants. In one class a man may be entitled to hold certain land free of rent as long as he performs certain services, both tenure and exemption being dependent on the services and ending with them. In the other are persons entitled to hold land as tenants, with an added condition that they shall pay no rent as long as they perform certain services, the exemption but not the tenure being dependent on the services and ending with them. **N** BED PRASAD *v.* KANGALU **305**

Muhammadan Law—*Lubbai Muhammadans—Inheritance—Females, whether excluded from succession.*

Among the Lubbai Muhammadans, who are converts from Hinduism, there is no custom or usage excluding females from succession.

There may be a custom at variance even with the rules of Muhammadan Law, governing the succession in a particular community of Muhammadans. But the custom must be proved and the burden of proving it lies on the party asserting it. **P C** MAHOMED IBRAHIM *v* SHAIKH IBRAHIM, 30 M. L. T. 85; 26 C. W. N. 793; 45 M. 308; 43 M. L. J. 69; 36 C. L. J. 64; (1922) M. W. N. 470; 24 BOM. L. R. 944 **115**

——— *Religious Endowments Act (XX of 1863), s. 14—*Inams *for religious services—Liability of service-holders to account for income—*Inam *property, whether divisible among trustees.*

In the case of an *inam* granted for the performance of religious services, it is not necessary that the service-holder should strictly account for his disposal of the produce of the lands attached to the charitable object.

The emoluments of a religious office are subject to partition among the holders of the office or joint trustees like any other family property though the office is joint and the co-trustees all form one

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ollective trustee. **M** MOHAMED HUSAIN v. MOHAMED ABDUL RAHIM BEG, (1922) M. W. N. 74; 15 L. W. 241; 42 M. L. J. 272 **492**

——— **Dower**—*Widow in possession of her husband's property "in lieu of dower"—Right of widow to alien ate—Transferee, rights of.*

Where a Muhammadan widow is in possession of property belonging to her deceased husband "in lieu of dower" it is competent to her to sell it without necessarily selling her right to receive her dower. Such a transfer conveys to the transferee the right to remain in possession during the widow's lifetime or until her dower or the proportionate part thereof corresponding to the property transferred is satisfied. **Pat** NABIJAN v. SAHIFAN **635**

——— **Gift**—Hiba-bil-ewaz—*Essentials.*

A conveyance by way of gift as between Muhammadans may be by deed of gift simply, or by deed of gift coupled with consideration. If the former, unless accompanied by delivery of the thing given, so far as it is capable of delivery, it is valid. If the latter, actual payment of the consideration must be proved and the *bona fide* intention of the donor to divest himself *in præsenti* of the property and to confer it upon the donee must also be proved. **A** MOHAN LAL v. MAHMUD HUSAIN, 20 A. L. J. 434; 4 U. P. L. R. (A.) 158; 44 A. 580 **671**

——— **Inheritance**—*Several deaths among heirs—Vested shares—Distribution.*

A 'vested inheritance' is the share which vests in an heir at the moment of the ancestor's death. If the heir dies before distribution, the share of the inheritance which has vested in him will pass to his heirs at the time of his death. So that where there have been several deaths among the heirs of a deceased Muhammadan before the final distribution of his estate, the shares of the different heirs must be determined on the basis of each death in working out the final distribution. **L** JAWAI v. HUSSAIN BAKHSH, 3 L. 80 **154**

——— **Wakf**—*Mussalman Wakf Validating Act (VI of 1913), s. 3 (b)—Wakf for payment of debts of settlor out of rents and profits of dedicated property, legality of—Provision for discharge of mortgage-debt if makes wakf invalid—Delivery of possession, if pre-requisite for validity of wakf—Marz-ul-maut—Disposition of more than one-third share of property without consent of heirs, whether valid — What constitutes death-illness — Mixed question of law and fact.*

Under section 3 *(b)* of the Wakf Validating Act, it is lawful for a person professing the Mussalman faith to create a *wakf* for the payment of his debts out of the rents and profits of the property dedicated.

A *wakf* is not invalidated by reason of the circumstance that the property dedicated was under mortgage and that provision was made in the *wakf-nama* for the discharge of the mortgage-debt.

Under the Hanafi Law delivery of possession is not a pre-requisite to the validity of a *wakf*, and even if transmutation of possession is necessary, no formal delivery is essential when the settlor is himself the first *mutwalli*.

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A Muslim who is in *marz-ul-maut* or death-illness cannot make a valid disposition of more than one-third of his property, and if he purports to make a *wakf* in such illness, unless his heirs assent, the *wakf* will affect only one-third of his estate and will be invalid in respect of the excess; this principle operates, notwithstanding that possession of the entire property dedicated has been delivered to the person nominated *mutwalli*.

In order to establish the existence of death-illness, there must be at least three conditions with regard to the illness which has caused death, namely, *(a)* proximate danger of death, so that there is a preponderance of apprehension of death; *(b)* there must be some degree of subjective apprehension of death in the mind of the sick person; and *(c)* there must be some external indicia, such as inability to attend to ordinary avocations.

Whether or not a particular illness constitutes *marz-ul-maut* is primarily a question of fact but it may sometimes be a mixed question of law and fact, for instance, where the question arises whether the facts found as to the physical condition of the deceased at the date of execution of the deed constitute the essential elements of a *marz-ul-maut* as formulated by Muhammadan jurists. **C** JINJIRA KHATUN v. MAHOMED FAKIRULLAH MEA, 34 C. L. J. 444; 26 C. W. N. 749; 49 C. 477 **77**

Murder—*Accused seen last with the deceased—No direct or circumstantial evidence—Acquittal.*

Accused was charged with murder and the only evidence against him was that he was seen last in the company of the deceased at about 8 o'clock in the night and, that when the body of the deceased was discovered the next morning, he was unable to give any explanation about the cause of the death:

Held, that in the absence of other evidence, circumstantial or direct, tending to show that he was concerned in the crime, the accused was entitled to an acquittal. **A** CHHIDDA v. EMPEROR, 20 A. L. J. 564; 4 U. P. L. R. (A.) 123; 23 CR. L. J. 452 **724**

Mussalman Wakf Validating Act (VI of 1913), s. 3 (b)—*Wakf* for payment of debts of settlor out of rents and profits of dedicated property, legality of—Provision for discharge of mortgage-debt if makes *wakf* invalid—Delivery of possession, if pre-requisite for validity of *wakf*. *See* MUHAMMADAN LAW—WAKF **77**

Offences punishable with death—*Murder—Death sentence normal sentence—Criminal Procedure Code (Act V of 1898), ss. 367 (5), 439—Mitigated sentence—Reasons—Enhancement of sentence after 9 months.*

For an offence punishable with death, the extreme sentence is the normal sentence and the mitigated sentence is the exception. Therefore, if the Judge does not pass the death sentence, he must find that there are really extenuating circumstances and not merely an absence of aggravating circumstances.

The existence of some provocation is not enough to justify the passing of the mitigated sentence.

Where a capital sentence should have been passed by the Sessions Judge but a sentence of transportation for life was passed instead, after 9 months

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the Chief Court found itself unable to enhance the sentence. **L B** EMPEROR *v.* SHWE HLA U, 11 L. B. R. 323; 23 CR. L. J. 437 **613**

Oudh Estates Act (I of 1869), s. 2—*Will, requirements of Family agreement embodying testamentary instructions — Family agreement, binding nature of—Construction of document—Document to be interpreted as a whole—Interpretation to be consistent.*

A Will as defined by section 2 of the Oudh Estates Act is a legal declaration of his intentions by a testator with respect to his estate which he desires to be carried into effect after his death. It has to be in writing and registered in the manner required by law. It need not be in any particular form. It must contain a declaration by the testator of his intention regarding the devolution of his estate after his death.

In all cases the primary duty of a Court is to ascertain the true intention of the testator from an examination of the entire Will. The Court is in fact entitled to put itself into the testator's chair and say what, having regard to the language used in the different clauses when read together, his intention was.

If a consistent interpretation can be placed on all the clauses of a document it should be adopted in preference to any other which might lead to inconsistent results.

A family settlement is binding on the parties thereto because the object of such settlement is the reconciliation of existing differences and the avoidance of future disputes.

Three brothers *K.*, *M.* and *A.* entered into a family agreement which recorded that they would have no power to make a gift or Will of their properties in favour of any person other than their children and wives of equal status, *(aulad wa azwaj najib-ut-tarfain)*, that after they died their *najib-ut-tarfain* children and widows would be their heirs and representatives and that children and widows as were not *najib-ut-tarfain* would be entitled only to maintenance. But that if any of them died without *najib-ut-tarfain* issue, then their issue who were not *najib-ut-tarfain* would inherit. This agreement was duly signed and registered *A.* died childless and the question was whether the above agreement constituted a Will on the part of *A.* whether it was binding on all the brothers and if so what interest in *A.*'s property was taken by his *najib-ut-tarfain* widow:

Held, (1) that the agreement constituted a valid Will on the part of *A.* as it satisfied all the requirements of a Will under section 2 of the Oudh Estates Act to which the parties were subject.

(2) that by the family agreement all the brothers relinquished their rights of succession to each other which they had under the Oudh Estates Act and that the agreement was binding on them as well as on all persons claiming through them:

(3) that under the Will of *A.* his widow succeeded to his property absolutely with full power to bequeath it to any person she liked. **O** MUHAMMAD YAQUB KHAN *v.* MUHAMMAD SHAHID ALI KHAN, 9 O. L. J. 160; 25 O. C. 21 **556**

Ouster—*Exclusive possession—Erection of substantial building on joint property if conclusive evidence of ouster.*

The erection of a substantial building on joint property by one co-owner cannot be regarded as conclusive evidence of ouster. **C** JAGANNATH MARWARI *v.* CHANDNI BIBI, 34 C. L. J. 432; 26 C. W. N. 65 **31**

Paramsana rent, *recovery of*—Paramsana *rent, what is—Suit for recovery whether lies in Revenue Court.*

A suit for arrears of *paramsana* rent lies in a Court of Revenue under section 108, clause 2 of the Oudh Rent Act in the same way as a suit for arrears of rent of any other kind payable in respect of a cultivatory holding. **O** SAT DEO *v.* JAI NATH, 9 O. L. J. 141; 4 U. P. L. R. (J. C.) 43 **808**

Pardah-nashin lady, dealings with—General rule, when not applicable. *See* SPECIFIC RELIEF ACT, s. 25 **19**

Part performance, *applicability of, equitable doctrine of—Doctrine applicable whether right to claim specific performance was or was not subsisting.*

In a suit for joint possession of land on declaration of title the defendant admitted that the land had fallen exclusively to the share of the plaintiff's father but alleged that the latter had exchanged that land with the defendant and received from her another piece of land that had fallen to her share. The lower Appellate Court found the story of exchange to be true but held that without a registered document the exchange was void:

Held, that notwithstanding the absence of a registered document, on the equitable doctrine of part performance, the plaintiff as heir of her father could not question the validity of the exchange.

That the doctrine was applicable without reference to the question whether the right to claim specific performance was or was not subsisting. **C** MEHAR ALI KHAN *v.* AROATANNESSA BIBI, 25 C. W. N. 905 **267**

Parties to suit—*Transferee pendente lite, whether necessary party.*

A person in whose favour a conveyance is made of the suit properties *pendente lite*, is not a necessary party to the suit, and if, on his own application, he is joined as a party, and during the pendency of an appeal in the suit he dies, the fact that his heirs are not substituted in his place, is not a defect in the constitution of the appeal. **Pat** RAMRUP GIR *v.* LAL CHAND MARWARI, 3 P. L. T. 352 **401**

Partition—*Parties, necessary—Co-owners—Co-sharers—Mortgagee with possession, whether necessary party*—Locus standi *to object to correctness of partition proceedings—Partition, effect of—Land in possession of one co-sharer before partition allotted to another co-sharer—Adverse possession of co-sharer in possession, when begins.*

Only owners and co-sharers are necessary parties to a partition proceeding. A mortgagee with possession is in no sense an owner or a co-sharer and therefore is not a necessary party and consequently has no *locus standi* to object to the correctness of a partition proceeding.

Whatever may have been the rights of parties to a partition proceeding before the partition of land, the partition creates new rights. Therefore

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for howsoever long a period a co-sharer may have been in possession of a piece of land, which in partition is allotted to another co-sharer, his adverse possession begins only from the date of partition. **L** MUHAMMAD DIN *v.* MUHAMMAD, 3 L. L. J. 377 **425**

——— Suit by co-sharers for declaration that partition is against terms of *wajib-ul-arz*—Jurisdiction of Civil Court. *See* SHAMILAT **240**

——— *Widow of deceased co-sharer, whether can claim partition—Maintenance, agreement to receive, whether bars claim.*

The widow of a deceased co-sharer in a joint holding has a statutory right to demand partition. The mere fact that she once agreed to receive a certain amount as maintenance from the co-sharers of her deceased husband would not debar her for all time from seeking to have her share in the holding partitioned off. **L** THAKRI *v.* SADHU SINGH, 54 P. L. R. 1922 **356**

Partition decree—*Execution by plaintiff—Defendant, right of, to continue proceedings.*

Plaintiff obtained a decree for the partition of a house, and applied for execution. A Commissioner was appointed to effect a division of it but before effect could be given to his report the house was burnt down: plaintiff thereupon wanted to drop the proceedings, but defendant objected:

Held, that defendant should be allowed to continue the execution proceedings in order that the property might be partitioned. **B** CHUNILAL *v.* MULCHAND, 24 BOM. L. R. 440 **417**

Partnership based on contract—Minor whether can create. *See* CONTRACT ACT, s 1247 **95**

Patent medicine, *imitation of—Suit for injunction—Specific Relief Act (I of 1877), s. 54—Test of imitation—Protection of Court, when to be given.*

A customer is generally and to a great extent guided by first impressions of general similarity. Consequently in a suit for injunction against the imitation of a patent medicine, its label and general get-up, the true test is to consider the number of similarities, not to calculate the points of difference. Minor points of distinction here and there which are not likely to attract a customer's eye on first sight, should not be magnified.

Though a Court of Law will not assist in the perpetration of a fraud, yet, where a particular business cannot be shown to be fraudulent, forbidden by law or even harmful to the public interest, the person whose trade is being captured and patent right infringed is entitled to its protection. **A** CHETARPAL SHARMA *v.* JAGANNATH DAS, 20 A. L. J. 537; 4 U. P. L. R (A.) 135; 44 A. 603 **353**

Pattams, *nature of—Pattam property—Junior members of pattam's family—Maintenance, right of—Appropriation of pattam property for private purpose, legality of*

Pattam is in some respects analogous to the *stanom* in Malabar. But it is not like the latter a mere dignity, but rather partakes of the nature of a religious office. The office is conferred by the Maghava villagers. Although they are by custom bound to bestow it on a member of the *aliyasanthana*

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family, yet on the non-existence of any such member, they can bestow it on any body they like.

Junior members of the family of a *pattam* holder cannot claim maintenance out of the *pattam* properties.

Per *Spencer, J.*—The *pattam* properties being properties attached to a religious office, any agreement by the *pattam* to appropriate them for private purposes is illegal. **M** NAGA RAJA *v.* KARNANTHAYA BELLALA, 41 M. L. J. 340; 14 L. W. 310; (1921) M. W. N. 626; 45 M. 62 **84**

Penal Code (Act XLV of 1860), ss. 116, 161, 107—*Public servant—Illegal gratification—Abetment—Offer — Instigation—Offering money for charities in which public servant interested.*

The accused called on *C.*, a Municipal Commissioner, to express acknowledgments for the withdrawal of objections against a building which a cousin of his wished to erect. In the course of the conversation the accused enquired if he should put in a tender for some cement about which the Municipality had advertised, remarking that it was no good putting in a tender unless one had influence. After this the accused said to *C.* "when shall I see you again." *C.* replied that there was no need. The accused again said, "shall I see you here or elsewhere." *C.* said, "what about." Accused said, "about that Rs. 5,000." *C.* enquired, "what Rs 5,000." Accused replied, "my cousin wishes to give you Rs. 5,000." *C.* became suspicious and called a colleague *K.* who was in the adjoining room and told him that the accused had offered him a bribe. The accused in the presence of the colleague admitted that he offered the money on behalf of his cousin. When asked to leave the office, the accused was profuse in his apologies and reluctantly withdrew. The accused was charged under section 116, Indian Penal Code, for the abetment of an offence under section 161. He stated in his defence that the sum offered was for certain charities in which *C.* was interested, and that *C.* did not allow him to make himself clear. As a matter of fact *C.* was interested in certain charities and had requested many gentlemen to subscribe to them. The accused was acquitted at the trial. The Government appealed:

Held, per *Shah, J.* (1) that the appeal failed and the accused was rightly acquitted as the conversation did not amount to an offer, nor did it amount to an instigation within the meaning of section 107 of the Indian Penal Code;

(2) that even assuming that the words amounted to an instigation within the meaning of section 107 of the Indian Penal Code the question was whether it was for doing anything which, if done, would be punishable under section 161, Indian Penal Code, but the sum which the cousin was to pay could have reference only to the objections against the building already withdrawn and could not refer to any future act such as the tender with which the cousin had no connection;

(3) that although the explanation of the accused that the sum was meant for charities in which *C.* was interested was undoubtedly open to criticism, as the inference suggested by what happened at the

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interview was equivocal and the explanation put forward by the accused was reasonably possible, the theory of innocence could not be said to have been sufficiently negatived by the prosecution; (4) that no inference could be drawn against the accused from his omission to mention that the sum was meant for charities when *C.* called in *K.* and told him that he had been offered a bribe as in such a position some persons may act with coolness while others may not be able to do so.

Per *Macleod, C. J.*—That the words "my cousin wishes to give you Rs. 5,000," did not legally amount to an offer, but they indicated a state of mind on the part of the cousin that, if asked, he might give the sum, that the words were an instigation stimulating *C.* towards making an attempt to get the amount and that even if it was assumed that the accused was instigating *C.* to get the sum for one of his funds, that would amount to no more than a mitigation of the offence since under section 161 gratification was not restricted to pecuniary gratification or to gratification estimable in money.

The distinction between offer and invitation to offer is well-recognised in the law of contract and there is no reason why the same should not be observed in a criminal case if the sole question is whether an offer has been made or not.

[In view of the fact that Shah, J. acquitted the accused, His Lordship refrained from expressing an opinion on the question whether the appeal should be allowed or not.—*Ed.*] **B** EMPEROR *v.* AMIRUDDIN SALEBHOY, 24 BOM. L R. 534; 23 CR. L. J. 466 **818**

——— **ss. 147, 333**—*Rioting—Assaulting and obstructing public servant—Separate convictions, legality of—Identification—Presumption—Evidence Act (I of 1872), s. 114 ill. (e).*

Several persons were convicted under section 147 of the Penal Code of rioting with a view to attacking and obstructing the Police in the discharge of their duties and were also convicted under section 333 of the Code of the substantive offence of so attacking and obstructing them:

Held, that both convictions could not stand and that the conviction under section 147 must be set aside.

Although it has to be presumed under section 114 illustration *(e)* of the Evidence Act that every official act is properly performed, yet this presumption is hardly sufficient to satisfy a Court that such precautions have been taken at an identification as to render it truly valuable. **L** KALLU *v.* EMPEROR, 23 CR. L. J. 449; 4 L. L. J. 448; 4 U. P. L. R. (L.) 95 **721**

——— **ss. 147, 355**—*Offences committed in same transaction—Separate sentences, legality of.*

In order to carry out a sentence imposed by a private *panchayat* upon the complainant, the accused blackened the complainant's face and made him ride a donkey round the village. They were convicted of offences under sections 147 and 355 of the Penal Code and separate sentences were awarded in respect of each offence:

Held, that the acts committed by the accused formed part of the same transaction and that, therefore, separate convictions and separate sentences under section 147 and section 355 were illegal. **L** KARAM SINGH *v.* EMPEROR, 23 CR. L. J. 457 **729**

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——— **s. 188**, *elements of—Direction for prosecution—Prima facie case.*

A Court in giving directions for the prosecution under section 188, Penal Code, is bound to find that there was a *prima facie* case with respect to all the elements, which are essential to constitute the offence with respect to which the order under section 476 of the Criminal Procedure Code is passed. An order which does not set forth all the elements of an offence covered by it is, therefore, without jurisdiction. **Pat** PARMESHWAR RAI *v.* EMPEROR, 3 P. L. T. 268: (1922) PAT. 204; 4 U. P. L. R. (PAT.) 34; 23 CR. L. J. 381 **205**

——— **s. 188**—*Criminal Procedure Code (Act V of 1898), s. 144, order under, legality of, whether can be questioned.*

The mere fact that an application to revise an order under section 144, Criminal Procedure Code, was rejected by the High Court on the ground that when the application was made, the period of the order had elapsed, would not preclude a Magistrate in a trial, under section 188 of the Penal Code, from questioning the legality of the order under section 144 of the Criminal Procedure Code. **C** JIARATDIN MOHAMMAD *v.* EMPEROR, 34 C. L. J. 578: 23 CR. L. J. 376 **200**

——— **s. 193**—*Contradictory statements before two Magistrates—Sanction to prosecute—Proper Court—Criminal Procedure Code (Act V of 1898), s. 195, cl. 7 (a).*

Where a witness makes contradictory statements in the Courts of two Magistrates, the Court competent to grant sanction for his prosecution under section 193, Penal Code, is the Court to which both the said Courts are subordinate.

For the purpose of a sanction to prosecute a witness under section 193, Penal Code, the Court of a Magistrate of the Second Class, is subordinate to the District Magistrate and not to the Sessions Judge. **L** WARYAM SINGH *v.* EMPEROR, 3 L. L. J 589: 23 CR. L J. 465 **817**

——— **s. 295**—*Damage to mosque by placing rafters of house in walls thereof—Absence of knowledge of damage or insult to Muhammadan religion—Offence.*

When a person in re-building his house has no idea that he is likely to do damage to the walls of a mosque by placing the ends of his rafters thereon, or without knowledge that such damage was likely to result, as would be considered by Muhammadans, as an insult to their religion, his conviction under section 295 of the Penal Code, is not justified. **L** SOHANA RAM *v.* EMPEROR, 3 L. L. J. 247; 23 CR L. J. 426 **586**

——— **s. 361**—*Minor brother—Complaint for kidnapping of sister.*

A minor brother cannot be the guardian of his sister, and, consequently, cannot lodge a complaint for kidnapping under section 361 of the Penal Code. **L** KARURA *v.* MAM RAJ, 3 L. L. J. 588; 23 CR. L. J. 479 **831**

——— **ss. 366, 394**—*Abduction—Intention—Inference—Robbery and abduction—Separate convictions.*

The intent with which a woman is abducted or kidnapped is more or less a matter of inference.

There may be some cases in which the matter is capable of direct proof, but very generally one has to infer from the circumstances of the case and the subsequent conduct of the accused as to what was the intention with which the kidnapping or the abduction had been brought about. In such cases it is for the accused to explain away the incriminating circumstances and to prove that he had no improper or sinister object in view.

Where a woman going peaceably with her husband on the road is robbed of her ornaments and then carried off to a distant village and is kept confined in a house to which no other person could have access except the accused, the only inference that is possible is that she was carried off with the object that she may be forced or seduced to illicit intercourse, and it is for the accused to prove that they had some other object in view.

Where a woman is first robbed of her ornaments and is then carried off, the abduction although immediately following the robbery is no part of that offence, it not being necessary to complete the offence of robbery that the woman should also be abducted. In such a case separate convictions and sentences of the accused under the two offences are right and proper. **L** CHANDA SINGH *v.* EMPEROR, 8 L. L. J. 574; 23 CR. L. J. 459 **731**

——— **s. 376**—*Rape—Conviction based solely on evidence of woman raped, whether justified.*

In cases of rape, where the prosecution evidence is not sufficiently strong to warrant a conviction, it is unsafe to convict merely on the accusation of the woman who has been raped. **L** KANSHI RAM *v.* EMPEROR, 23 CR. L. J. 475 **827**

——— **s. 379**—*Theft—Crops sown in another's field—Removal by latter—Offence.*

A person who cuts and takes away crops sown by another, is guilty of theft. The fact that the crops in question stood upon fields in the cultivatory possession of the person removing them and were sown there without any right is of no consequence. **A** MUHAMMAD ATA *v.* EMPEROR, 19 A. L. J. 961; 23 CR. L. J. 402 **498**

——— **s. 403, Expl. (2)**—*Derelict animal—Possession—Misappropriation—Duty of finder of property.*

A person who takes possession of a derelict animal of which no owner can be discovered, is not guilty of any offence, and cannot be convicted of an offence under section 403 of the Penal Code.

A person, finding a property of which, from the nature of it, there must be an owner, must take reasonable care of it and endeavour to find out the owner; but he is not bound to adopt extraordinary means for the discovery; nor is he bound to be out of pocket in discovering the owner by means of advertisement. **Pat** SARAJUL HAQUE *v.* EMPEROR, 23 CR. L. J. 401 **497**

——— **s. 411**—*Receiving stolen property—Father convicted—Son living in house, conviction of.*

A father and son were living in the same house. After the conviction of the father under section 411, Indian Penal Code, the son was *challaned* and convicted under the same section on the same grounds but there was nothing to show that he was in possession of property which he knew or had reason to believe was stolen except that he had said to the Police that there was no stolen property in the house:

Held, that the conviction could not be sustained. **O** EMPEROR *v.* FARRUKH HUSSAIN, 24 O. C. 294; 23 CR L. J. 428 **588**

——— **s. 411**—*Stolen property, possession of—Possession of wife, whether possession of husband.*

Accused with several other males and females lived in a house as a joint family During his absence from the house, a locked box containing stolen property was found therein, whose key was produced by accused's wife Accused was convicted under section 411 of the Penal Code:

Held, that although the possession of a wife would frequently be the possession of the husband, yet this could not be presumed *per se* in every case: there must be something to connect the husband with the possession more than the mere fact that he is the husband, and that, in this case, the conclusion that the husband was in possession could not be justified. **A** KHUSHI RAM *v.* EMPEROR, 20 A. L. J. 162; 4 U. P. L. R. (A.) 14; 23 CR. L. J. 356 **338**

——— **ss. 415, 420**—*Cheating — Fraudulent intention — "Property," meaning of — Certificate obtained by making false representations—Certificate, if "property."*

A practically conclusive test of the fraudulent character of a deception for criminal purposes is this: Did the author of the deceit derive any advantage from it which could not have been had if the truth had been known?

Whether an article is or is not "property" within the meaning of section 420, Indian Penal Code does not depend upon its possessing a money or market value. If it has some special value for the person or persons concerned, it is "property," even though its value cannot be measured in money.

A certificate for having passed an examination is "property" within the meaning of section 415, Indian Penal Code.

Where a person by representing himself to be another obtains from an Inspector of Schools a certificate testifying to his having passed a certain examination, when, in fact, he had not passed that examination, he commits the offence of cheating punishable under section 420 of the Penal Code. **N** LOCAL GOVERNMENT *v.* GANGA RAM, 18 N. L. R. 52; 23 CR. L. J. 448 **619**

——— **s. 417**—Cheating—Offence committed at one place—Loss caused at another place—Jurisdiction. *See* CRIMINAL PROCEDURE CODE, s. 177 **623**

——— **ss. 417, 420**—*Conviction under s. 417—Offence disclosed under s. 420—Magistrate, second Class, jurisdiction of, to try case.*

Complainant, while under the influence of liquor administered to him by the accused, was induced to sign a document purporting to be a bond evidencing a loan of money but which, in reality, was a deed divorcing his wife: accused were convicted by a Magistrate of the Second Class of an offence under section 417 of the Penal Code: On revision:

Held, that the offence charged fell within the purview of section 420 and not section 417 of the Penal Code, and consequently the Trying Magis-

Penal Code—concld.

trate had no jurisdiction to enquire into or try the case. **L** BAKHTAWAR SINGH *v.* EMPEROR, 3 L. L. J. 283; 23 CR. L. J. 428 **588**

——— **s. 447**—Criminal trespass—Possession, finding as to. *See* CRIMINAL PROCEDURE CODE, s. 342 **616**

——— **ss. 494, 497, 493.** *See* CRIMINAL PROCEDURE CODE, s. 199 **734**

——— **s. 499**—*Defamation—Imputations against persons who cannot be identified—Printing unfounded rumours—Good faith—Journalistic duties.*

A defamatory statement to be actionable must contain an imputation concerning some particular person or persons whose identity can be established. An imputation against an Association or collection of persons jointly may amount to defamation within the meaning of section 499, Indian Penal Code, but it must be an imputation capable of being brought home to a particular individual or collection of individuals as such.

It is unnecessary that the person whose conduct is called in question should be described by name. It is sufficient if on the evidence it can be shown that the imputation was directed against a particular person or persons who can be identified. The rule is that if the words used contain no reflection upon a particular individual or individuals but may equally well apply to others, although belonging to the same class, an action will not lie.

To publish, without regard to the feelings of those against whom it is directed, every foul rumour that may be reported to him, cannot be justified by any recognised standard of editorial duty, specially in a case where the untruth of the rumour could easily have been established by a few simple enquiries on the spot The Editor in such a case neither acts in "good faith" nor for the "public good." **Pat** GOVERNMENT ADVOCATE *v.* GOPABANDHU DAS, 3 P. L. T. 209; (1922) PAT. 117; 4 U. P. L. R. (PAT.) 27; 23 CR. L. J. 433 **609**

——— **ss. 499, Excep. (9), 500**—Defamation—"*Pichhlag*" and "*lawaris*," whether defamatory. *See* CRIMINAL PROCEDURE CODE, s. 439 **589**

Perpetuity, *rule against—Lease—Covenant not to transfer without lessor's permission.*

A covenant in a lease offends against the Rule of Perpetuity, when it provides that, if the lessee or any of his representatives intend to transfer the whole or any portion of the lease, the transfer would be made in favour of the lessors for proper price and that the lessee would not be able to transfer in favour of a third party without the lessor's permission or wishes. **C** SWARNA KUMAR GHOSE *v.* PRAHLAD CHANDRA SARKHEL, 25 C. W. N. 874 **719**

Plaint, amendment of—Case ripe for judgment. *See* CIVIL PROCEDURE CODE, O. VI, R. 17 **132**

Plea and issue, absence of—High Court, power of, to set up new case. *See* CONTRACT ACT, ss. 247, 239 **124**

Pleadings—*Suit for possession of mortgaged property—Mortgage-bond challenged as fraudulent—Fraud not proved—Amendment—Suit, whether can be converted into suit for redemption—Discretion of Court.*

Pleadings—concld.

In the absence of special circumstances, a suit to recover possession of a plot of land on a declaration that a mortgage-bond was fraudulent, collusive and without consideration, when the case of fraud has failed, cannot be converted into a suit for redemption of the mortgage: but it may be so converted, in the discretion of the Court, if the mortgage is valid and binding and the circumstances of the case permit it.

A plaintiff must ordinarily succeed on the case he has made in the plaint and, unless there are special circumstances, an action instituted for purposes absolutely inconsistent with redemption cannot properly be converted into an action to redeem, as it would in reality amount to the conversion of a suit of one character into a suit of another and inconsistent character. **C** NITYA GOPAL *v.* RAMSASI ROY **394**

Possession, *suit for—Defendant alleging sale—Sale found to be invalid—Title and ownership, proof of.*

Plaintiff sued to recover possession of land from defendants whom he described as trespassers; the defendants in reply asserted title under a deed of sale in their favour executed by the plaintiff's guardian during his minority; plaintiff impugned the sale, and it was found that it was not for his benefit and was, therefore, not binding on him:

Held, that the defendants having failed to prove title, plaintiff should succeed without being asked to prove his own title to ownership. **L** AMAR CHAND *v.* RAM RAKHA, 3 L. L. J. 402 **941**

———, *suit for, on basis of dispossession—Dispossession, what is—Evidence of definite acts of ownership adduced by both parties—Court, if can resort to any presumption as to title—Limitation Act (IX of 1908), Sch. I, Art. 142.*

There is no dispossession unless there is termination of the possession of the rightful owner followed by the actual possession of another.

Where in a suit for recovery of possession of land, each of the parties to the suit sets up the exercise of some definite acts of ownership over the land, the Court must decide the case upon the evidence adduced by the parties without resorting to any presumption as to title. **C** BEHARI LAL NANDI *v.* NRIYANANDA GHOSE **1005**

———, *suit for, on ground of dispossession—Oral evidence given by both parties unsatisfactory—Court, whether competent to look into other circumstances, probabilities and presumptions as to title and possession—Limitation Act (IX of 1908), Sch. I, Arts. 142, 144.*

In a suit for possession of immoveable property on the allegation that the plaintiff, while in possession of the property was dispossessed by the defendant, if oral evidence of possession is given on both sides but the Court finds some difficulty in arriving at a conclusion upon that evidence, or does not consider the evidence altogether satisfactory, it is not precluded from taking into account the other circumstances, probabilities and presumptions that may arise in the case in regard to possession and title. Such a case is not one in which there is no evidence, or where the evidence is valueless. **Pat** TIAN SAHU *v.* MULCHAND SAHU, 3 P. L. T. 460 **631**

Possession—concld.

——, *suit for—Plaintiff to establish title—Defendant's failure to prove title cannot affect position.*

In a suit for recovery of possession of a land on declaration of title it is for the plaintiff to establish his title to the land and if he fails to do so the failure of the defendant to establish his title cannot affect the position. C ABDUL AZIZ v. AMIR ALI **149**

—— *without title—Interest good against all world except true owner.*

A person in possession, whether lawful or not, has an interest in the property which is good against all the world except the true owner. L SIDHU v. DHANNA, 2 L. L. J. 271 **948**

Practice—*Criminal appeal before Sessions Judge—Case triable by Sessions Court—Committment.*

When a Sessions Judge on appeal finds that the case against the accused is in reality one triable by a Court of Session, it is not open to him to modify the charge and alter the sentence. The proper course for him is to direct that the accused be committed for trial to the Court of Session on the new charge. A HASAN RAZA v EMPEROR, 20 A. L. J. 568; 23 CR. L. J. 456; 4 U. P. L. R. (A.) 152 **728**

—— *Patna High Court, whether bound to follow Calcutta rulings.*

The Patna High Court is not bound to follow slavishly the decisions of the Calcutta High Court or of any other High Court Pat AMRIT LAL v. MURLIDHAR, 3 P. L. T. 412; (1922) PAT 224 **538**

Pre-emption—*Agricultural land — Punjab Pre-emption Acts (II of 1905) and (I of 1913)—Right to pre-empt.*

On a sale of agricultural land in the Punjab, the right to pre-empt is open to every one of the vendor's heirs, the preferential right among them being determined according to the order of succession. PC SABZ ALI KHAN v. KHAIR MUHAMMAD KHAN, 30 M. L. T. 237; 20 A. L. J. 427; 3 L. 48; 7 P. W. R. 1922; 35 C. L. J. 514; 43 M. L. J. 49; 4 U. P. L. R. (P. C.) 39; 1 P. L. R. 1922 **264**

—— *Hindu Law—Joint family—Sale by father—Necessity—Son, whether can pre-empt.*

The sons in a joint Hindu family cannot maintain a suit to pre-empt a sale of joint family property made by the father as managing member of the family and which is not alleged to be otherwise than for necessity. L SUKHA RAM v. KOTU RAM **76**

—— *Mortgagee pre-emptor — Acceptance of mortgage-money from vendee—Delay in institution of pre-emption suit—Waiver.*

The mere acceptance of the mortgage-money by a mortgagee from the vendee of the equity of redemption or his omission at the time to express a desire to purchase the property does not amount to a waiver of his right to claim pre-emption.

A pre-emptor is allowed by the law twelve months to make up his mind whether he will sue or not, and any delay in suing is immaterial provided that the suit is within the period of limitation. L IMAM DIN v. JALAL, 4 L. L. J. 204 **395**

Pre-emption—contd.

—— *Non-compliance with decree—Appeal.*

Non-compliance with a decree for pre-emption is not fatal to the further prosecution by the pre-emptor of an appeal against the decree. L MUHAMMAD KHAN v. GHULAM QADIR, 4 L. L. J. 397 **844**

—— *Non-Muhammadans - Lex loci—Personal law—Non-Muhammadan of Delhi owning property in Bihar—Sale—Right of pre-emption.*

The Muhammadan Law of pre-emption exists in certain parts of India as a *lex loci* where both Muhammadans and non-Muhammadans are entitled under it to claim the right of pre-emption. But nowhere has it been adopted as the personal law of non-Muhammadans, and thus is not carried outside the locality in which it obtains. Therefore, if a non-Muhammadan, who is by custom amenable to the law of pre-emption in a particular locality, is the owner of a property in another locality, where a similar custom exists, he is not amenable to the custom in the new locality, for, although it is a similar custom, it is not the same custom to which he has become amenable by reason of the fact that he is a native of or domiciled in a particular locality. Consequently, a non-Muhammadan of Delhi is not bound by the custom of pre-emption which exists in Bihar, although a custom of pre-emption exists also among non-Muhammadans of Delhi. In other words, the sale of property by a non-Muhammadan in Bihar does not give rise to a right of pre-emption if the vendor is not either a native of or domiciled in Bihar. Pat FAZAL KARIM v. BIBI FATMATUL KUBRA, 3 P. L. T. 556 **706**

—— *Omission to claim whole land sold—Accidental mistake—Amendment of plaint.*

If in a suit for pre-emption the plaintiff intentionally sues for less land than is covered by the sale he loses his right of pre-emption; but in cases where the error is merely accidental and relates only to the description of the property the pre-emptor is always allowed to amend his claim. If, of course, he refuses to correct his error when it is pointed out to him he will be held to have forfeited his claim.

Where, however, the vendee himself takes no objection to the error or raises an objection too late, the right of pre-emption is not forfeited. L ALLAH RAKHIA KHAN v KALA RAM **872**

—— *Transfer by vendee after institution of suit—Transferee, whether can set up superior right of pre-emption—Lis pendens, doctrine of, applicability of.*

Where after the institution of a suit for pre-emption the vendee transfers the property in dispute to a third person but the transfer is not made in recognition of the superior right of pre-emption of the transferee, the doctrine of *lis pendens* applies, and the latter cannot plead his superior right of pre-emption in answer to the plaintiff's claim. L MUNSHI RAM v. MAGHAR MAL **304**

—— **suit** *—Decree directing payment within certain period—Period, expiry of, while Court closed—Payment on re-opening of Court, effect of.*

Where a pre-emptor is given a decree on condition of paying in Court the purchase-money within a certain period and the Court closes the very next day and remains closed till after the

expiry of the period allowed, payment on the day the Court re-opens is a sufficient compliance with the decree.

Obiter.—When a pre-emptor is given a decree on condition of paying the purchase-money within a certain period, and the Court is open during the earlier part of that period but closed during the latter part, payment on the day the Court re-opens is not a sufficient compliance with the decree. **L** HIMMUN *v.* FAUJA, 3 L. L. J. 310 **772**

Presidency Towns Insolvency Act (III of 1909), s. 17 *no bar to creditor's right to institute suit.*

Section 17 of the Presidency Towns Insolvency Act is not a bar absolute to the creditor's right to institute a suit unless the institution of a suit has been stayed by an injunction or order The creditor, therefore, cannot claim a deduction of time, during which the insolvency was pending, in computing the period of limitation in any suit brought by him after the insolvency proceedings are quashed. **B** SIDHRAJ BHOJRAJ *v.* ALLI HAJI, 24 BOM. L. R. 509 **757**

Principal and agent—Agent acting for foreign principal—Personal liability of agent—Presumption—Time of essence of contract. *See* CONTRACT ACT, s. 230 (1) **157**

Probate and Administration Act (V of 1881), s. 92—*Executors—Power to act alone—Direction in the Will—"Several," meaning of—Renewal of barred debt—Executor, competency of.*

Under section 92 of the Probate and Administration Act, two out of three executors are competent to act alone unless the Will contains "a direction to the contrary."

The word "several" in section 92 of the Act does not mean "possessing powers to act severally" This meaning is inconsistent with the use of the word in ordinary parlance

An executor is competent to renew a barred debt. Probate and Administration Act should not be read as superseding the previous law, merely because it is silent on this point. **A** ALAMURI SITARAMASWAMI *v.* RAGHAVACHARYULU VENKAATA, 42 M. L. J. 559; 30 M. L. T. 344; 16 L. W. 52 **104**

Procedure—*Evidence—Court, if can refer to documents other than those on record without hearing parties.*

No Court has a right to look at any document or any papers other than those on the record without giving the parties to the suit an opportunity of being heard and of making their submission with regard to what is contained in documents outside the record to which the Judge desires to refer.

If it becomes necessary to refer to matters other than those on the record in accordance with the provisions in that behalf contained in the Code of Civil Procedure, reference to such evidence must only be made in the presence of the parties and after hearing them upon the evidence. **C** ALTAF ALI CHOUDHURY *v.* JARINA BIBI **871**

Promissory-note *signed by member of Company—Company, liability of.*

A promissory-note was written on paper on which was printed the name of a Company, and there was

in addition on the paper a rubber stamp impression of the Company: the note was passed in lieu of the balance due on account of certain machinery purchased for the Company, and was signed "T. N. Joshi for oshi Patwardhan & o., Secretaries, Treasurers and Agents":

Held, that the promissory-note was drawn on behalf of the Company, and that the Company was liable for the amount thereof **C** POONA CHITRASHALA STEAM PRESS *v.* GAJANAN INDUSTRIAL & TRADING CO, 21 BOM. . R. 5 **941**

——, *suit on—Consideration—Onus—Defendant, when entitled to succeed without proving want of consideration.*

The ordinary rule is that in a claim to recover money lent, the defendant must prove absence of consideration if that is his case.

But in a case where consideration is denied in the written statement and the plaintiff goes into the witness-box, and the result of his cross-examination is such that he fails to establish the point which he set out to make, namely, that he gave the consideration and the Court is thus satisfied that he did not give the consideration, the defendant can avail himself of that and has a right to a decree. **A** MUHAMMAD SHAFI KHAN *v.* MUHAMMAD MOAZZAM ALI KHAN, 4 U. P. L. R. (A.) 46 **684**

Prosecution, failure of, to appreciate motive, effect of *See* EVIDENCE ACT **343**

Provincial Insolvency Act (III of 1907), ss. 14, 15—*Provincial Insolvency Act (V of 1920), ss. 10, 24—Application to be adjudged insolvent—True and full disclosure of property, inquiry as to, whether can be made at adjudication.*

An issue whether a petitioner to be adjudged insolvent has made a true and full disclosure of his property is not pertinent at an inquiry under section 15 of the Provincial Insolvency Act III of 1907 provided he has given the particulars required with regard to his property, as it is not until after the adjudication that it can be ascertained whether the petitioner has made a true and full disclosure. **B** LAXMI BANK, LTD *v.* RAMCHANDARA NARAYAN APTE, 24 BOM. L. R ; A B 757 **235**

—— **ss. 16, 28**—*Insolvent tenant—Rents due after adjudication, whether provable under the Act—Suit for recovery with leave of Insolvency Court, whether maintainable.*

Where, after a tenant is adjudged insolvent, his rent falls into arrears, the arrears of rent so due stand on the same footing as a debt or liability incurred after the order of adjudication and do not constitute a debt provable under the Provincial Insolvency Act, because the obligation or liability to pay the arrears did not arise till after the adjudication was made. A suit, therefore, to recover such arrears is maintainable without the leave of the Insolvency Court. **O** KUER BEHARI LAL *v.* KALKA, 9 O. L. J 157 **549**

Provincial Insolvency Act (V of 1920), ss. 5, 75 (3)—*District Court, power of, to grant review—Appeal from order granting review—High Court when will interfere*

A District Judge acting under the Provincial Insolvency Act has power to review his own order,

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because section 5 of that Act gives a District Judge, when sitting as an Appellate Court, the same powers under the Code of Civil Procedure which he would have had if he had been sitting to hear an ordinary appeal.

Though an appeal lies to the High Court under section 75 (3) of the Provincial Insolvency Act, from an order granting a review of judgment, yet the Court in dealing with such an appeal should be guided by the principles laid down in the Civil Procedure Code. A MUNNU LAL v KUNJ BEHARI LAL, 20 A. L. J. 517; 4 U. P. L. R. (A.) 66; 44 A. 605 **317**

——— **ss. 53, 75**—*Gift of money, whether 'transfer'—Order under s. 53—Appeal, second.*

A gift of money made by an insolvent a few months before his being adjudged an insolvent to his mistress for the purpose of purchasing a motor car, amounts to a 'transfer' within the meaning of section 53 of the Provincial Insolvency Act and is liable to be set aside under the provisions of that section, even though the subject-matter of the gift is converted into a car.

No second appeal lies from an order under section 53 of the Provincial Insolvency Act annulling a transfer. L ILAHI JAN v HARI KISHEN DAS **887**

Provincial Small Cause Courts Act (IX of 1887), s. 25—*Jurisdiction—No error of law—Interference by High Court, if competent.*

A High Court will not interfere with a decree, if no error of law has been committed by the Small Cause Court within the meaning of section 25 of the Provincial Small Cause Courts Act. C BAUL CHANDRA ADDYA v. ABDUL MATLEB **851**

——— **s. 27**—*Decree or order of Small Cause Court—Transfer to ordinary Court for execution—Order in execution, whether appealable.*

Ordinarily, the decree or order of a Small Cause Court is final, under section 27 of the Provincial Small Cause Courts Act, but when such a decree is transferred to the ordinary Court for execution as if it were a decree made by that Court, the orders made in execution are appealable in the same way as orders made in the execution of decrees passed by that Court, although under section 102 of the Civil Procedure Code a second appeal would be barred. C JAMINIPALA DEBI v. KARALI PRASAD MUKHERJEE, 34 C. L. J. 77 **6**

——— **Sch. II, Art. 35 (ii)**—*Suit for value of fruit removed from tree—Jurisdiction, objection to, not taken in Trial Court, effect of.*

A suit to recover the value of fruit removed from a tree is excluded from the cognizance of a Small Cause Court by Art. 35 (ii) of Schedule II to the Provincial Small Cause Courts Act, if the removal amounts to theft.

The fact that no objection as to jurisdiction is taken in the Trial Court, has not the effect of conferring a jurisdiction on that Court which it otherwise did not possess. L NABI BAKHSH v. MOHAMMAD ALI, 3 L. L. J. 380 **305**

"Public demand," *meaning of.*

The "public demand" mentioned in section 4 and defined in section 3, clause (6), read with clause 7, of Schedule I includes a demand payable to the collector by a person holding any interest in land when

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such demand is a condition of the use and enjoyment of the land. C PRATAP CHANDRA JANA v. SECRETARY OF STATE FOR INDIA, 35 C. L. J. 304 **375**

Public Demands Recovery Act (III of 1913), ss. 4, 37.

It is not open to the Revenue Authorities to issue a supplemental certificate for the period covered by a certificate previously issued under section 4 of the Public Demands Recovery Act. C PRATAP CHANDRA JANA v. SECRETARY OF STATE FOR INDIA, 35 C. L. J. 304 **375**

Punjab Courts Act (XVIII of 1884), ss. 40, 70 (1), (a), (b)—*Divisional Court confirming decree of lower Court—Revision to the Chief Court—Revision converted into appeal under s. 70—Punjab Courts Act I of 1912 passed before this conversion giving right of appeal—Appeal whether valid.*

A petition for revision, under section 70 (1) (a) of the Punjab Courts Act XVIII of 1884, was presented to the Chief Court on 20th January 1920. Before the petition came up for admission, that section was repealed by Act I of 1912 but the admitting Judge by a mere inadvertance and probably not having before his mind the Act I of 1912, admitted it as an appeal under clause 1 (b) of the repealed section. At the hearing of the appeal it was objected that as the power of converting a revision into a further appeal had been taken away by the new Act, the order of the Judge was made without authority:

Held, that although the Act of 1912 had taken away from the Chief Court the power of converting a revision into a further appeal, yet under section 41 of the Act of 1884, as amended by the Act of 1912, the petitioner had acquired an independent right of appeal when the appeal was admitted, and that as that right was subsisting on that date, the appeal could be treated as properly admitted under that section. L JAI CHAND v. SHAHZADA, 1 L. L. J. 126 **358**

Punjab Courts Act (VI of 1918), ss. 41 (3), 44—*Appeal, second—Custom—Burden of proof—Certificate, whether necessary—Refusal, erroneous, to grant certificate—Revision, if competent.*

The question of *onus probandi* in custom case cannot be raised in second appeal without a certificate under section 41 (3) of the Punjab Courts Act.

When an application for a certificate under section 41 (3) of the Punjab Courts Act for filing a second appeal on the question of *onus probandi* in a custom case is refused by a District Judge on the erroneous ground that no certificate is required, a revision to the High Court from the order of refusal is competent on the ground that the District Judge has failed to exercise the jurisdiction vested in him. L NATHU v BATAN SINGH **759**

Punjab Excise Act (I of 1914), ss. 58, 59, 65, 78—*Licensee of liquor-shop contravening rules as to keeping correct registers—Sentence of fine and order for forfeiture of liquor, validity of.*

The mere making of an incorrect entry in the registers, kept under rules framed under sections 58

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and 59 of the Punjab Excise Act, is not an offence in itself. It is only a wilful contravention of any regulation made under sections 58 or 59 which is punishable under section 65 of the Act.

An order directing forfeiture of liquor and empty bottles found in the shop is illegal and cannot be passed under section 78 of the Act. **L** SUNDAR DAS *v.* EMPEROR, 3 L. L. J. 195; 23 CR. L. J. 376 **200**

Punjab Land Revenue Act (XVII of 1887), s. 158 (2) (xvii). *See* SHAMILAT **240**

Punjab Laws Act (IV of 1872), *insolvency proceedings under, whether "suit"—Order, whether decree—Appeal.*

Insolvency proceedings under the special provisions of the Punjab Laws Act do not amount to a "suit", as the term is used in section 13 of the Civil Procedure Code; an order in such proceedings, therefore, is not a decree, and is, consequently, not appealable. **L** RADHA KISHEN *v.* MADAN GOPAL, 3 L. L. J. 338 **794**

Punjab Limitation (Ancestral Land Alienation) Act (I of 1900), Sch. I, Arts. 1, 2—*Limitation Act (IX of 1908), Sch. I, Art. 144—Suit for possession by heir or reversioner--Object of Punjab Act—Suit barred before accrual of right to sue—Limitation—Particular provision, plaint to determine.*

An action to recover possession of ancestral land alienated by a male proprietor subject to the Customary Law of the Punjab is governed by the provisions of the Punjab Limitation (Ancestral Land Alienation) Act, I of 1900, if the death of the alienor, which gives rise to the cause of action for a suit for possession, takes place after the enforcement of the Act

The whole scheme of the Act makes it clear that the object of the legislature was to remove an uncertainty about titles to land by compelling the relatives of the male proprietors to impeach their alienations within a limited period, namely, twelve years from one of the dates specified therein. It was intended that the title of the alienee should be immune from attack, if the alienation in his favour was not contested within twelve years from the date mentioned in the third column of the schedule Art 2, which deals with a suit for possession, should be read with Art. 1 which prescribes the period of limitation for a suit for a declaratory decree, and the word 'heir' used in the former Article connotes the same person or persons as the expression "son or reversioner" in the latter Article.

The word "heir" denotes a person who succeeds by descent to an estate of inheritance, and it is beyond doubt that as long as a proprietor is living he has no heir The person impeaching his alienation and seeking a declaratory decree cannot, therefore, be designated by the term "heir" and is consequently described as "son or reversioner." It is only after the death of the proprietor that the "son or reversioner" becomes his heir.

In order to determine whether an action is governed by a particular provision of the Law of Limitation the Court has only to peruse the plaint

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and to decide whether upon the averments contained therein the claim comes within that provision.

It is by no means a rare thing that a suit for possession is barred by limitation though the right to sue for possession has not yet accrued. **L** RULDU SINGH *v.* SAWAL SINGH, 3 L. 188 **388**

Punjab Municipal Act (III of 1911), s. 56 (1) (b)—*Well sunk by private person and dedicated to public, whether vests in Municipality.*

A well sunk as a charitable act by a private person and dedicated by him to the public must be regarded as a public place and vests in the Municipality under section 56 (1) *(b)* of the Punjab Municipal Act. **L** KISHEN SINGH *v.* MUNICIPAL COMMITTEE, AMRITSAR, 4 L. L. J. 62 **899**

Punjab Pre-emption Acts (II of 1905) and (I of 1913)—Right to pre-empt. *See* PRE-EMPTION **264**

Punjab Pre-emption Act I of 1913), s. 3 (5) (a), application of *See* GUARDIANS AND WARDS ACT, s 29 **924**

——— **s. 7**—*Pre-emption — Custom — Proof—Fatehabad, Hissar District—Judgment based upon compromise, value of.*

The custom of pre-emption does not exist in the town of Fatehabad in the Hissar District.

A judgment based upon a compromise or concession, though of some probative force, cannot be placed on the same footing as one in which a custom was held to be proved or negatived after contest. **L** PIRBHU *v.* TOTA, 3 L. 136; 20 P. W. R. 1922 **71**

——— **s. 8 (2),** *Notification under—Retrospective effect—Pending suits.*

A Notification under section 8 (2) of the Punjab Pre-emption Act cannot have retrospective effect and does not affect suits pending at the date on which it is issued.

General principles deducible from the statutory provisions relating to pre-emption in the Punjab are in favour of the pre-emptor's cause of action, after it has accrued, not being affected by any contingencies arising after the date of sale. **L** MOHINDER *v* ARUR SINGH, L 267 **625**

——— **s. 14**—*Agricultural land in Municipality, sale of—Non-agriculturist, whether can pre-empt.*

Although a non-agriculturist may buy land from a member of an agricultural tribe without restriction in a Municipality, he cannot pre-empt a sale of such land. **L** LACHMAN SINGH *v.* SUNDAR DAS, 3 L. L. J. 430 **816**

——— **s. 15 (c), secondly**—"Patti *or other sub-division," meaning of* Taraf *or* patti *created for purely fiscal purposes*

A *taraf* or *patti* of a village created at the time of Settlement for purely fiscal purposes, *i e*, for the purpose of convenience in collecting the land revenue, is not a *patti* or other sub-division, within the contemplation of section 15 *(c), secondly,* of the Punjab Pre-emption Act. **L** UTTAM CHAND *v.* MEHTAB SINGH **48**

——— **s. 22 (1)**—*Deposit—Time limit—Duty of Court—Failure to fix time for deposit—Pre-emptors, position of*

Under section 22 (1) of the Punjab Pre-emption Act, it is imperative for the Court to fix a time

Punjab Pre-emption Act, 1913—concld.

within which the deposit must be made, and if the Court fails to do so, and the pre-emptors do not pay in the deposit, they cannot be penalized for having disobeyed an order which was never made. **L** BALMOKAND *v.* LACHHMAN BAI, 3 L. L. J. 545 **796**

Punjab Tenancy Act (XVI of 18 7), s. 50—Sale of proprietary rights to occupancy tenants—Sale set aside—Possession awarded to proprietor—Suit by tenants to establish occupancy rights, whether barred *See* CIVIL PROCEDURE CODE, ss. 11, EXPL. IV, 47 **4-5**

Railway Company—*Common carrier—Goods, consignment of, for carriage—Contract, nature of—Goods lost in transit—Railway Company, liability of.*

Where goods are consigned to a Railway Company to be carried from one station to another, the contract is that the goods should be carried by the nearest route If the Railway Company, to suit their convenience, carry the goods by another and longer route, which offers far more opportunity for loss to occur, they are bound to notify the consignor, so as to give him an opportunity of deciding whether he should sign the Risk Note in Form H or not, and their failure to do so will render them liable for any loss which may occur. **B** VALI MAHOMED HAMAD *v.* G. I. P. RAILWAY, 24 BOM. L. R. 316 **366**

——— *Risk-Note Form H—Contract to carry goods at owner's risk—Loss of goods—Compnay's liability—Wilful neglect—Proof.*

The plaintiff delivered to the defendant Company at Nagpur fifty-seven bales of piece-goods to be conveyed from Nagpur to Amritsar and the defendant Company issued a Railway receipt for the said bales to the plaintiffs The goods were booked under a Risk-Note in Form H whereby the plaintiffs, in consideration of the consignment being charged for at the special reduced or owner's risk rates, agreed and undertook to hold the Railway Administration and all other Railway Administrations working in connection therewith, and also all other transport agents or carriers employed by them respectively, over whose Railways or by or through whose transport agency or agencies the said goods might be carried in transit, harmless and free from all responsibility for any loss, destruction or deterioration of or damage to all or any of the said consignment from any cause whatever except for a loss of the complete consignment or of one or more complete packages forming part of the same consignment, due either to the wilful neglect of the Railway Administration or to theft by or to the wilful neglect of its servants, transport agents, or carriers employed by them before, during or after transit over the said Railway or other railway lines working in connection therewith or by any other transport agency or agencies employed by them respectively for carriage of the whole or any part of the said consignment, provided that, the term "wilful neglect" should not be held to include fire, robbery from a running train or any unforeseen event or accident. The waggon was sealed and remained for 30 hours in the Nagpur goods yard. The seal bore the description: N G. P. 8. The goods were carried over the Railway of the defendant Company from Nagpur to Delhi, then over the Railway of the East India Railway Company from Delhi to Umballa, and lastly over the Railway of the North-Western Railway Company from Umballa to Amritsar. The goods arrived at Amritsar and the unloading clerk at Amritsar noticed that the seal on one side bore the inscription N G. P. in large characters without any figure, and that 3 out of 57 bales were missing Consequently only fifty-four out of the fifty-seven bales were delivered to the plaintiffs' consignees. Plaintiff sued the defendant Company for damages for loss of the three bales, the defendant admitted the short delivery but denied that the loss was due either to the wilful neglect of the defendant Company or to theft by or to the wilful default of their servants:

Held, that under the circumstances of the case the legitimate inference was that the waggon was broken open at Nagpur where the goods could be disposed of without exciting any suspicion and by persons who could calculate on being free from disturbance for a considerable time and that even if it occurred after the waggon left Nagpur, either some of the defendants' servants were concerned in the theft or the theft occurred owing to the wilful neglect of the defendants' servants.

Held, also, that there being a *prima facie* case against the defendants it was for them to offer some reasonable explanation in order to escape liability; and that as they failed to offer any explanation they were liable for the damages. **B** CENTRAL INDIA SPINNING & WEAVING CO. *v.* G I. P. RAILWAY, 24 BOM. L. R. 272 **162**

Railways Act (IX of 1890)—*Carriage of goods by Railway at Railway risk—Short weight—Railway Company, refusal of, to give "open delivery"—Cause of action—Suit for value of goods.*

Where goods are consigned for carriage by Railway, at Railway risk, and at destination are found to be short in weight, the fact that the Railway Company declines to give "open delivery," of the consignment affords no cause of action to the consignee to maintain a suit for the value of the goods, there being no provision in the Railways Act to make it incumbent upon a Railway Company to make "open delivery." **L** SECRETARY OF STATE FOR INDIA *v.* SHAM LAL DEOKI NANDAN, 4 U. P. L. R. (L.) 65 **312**

——— **ss. 72 to 76**—*Carriers Act (III of 1865)—Contract Act (IX of 1872), ss. 151, 152, 161—Railway Company — Bailee — Common carrier—Liability for loss of goods— Risk-Notes, Form A and B, effect of—Wilful neglect— Onus—Consignee to set forth particulars constituting neglect—Civil Procedure Code (Act V of 1908), O VI, r. 4.*

A Railway Company becomes a bailee under sections 51, 152 and 161 of the Indian Contract Act of 1872 and are common carriers under the Carriers Act, and would be liable for the loss destruction or deterioration of any consignment either wholly or in part of any goods consigned to them, and they are required to deliver the goods so consigned to the consignee in the condition in which they were consigned to them.

This ordinary liability of a Railway Company under sections 72 to 76 of the Railways Act is

Railways Act—concld.

intended to be limited by the special agreement between the Company and the consignor embodied in Risk-Notes A and B, and the consideration for limiting the liability of the Company is the reduction of the ordinary tariff rate.

The Railway Company under the Risk-Note is, therefore, liable only for the loss of one or more complete packages due to the wilful neglect of its servants, transport agents or carriers employed by them.

The Risk-Notes A and B fulfil the conditions for rendering a contract valid, and, therefore, the parties are bound by the contract embodied in the Risk-Notes

The onus of proving wilful neglect and default of the Railway Company and thereby fixing the liability upon it must necessarily rest upon the plaintiff.

A plaintiff, in order to succeed in an action for compensation for the loss or deterioration of the goods consigned to the Railway must also set forth all the particulars constituting the wilful neglect or default of the Railway Company, which occasioned the loss or deterioration, as is required by O. VI, r. 4 of the Civil Procedure Code. **Pat** G. I. P. RY. CO. *v.* JITAN R. M. NIRMAL RAM, 3 P. L. T. 222 **664**

—— **Sch. II, cl. (m)**—*"Shawls," meaning of—Question as to meaning of word, whether question of law—Appeal, second.*

The term "Shawls" in clause *(m)* of Schedule II to the Railways Act, refers to Indian Shawls of special value, and cannot be taken to apply to articles of inferior value.

The question whether the term "Shawl" in clause *(m)* of Schedule II to the Railways Act is not used in a restricted sense, is a question of law, and the High Court can, in second appeal, consider what is the proper meaning of the word. **B** EAST INDIAN RY CO. *v.* DAYABHAI VANMALIDAS, 24 BOM. L. 418 **852**

Record of Rights—Presumption as to correctness—Burden of proof *See* BENGAL TENANCY ACT, s 103-B 3) **170**

Redemption of Mortgages (Punjab) Act (II of 1913), s. 15—*Money deposited, whether can be attached in execution of decree against mortgages.*

The provisions of section 15 of the Redemption of Mortgages Punjab Act, 1913, are meant primarily for the protection of the person depositing the money. The intention of the Legislature was that the money deposited under the provisions of this Act should be exempt from attachment in execution of a decree against the depositor. But as soon as the money has become the property of the mortgagee there is nothing to prevent its being attached in execution of a decree against the latter. **L** MOHNA MAL *v.* TULSI RAM, 3 L. 141 **718**

Reference to Full Bench—*Hypothetical questions.*

An order of reference to a Full Bench should not ask hypothetical questions or ask the Full Bench, so to speak, to give a dissertation on general principles of law but to do what is quite enough for any

Reference to Full Bench—concld.

Judge to do, to answer the question which directly arises in the case before the Court **M** NALLA TIRUPATIRAJU *v.* NANDIKOLLA VENKAYYA, 15 L. W. 39; 30 M L. T. 181; 42 M. L. J. 382; (1922) M. W. N. 207; 45 M 504 **479**

Registration Act (XVI of 1908), s. 17—*Family agreement—Reversioner undertaking not to challenge alienation of half of ancestral property—Registration, whether necessary—Alienation, contemplated or completed—Consent of next reversioner—Good faith to be presumed—Bad faith to be established.*

A family agreement by which a sonless proprietor agrees not to alienate half of his land, and his nearest reversioner undertakes not to challenge or object to any alienation which the former might see fit to make of the remaining half of his land, does not require registration and is binding on the sons of the reversioner.

If the bad faith of a reversioner in giving his consent to an alienation is pleaded, it must be established. Good faith must be presumed.

Where the next reversioner consents to a contemplated alienation, such consent is as binding and valid as a consent given to a completed transfer. **L** GULAB *v.* MEHNDI, 4 L L J 52; 3 L 12 **417**

—— **s. 17 (1) (b)**—Letter depositing title-deeds after mortgage effected, admissibility of, without registration. *See* EQUITABLE MORTGAGE **421**

—— **s. 33**—*Power-of-attorney executed by parda-nashin lady—Attestation by Sub-Registrar—Presumption—Onus—Proof—Construction of power—Power to execute mortgage, whether includes power to incur loan—Power to sign, whether includes power to mortgage.*

Where a Sub-Registrar has attested under section 33 2) of the Registration Act a power-of attorney, purporting to be executed by a *parda-nashin* lady, it will be presumed that he was satisfied that it had been voluntarily executed by the lady; but a presumption is only a rule of evidence which throws the onus on the other side; and it is of no avai where there is evidence on the record which would lead the Court to the conclusion that there was not evidence sufficient to satisfy the Registrar that the power-of-attorney was voluntarily executed by the *parda-nashin* lady.

All powers-of-attorney should be construed strictly.

The power to execute a document carries with it the necessary power to enter into the transaction itself, and, therefore, the power to execute a mortgage carries with it the power to incur any loan.

Obiter.—A power to sign a mortgage does not carry with it a power to enter into a mortgage transaction. **Pat** RAM LAL SINGH *v* BIBI SHAHRUNNISSA, 3 P. L. T. 442 **315**

—— **ss. 73, 82 (a), 83**—*District Registrar refusal by, to sanction prosecution—High Court, power of, to interfere—Remedy, proper.*

A deed of mortgage and a sale-deed were presented to a Sub-Registrar for registration, the alleged executant of the deeds denied that he had executed them, and registration was refused: an application was then made to the District egistrar under section 73 of the Registration Act who ordered an

Registration Act—concld.

inquiry to be made by the Special Sub-Registrar, and this officer found that the documents had been duly executed by the alleged executant and directed registration thereof; he also found that the executant had made false statements and applied to the District Registrar for sanction to prosecute him under section 82 *(a)* of the Registration Act: the District Registrar, after a full inquiry, reversed the order of the Special Sub-Registrar directing registration, and refused to sanction the prosecution of the executant. On revision to the High Court:

Held, that the High Court had no jurisdiction to interfere as the District Registrar had acted as a Revenue Court, and that the proper remedy was to obtain a reversal of the order of the District Registrar by the Board of Revenue, or by a decree of a Civil Court. **Pat** HARI BUX RAM *v.* CHHEDI PANDE, 23 CR. L. J. 415 **511**

Relationship, *question of—Evidence—Tradition Oral tradition, value of.*

When the question of relationship arises between people among whom accessible records of births and deaths are not maintained, nor are such events preserved in written family memorials, the question must depend for its decision on oral tradition, and though this requires close scrutiny, the tradition ought not to be regarded as weak and unsatisfactory merely because it may in one or two respects fail to satisfy the strict conditions that would be necessary for proving a pedigree where records and documents could be used. **P C** SABZ ALI KHAN *v.* KHAIR MUHAMMAD KHAN, 30 M. L. T. 2 7; 20 A. L. J. 427; 3 L. 48; 7 P. W. R. 1922; 35 C. L. J. 514; 43 M. L. J. 49; 4 U. P. L. R. (P. C.) 39; 1 P. L. R. 1922 **264**

Religious Endowments Act (XX of 1863), s. 14. *See* MUHAMMADAN LAW **492**

Remand, *order of—Provision under which made not specified—Presumption—Civil Procedure Code (Act V of 1908), O. XLI, r. 23, application of—Appeal.*

Per *Ryves, J.*—Where an Appellate Court being of opinion that the Trial Court has jumbled up the issues and misdirected itself *in limine* sends the case back without deciding a single issue in appeal, it is a finding on a preliminary point within the meaning of O. XLI, r. 23, Civil Procedure Code, and the Appellate Court, where it is silent on the point, should be considered to have acted under that provision of the Code, and not under any inherent jurisdiction.

Per *Walsh, J.*—In the case of an order of remand, it must be presumed, unless the contrary is shown at the time when it is made, to be made under O XLI, r. 23 of the Civil Procedure Code. **A** KULSOOMUNNISSA *v.* RAM PRASHAD, 20 A. L. J. 321; 44 A. 432; 4 U. P. L. R. (A.) 168 **713**

——— *Power of High Court to remand on point covered by existing issue.*

Where an issue is raised in the Court of first instance on a particular point and the parties have adduced evidence upon the same, and there is a distinct finding of both the Trial Court and the first Appellate Court upon that point, it is not open to the High Court to remand the case for a re-hearing upon the same point. **Pat** GUNPAT RAO *v.* RAJ KUMAR SINGH **494**

Rent-sale—*Omission to make heirs of recorded tenant parties, effect of*

The interest of the heirs of a recorded tenant in respect of a holding cannot be affected by a sale of the holding in execution of a decree for arrears of rent unless they were made parties to the execution proceedings in which the sale took place. **C** ABDUL AZIZ *v.* AMIR ALI **149**

Res judicata—*Dismissal of objection to execution proceeding for non-prosecution, effect of—Civil Procedure Code (Act V of 1908), O. XXI, r. 100, application under—Limitation—Limitation Act (IX of 1908), Sch I, Art 65.*

The dismissal for non-prosecution of an objection to an execution proceeding cannot operate as *res judicata* there being no decision with regard to the objection and no actual determination thereon.

Article 165 of Schedule I to the Limitation Act applies only to applications under O. XXI, r. 100 of the Civil Procedure Code. **C** BAMIR DAS PAL *v.* GIRISH CHANDRA PAL **663**

——— *Proceedings under Land Acquisition Act (I of 1894), operate as res judicata—Principle of res judicata is general—Plea of trifling value for not appealing, not admissible.*

A decision of a competent Court in proceedings under the Land Acquisition Act operates as *res judicata* and the same question cannot be re-opened in a subsequent litigation between the same parties.

It is not competent for a Court, in the case of the same question arising between the same parties, to review a previous decision, no longer open to appeal, given by another Court having jurisdiction to try the second case. If the decision was wrong, it ought to have been appealed from in due time. Nor in such circumstances can the interested parties be heard to say that the value of the subject-matter on which the former decision was pronounced was comparatively so trifling that it was not worth their while to appeal from it. If such a plea were admissible, there would be no finality in litigation. The importance of a judicial decision is not to be measured by the pecuniary value of the particular item in dispute

The principle which prevents the same case being twice litigated is of general application, and is not limited by the specific words of the Code of the Civil Procedure in this respect. **P C** RAMACHANDRA RAO *v.* RAMACHANDRA RAO, 30 M. L. T. 154; 26 C. W. N. 713; 45 M. 320; 25 C. L. J. 515; 16 L. W. 1; (1922) M. W. N. 539; 20 A. L. J. 684; 43 M. L. J. 78; 24 BOM. L. R. 963 **408**

——— *Suit by reversioners that mortgage without consideration and necessity—Finding that all consideration did not pass—Subsequent suit by mortgagee for possession against mortgagor, whether barred.*

In a suit by reversioners for a declaration that a mortgage, being wanting in consideration and necessity, should not affect their reversionary interests, it was decided that all the consideration had not passed and that necessity was not proved. Subsequently, the mortgagee brought the present suit for possession against the mortgagor. The latter denied consideration and pleaded that the suit was barred by the rule of *res judicata* inasmuch as

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the question of consideration had already been decided in the previous suit:

Held, that the suit was not barred as there was no conflict of interest in the previous suit between the mortgagee-defendant and the mortgagor-defendant, and there was no issue whether the deed was valid and binding as between the mortgagor and mortgagee. **L** DEWA SINGH *v* GOKAL, 3 L L J. 295 **881**

Restitution of conjugal rights—*Decree, manner of enforcing—Guardians and Wards Act (VIII of 1890), provisions of, inapplicable.*

The provisions of the Guardians and Wards Act should not be put in force in order to enable a husband to get possession of the person of his wife.

Where a husband obtains a decree for restitution of conjugal rights against his wife, who is under the age of 18 years, his remedy to enfore the decree is by applying for execution of the same, and not by means of an application under the Guardians and Wards Act to be appointed the guardian of the person of his wife, especially where there is no necessity for the appointment of a guardian. **L** ASI BAI *v.* GIRDHARI RAM, 3 L. L. J. 293 **882**

Revenue Court—*Exclusive jurisdiction—Decision, whether assailable in Civil Court.*

A suit for a declaration that the decree of a Revenue Court in a matter in which that Court had exclusive jurisdiction is void and ineffectual is not maintainable in the Civil Court on the bare ground that the proceedings in that Court were contrary to law. **O** SAT DEO *v.* JAI NATH, 9 O. L. J. 141; 4 U P. L. R. (J. C.) 43 **803**

Revenue sale—*Wilful default—Fraud—Purchaser joining in fraud after default and before sale, position of.*

A fraudulent motive of the proprietor, who purposely defaults in paying revenue, cannot affect the rights of a *bona fide* purchaser at the sale. But a purchaser, who joins in the fraud *after* the default and *before* the sale, which is the machinery by which the fraud is to be carried out, and with knowledge thereof, cannot be permitted to enjoy the benefits which result to a *bona fide* purchaser at a sale for arrears of revenue. The rights of such a purchaser are not higher than those of a purchaser at a private sale **C** TEJENDRA CHANDRA DHAR *v.* DURGADAS DUTT **398**

Reversioner's right *to contest alienation, relinquishment of—Reversionary right.*

The right of a reversioner to bring a suit to contest any alienation which a sonless proprietor might make in future arises out of and is, in a sense, ancillary to the reversionary rights But it cannot be said to be an integral part of those rights It is wholly impossible to estimate the value of such a right, which must depend on all the circumstances of the case. If the alienation is for necessity or can be shown to have been for necessity by evidence, true or false, the right is valueless It varies, moreover, with the prospects of the reversioner to succeed to the land and inversely with the age and health of the owner. **L** GULAB *v.* MEHNDI, 4 L. L. J. 52; 3 L. 112 **417**

Revision—*Order granting leave to sue as pauper.*

An order admitting an application for leave to sue *in forma pauperis* in not open to revision. **A** KANDHAIA SINGH *v* KUNDAN, 20 A. L. J. 471 **641**

——— Practice of High Court. *See* CIVIL PROCEDURE CODE, s 115 **286**

Riwaj-i-a, entry in, value of. *See* CUSTOM—SUCCESSION **415**

——— not opposed to general custom but not supported by instances, evidentiary value of. *See* CUSTOM—ALIENATION **629**

Sale, *completion of—Unregistered sale-deed, whether an agreement to sell—Specific performance—Evidence Act (I of 1872), s 91.*

A sale is completed by the execution of the deed of sale.

The mere non-registration of a sale-deed does not make it anything less than a sale-deed.

A contract of sale, even if unregistered, is not an agreement to sell and cannot form the basis of a suit for specific performance.

An unregistered document, which amounts to a sale-deed, must be excluded from evidence for want of registration, and also by reason of section 91, Evidence Act, no other evidence of the sale can be admitted **L** PARMESHRI DEVI *v.* AUTAR SINGH, 3 L. L J 73 ; U P L R. L. 59 **144**

——— *in execution—Suit against purchaser to recover property—Sale not set aside—Suit, whether maintainable.*

A suit to recover from a purchaser at a Court-sale the property purchased by him is not maintainable until the Court-sale is set aside, unless it is a nullity, even though the suit relates to property included in the sale which is outside the suit and which by mistake was included in the decree. **B** NAGABHATTA TIMMANBHATTA BOPPANHALLI *v.* NAGAPPA SUBBAYA HAVIK, 24 BOM. L. R. 423 **857**

——— *Mortgage—Transaction, whether sale or mortgage—Intention of parties—Surrounding circumstances.*

The question whether a transaction is a sale or a mortgage must be determined with reference to the intention of the parties as gathered from the document and the surrounding circumstances.

In 1899, *D.* executed a deed in respect of certain property in favour of *P.*: immediate possession was delivered to *P.*: and the documents of title were also delivered to him: there was a stipulation in the deed that if *D* paid the principal amount of the purchase-money within three years from the date of execution of the deed, the property would be given up by *P.*: there was no mention in the deed of interest to be paid on the principal sum at the time of the re-purchase, but it was provided that in the event of *D.* not paying the purchase-money within three years, the sale would become absolute. No money was paid within the term limited. In 1916 *D* brought a redemption suit and the question was, whether the transaction was a deed of sale with a condition of re purchase, or a deed of mortgage by conditional sale:

Held, that the transaction was a sale out and out and not a mortgage it was not a mortgage because there was no relation of debtor and creditor between the parties. **C** CHANDI CHARAN NABIN CHANDRA **113**

School Master and pupil—*Corporal punishment on pupil, right of, extent of—School discipline, breach of—Two smacks, infliction of, not causing injury, whether actionable—Madras Educational Rules, r. 59 A.*

A School Master is the delegate of the parent and may for the purpose of correction inflict moderate and reasonable corporal punishment on a pupil.

The Courts, however, should not fail to insist on a close scrutiny of the severity of the chastisement inflicted and its justification.

Rule 59 A of the Madras Educational Rules, 1918 or the similar rule in the Rules of 1901, which refer to cases of moral delinquency and flagrant insubordination should not be construed to prohibit or regulate the petty corrections without which the ordinary discipline of a School cannot be maintained and which, if they are to be effective, must be given immediately.

Where a School Master smacks a pupil on the cheek for making a noise and the smacks cause no injury requiring medical aid or disable the pupil from going home at once, the punishment is such as a parent might expect his child to receive, and is not in excess of the master's legitimate powers of chastisement.

Per *Venkatasubba Rao, J.*—If the punishment be administered for the gratification of passion or of rage, or if it be immoderate and excessive in its nature or degree or if it be protracted beyond the child's powers of endurance or with an instrument unfitted for the purpose and calculated to produce danger to life or limb, in all such cases the punishment is excessive, the violence is unlawful.

A School Master cannot escape liability merely on the ground that chastisement administered to a pupil has not left any marks of violence or injury on the pupil's body. The question whether the punishment inflicted is moderate and reasonable is one of fact and Courts in this country will certainly discountenance resort by a School Master to barbarous and inhuman forms of correction. **M** SANKUNNI *v.* VENKATARAMANI, 43 M. L. J. 460; 15 L. W. 501; (1922) M. W. N. 246; 31 M. L. T. 26; 45 M. 548 **514**

Sea Customs Act (VIII of 1878), s. 30 cl. (a)—*"Wholesale cash price," meaning of—Cl. (b) of section, applicability of—"Real value," test for determining.*

The expression "wholesale cash price" in clause *(a)* of section 30 of the Sea Customs Act, means the price realized on the wholesale disposal of goods at the place and time of importation, and not the price paid by the importer.

The object of clause *(b)* of the section is to provide a test for calculating the real value of goods imported where the wholesale cash price is not ascertainable, where such price can be easily ascertained, the test for determining the real value is provided in clause *(a)* of the section. **B** VACCUM OIL CO. *v.* SECRETARY OF STATE FOR INDIA, 24 BOM. L. R. 198 **267**

Shamilat—*Partition—Suit by co-sharers for declaration that partition is against terms of wajib-ul-arz—Jurisdiction of Civil Court—Punjab Land Revenue Act (XVII of 1887), s. 158 (2), (xvii).*

A declaratory suit by certain co-sharers that a certain land is, according to the terms of the *wajib-ul-arz*, not subject to partition and that the partition directed by the Collector is, therefore, wrong, is according to the provisions of clause (xvii) of sub-section 2 of section 158 of the Punjab Land Revenue Act, not cognizable by a Civil Court, no question of title being involved therein. **L** SINGH RAM *v.* DATA RAM, 3 L. 4; 4 U. P. L. R. (L.) 72; 63 & 70 P. L. R. 1921. **240**

Shamilat land—*Grazing rights—Land in excess of requirements—Appropriation of excess by proprietor—Civil Procedure Code (Act V of 1908), O XXII, applicability of—Legal representatives not brought on record—Bona fide mistake.*

In cases where the area of *shamilat* land, over which the grazing rights extend, is larger than that required by the persons with those rights, the proprietor of the *shamilat* may use the excess land for his own purposes.

The provisions of Order XXII of the Code of Civil Procedure do not apply where through a *bona fide* mistake in the copy of the judgment, the legal representatives of a deceased party, though brought on the record in the Appellate Court, are not brought on the record of second appeal; but even if they did apply, there would be ground for extending the period of limitation. **L** KARTAR SINGH *v.* RALLA, 2 L. L. J. 44 **306**

Sonthal Parganas Settlement Regulation (III of 1872), ss. 11, 25 A, *application of—Certificate of publication of Record of Rights, effect of production of—Hindu Law—Joint family estate, impartible, incidents of—Jurisdiction, meaning of—Jurisdiction, want of—Decision when null and void—Documentary evidence, production of, at first hearing—Regulation (III of 1872), object and scope of—Operation of Record of Rights as between members of joint family.*

Section 11 of Regulation III of 1872 bars every suit regarding any matter decided by any Settlement Court, except such suits as are brought to contest the finding or record of the Settlement Officer, where only the rights of Zemindars and other proprietors as between themselves are concerned, provided they are brought within 3 years from the date of the publication of the Record of Rights.

The production of a certificate of publication of a Record of Rights by the defendant raises a presumption that there was publication according to the procedure laid down in Regulation III of 1872, throwing the *onus* on the plaintiff to establish that there was no regular publication of the Record of Rights.

Under Hindu law the impartibility of an estate does not destroy its nature as a joint family property or render it the separate property of the last holder unless there is something equivalent to partition. But at the same time the other members of the family have no such property in it to enable them to challenge an alienation made by the holder of the estate either during his lifetime or after his death.

Jurisdiction means power and authority conferred on a Court to pronounce the sentence of the law or to award the remedies provided by law, upon a state of facts, proved or admitted, referred to the Court for decision and authorised by law to be the subject of investigation or action by that Court and in favour of or against persons who present themselves or who are brought before

Sonthal Parganas Settlement Regulation—concld.

the Court in some manner sanctioned by law as proper and sufficient.

When want of jurisdiction of a Court is apparent on the face of the record, any judgment rendered by such a Court is null and void, incapable of ratification and subject to collateral impeachment. But a Court has jurisdiction to decide whether it has jurisdiction to entertain the suit and the decision of the Court that it has jurisdiction is final and conclusive in all collateral enquiries. Where, however, the want of jurisdiction is not apparent on the face of the proceedings but the absence of jurisdiction depends on a fact, in the knowledge of a party which he had an opportunity of bringing forward in Court, then, if he does not bring that fact forward but allows the Court to proceed with the judgment, he ought not to be permitted to impeach the jurisdiction of the Court in any collateral proceeding.

Obiter dicta.—The Civil Procedure Code compels the parties to produce all the documentary evidence of every description in their possession or power on which they intend to rely at the first hearing of the suit and provides that such evidence which should have been, but has not been, produced shall not be received at any subsequent stage of the proceedings unless good cause is shown to the satisfaction of the Court for the non-production thereof. This rule, however, was enacted to prevent fraud by the late production of suspicious documents and since no suspicion can attach to certified copies of public documents, they may be received in evidence though they have not been produced at the first hearing

The policy of the Legislature in enacting Regulation III of 1872 was to have a complete Record of Rights and interests in land in the Sonthal Parganas and to exclude the jurisdiction of Civil Courts except in certain matters. The Regulation gives no scope for the view that the members of a joint family may allow the name of the *karta* to be recorded in the Record of Rights and yet claim to have an interest in the estate.

The Record of Rights framed under Regulation III of 1872 operates as between members of a joint Hindu family as completely as between strangers. **Pat** DWARKA PRASAD *v.* JAI PARHAM **686**

Specific performance—*Agreement to lease—Construction of agreement—Uncertain terms—Agreement "subject to" condition, meaning of—Agreement subject to "usual conditions," meaning of—Specific performance, whether can be enforced.*

Plaintiff brought the present suit to enforce the specific performance of an agreement to let certain premises to him. The agreement ran as follows :—

"We agree to rent to Mr. Haji Shaikh Mahomed Shustary the top floor of our building under construction at Plot No. 3 Ballard Estate for a period of five years and five years' option at a monthly rent of Rs. 1,500 only from the date of the completion of the same subject to the conditions and entering into a regular lease. A deposit of three months' rent amounting to Rs. 4,500 only is paid on signing of this contract." Plaintiff obtained a decree in the Trial Court and on appeal by defendant:

Held, (1) that the document sued on was not a concluded agreement which the Court could direct to be specifically performed, because its terms were too uncertain to be reduced to a formal document, and that the document was merely the result of preliminary negotiations which defined a portion of the terms to appear in the lease as eventually settled, while it left a great many of the terms to be agreed upon thereafter; so that the final agreement between the parties depended on a regular lease which was to be executed;

(2) that the effect of the words "subject to" was to introduce a condition or proviso to the effect that the final agreement between the parties depended on a regular lease to be executed later on.

Obiter :—Where an agreement recites that it is to be subject to "usual conditions," the meaning is that when those conditions came to be recorded, the draftsman would put down the usual covenants to be found in agreements of that nature, and that it would be open to the other side either to alter or add to those conditions, and it would be only when the draft had been finally agreed to that the terms of the lease could be ascertained. **B** SIMON REUBEN *v* HAJI SHAIKH MAHOMED SHUSTARY, 24 BOM L. R. 66 **433**

——— *of contract for sale—Decree—Execution—Defendant, whether can execute decree—Civil Procedure Code (Act V of 1908), s. 2 (3), effect of.*

A decree for specific performance of a contract to sell property is capable of being executed by the defendant as well as by the plaintiff, so where, in such a case, the plaintiff refuses to take the sale-deed, and pay the consideration money, the defendant is entitled to come to Court and ask for the payment to him of the consideration money for the purchase on his tendering a sale-deed. **B** KARIMABIBI DAUDBHAI *v.* ABDEREHMAN SAYAD BANU, 24 BOM. L. R. 496 **667**

——— *, suit for, against vendor of real estate—Lis pendens.*

A suit for specific performance of a contract for transfer of the immoveable property operates as *lis pendens*, in other words, in a suit against the vendor of real estate for specific performance, his conveyance of the legal title after suit was brought would not suspend the proceeding or defeat the title under the decree of the Court Consequently, when such a suit for specific performance is ended by a final decree transferring the title, that title relates back to the date of the agreement on which the suit is based and the Court will not permit its decree to be rendered nugatory by intermediate conveyances. **C** JOHAR MULL BHUTRA *v.* BHUPENDRA NATH BASU, 34 C. L. J. 79; 49 C. 495 **108**

Specific Relief Act (I of 1877), s. 22

—Specific performance — Delay — Abandonment—Evidence.

Delay in bringing a suit for specific performance may, in certain cases, be evidence of abandonment or acquiescence, but, on the other hand, delay which does not amount to waiver, abandonment or acquiescence and in no way alters the position of the defendant, does not disentitle the plaintiff to sue for specific performance

The Court will decide in each case whether the delay on the part of the plaintiff was evidence of abandonment by him of his rights; and if the suit is within time and the delay is not so great as to induce the Court to hold that the plaintiff

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had forfeited his right, it will not refuse to grant the equitable relief claimed by him. **L** JAUGAL SINGH *v.* GHULAM MAHOMED **700**

s. 25—*Vendor and purchaser—Vendor's title—Purchaser, right of*—Pardanashin *lady, dealings with—General rule, when not applicable.*

A purchaser, while he is not, on the one hand, at liberty to raise doubts which are not considerable or rational, cannot be compelled, on the other hand, to take a title which will expose him to litigation or hazard. The question whether the doubt is reasonable must be determined on the facts of each case.

To cases where the husband, having entered into the agreement, obtains his wife's consent and signature shortly afterwards, the law which throws upon parties, dealing with *pardah-nashin* ladies, the *onus probandi* of their understanding the contents, has no application. **S** KHEMCHAND RATANCHAND *v* DHALOMAL, 15 S. L. R 180 **19**

s. 27 (b)—*Agreement to sell—Transfer in favour of third person—Specific performance—Burden of proof.*

The general principle of clause *(b)* of section 27 of the Specific Relief Act and its illustration is that from the time of a contract for the sale of land, the vendor, as to the land, becomes a trustee for the vendee; and the vendee, as to the purchase-money, a trustee for the vendor, who has a lien upon the land therefor. And everyone coming in by subsequent and representative title, and every subsequent purchaser from either with notice, becomes subject to the same equities as the party would be to whom he succeeds, or from whom he purchased

A subsequent transferee who desires to take advantage of the exception contained in clause *(b)* of section 27 of the Specific Relief Act must prove *(a)* that he was a purchaser for value, *(b) bona fide*, and *(c)* without notice

One who owns property subject to a charge can, in general, convey no title higher or more free than his own and it lies always on a succeeding owner to make out a case to defeat such a prior charge.

Per *Harrison, J.*—Where, however, a subsequent transferee proves the payment of consideration in full, and also establishes that he acted in ignorance of the original contract, good faith must be presumed in the absence of evidence to the contrary.

The burden of proving ignorance is on the subsequent transferee. **L** KANSHI RAM *v.* ISHWAR DAS **888**

s. 42—"Birt," *right to, whether property—Suit for possession of* "birt," *whether maintainable.*

The so-called right on the part of a "*prohit*" to "*birt*" is, in law, no right at all and does not amount to "property" for the purposes of section 42 of the Specific Relief Act. It is a mere *spes successionis* or contingent right, which is dependent for its existence on the pleasure of the "*jajmans*"

A suit, therefore, for possession of "*birt*" is not maintainable. **L** BISHIN DATT *v.* KRISHEN DATTA, 8 L. L. J. 414 **439**

s. 42—*Declaratory suit—Discretion of Court—Infructuous decree, setting aside of—Civil Procedure Code (Act V of 1908), s 92, scope of.*

To grant a mere declaratory decree which is not calculated to produce any effect, unless as a stepping stone to fresh litigation is contrary to the principles governing the proper exercise of the discretion of a Court in the matter of granting relief in a declaratory suit, even where the express provisions of section 42 of the Specific Relief Act are not applicable. Such a decree is liable to be set aside.

Per *Walsh, J*—Suits with regard to trusts relating to public charities must either be brought under section 92 of the Civil Procedure Code or they cannot be brought at all.

Per *Piggott, J*—The proper view of section 92 of the Civil Procedure Code seems to be that it is intended to be an exhaustive statement of the law applicable to suits based upon any alleged breach of any express or constructive trust, created for public purposes of a charitable or religious nature.

A suit asking for relief by way of a declaration regarding the invalidity of an alienation by the trustees of a public trust would seem to be covered by section 92 (), clause *(h)* of the Civil Procedure Code. **A** ALI JAFAR *v.* FAZAL HUSAIN, 20 A. L. J. 557; 4 U. P. L. R (A.) 13; 44 A. 622 **659**

s. 42—*Mortgage—Suit by mortgagee for declaration that he was in possession, maintainability of—Second appeal—Finding of fact.*

A mortgagee who is not in actual possession and who is entered in the Revenue Records as a mortgagee without possession is not competent to maintain a suit for a declaration that he is a mortgagee in possession, nor is such a suit within the contemplation of section 42 of the Specific Relief Act.

The finding of the lower Appellate Court that a mortgagee had never been in "actual possession" of the land, being one of fact, cannot be contested in second appeal. **L** NARAIN DAS *v* JANAT BIBI **152**

Stamp Act (II of 1899), s. 2, sub-sec. (5), cl. (b)—*Attestation, meaning of.*

The attestation referred to in section 2, sub-section 5 clause *(b)* of the Indian Stamp Act means attestation on the face of the instrument. **C** BIDHURANJAN MOZUMDAR *v.* MANGAN SARKAR, 26 C. W. N. 585; 35 C. L. J. 459; 43 C. 729 **780**

ss. 2 (20), 7 (3), 35 (a) Sch. I, Art. 47—*Document, construction of—Protection Note Policy of Sea Insurance—Unstamped policy of Sea Insurance, if admissible in evidence.*

The nature of a document must really be determined with reference to its terms and no general test can be laid down for distinguishing a Protection Note from a formal 'Policy of Sea Insurance.'

It may be that a document may in form appear to be a Protection Note, still if in terms it satisfies the requirements of the definition of "Policy of Sea Insurance" within the meaning of the Stamp Act, it would, for the purposes of that Act, be open to a party to contend that it is a Policy of Sea Insurance.

An unstamped document which otherwise fulfils all the conditions of a 'Policy of Sea Insurance' is admissible in evidence upon payment of the necessary stamp and the penalty prescribed in section 35 *(a)* of the Stamp Act

The defendants executed and passed an unstamped document to the plaintiffs in respect of a cargo shipped from Muscat to Bombay in the following terms:—

"Given in writing by the undersigned persons. To wit: That we accept the liability on goods shipped

Stamp Act - concld.

from the Port of Muscat in the boat "*Jeramprasad Tandel Ibram*" for Bombay Bunder. That liability is to exist up to the time the said goods have been discharged on the Bombay Bunder having passed any intermediate Ports. The insurance is accepted in accordance with the usage of English Policies without damage. The amount is to be paid within six months from the date of the loss deducting therefrom discount at the rate of 20 per cent. Through broker Tha: Dewkaran. The signatures are to be duly affixed to the stamped *pakka* (*i.e.*, formal) policy: "

Held, that the document in question was a Policy of Sea Insurance within the meaning of section 2 (20) of the Indian Stamp Act, provided the contract embodied therein was for consideration of a premium.

Obiter.—Mere initialling a Policy of Sea Insurance is sufficient to indicate the names within the meaning of section 7 (3) of the Stamp Act **B** TRICAMJI DAMJI & CO. *v.* VIRJI KANJI, 24 BOM. L. R. 8 0 **965**

——— **s. 35**—*Document bearing one anna stamp held to be bond—Deficiency in stamp duty—Document, whether to be taken as unstamped or insufficiently stamped—Fiscal act—Interpretation.*

For revenue purposes a document should not be considered as wholly unstamped, when as a matter of fact it bears a stamp, though of a wrong kind.

So long as the Government has received the value for its stamp, it is immaterial for the purpose of calculating the stamp duty due under the proviso to section 35 of the Stamp Act what is the nature of the stamp that has been used on the document.

The law ought to be interpreted as simply as possible, and when a document is stamped though wrongly and inadequately it is to the ordinary person insufficiently stamped, but not unstamped.

Where a document, intended to be a promissory-note, and bearing a one anna stamp, is held to be a bond, for the purpose of calculating the deficiency in stamp the document should not be considered as wholly unstamped but only as insufficiently stamped. **L B** COLLECTOR OF RANGOON *v.* ABDUL RAHMAN SIRCAR, 11 L. B. R 316 **640**

——— **s. 61**—*Partition decree, unstamped—Validity, whether can be questioned after execution—Inadmissible document, validity of—Civil Procedure Code (Act V of 1908), s. 152—Alteration of decree six years after enforcement.*

The validity of a partition decree which has been executed and acted upon cannot be called in question on the ground of its not being stamped.

Although a document may be inadmissible in evidence, it does not follow that it is invalid.

A decree which has been allowed by the parties to be enforced for six years cannot be altered under section 151, Civil Procedure Code. **N** RAJE UDAJIRAM *v.* RAJESHWAR **310**

Statutes, *interpretation of.*

Where a new Act supersedes an old one, it is of no help in the interpretation of those portions of the old Act, the law in respect of which has been expressly altered by the Legislature. **N** SAKHUBAI *v.* HARI **229**

Suit for possession—*Title in plaintiff—Burden of proof.*

In a suit for possession the onus lies on the defendant to prove that the plaintiff having proved title is not entitled to possession of the suit property. **B** VINAYAK KESHAV GULVE *v.* BALA SHIVRAM HINGNE, 24 BOM. L. R. 261 **176**

Surety, *execution of decree against—Surety's liability co-extensive with that of judgment-debtor—Judgment-debtor's failure to have payments certified—Surety, if affected*

A person who stands surety for a judgment-debtor is bound so long as the judgment-debtor is bound and the latter is bound so long as any payments which he may have made to the decree-holder are not certified to the Court executing the decree.

Where, therefore, such payments are not certified to the Court executing the decree, an application for execution of the decree against the surety is maintainable **C** ONKARMAL AGARWALA *v.* NRITYA GOPAL CHAKI **885**

Surrender—*Bengal Tenancy Act (VIII of 1885), s. 86 (b)—Tenant, if can surrender after he had transferred his interest—Mortgage by tenant—Subsequent surrender in favour of landlord, how far operative—Surrender, if wholly invalid—Surrender, whether assignment.*

A person who has parted with his interest in property, cannot deal with that interest by surrendering it in favour of the landlord and he cannot confer upon the landlord a higher right than he could have passed to any other person by assignment.

A surrender by the tenant after he has dealt with a portion of the holding in favour of another person amounts to no more than an assignment in favour of the landlord. But there is no reason why the landlord should be in a worse position than if the assignee were a third party and why he should not acquire all the interest which was left in the tenant at the date of the surrender. **C** AMIRADDIN MAHAMAD *v.* SANKAR BORMAN **91**

Transfer of Property Act (IV of 1882), s. 6 (a)—*Release of reversionary rights in favour of widow in possession—Family arrangement—Estoppel.*

A relinquishment deed, which purports to be a transfer of reversionary rights, in favour of a widow in possession of her deceased husband's estate by the brother of her husband, is against the provisions of section 6 *(a)*, of the Transfer of Property Act, and, therefore, cannot vest an absolute estate in the widow. Such a relinquishment deed is not a family arrangement, and nor would it operate as an estoppel, inasmuch as if she alienated the property in her lifetime, she, being in possession as a widow, could dispose of it in any event, while an estoppel could only take effect if she purported to deal with the property relying upon the deed of relinquishment. **B** DAYARAM PREMJI *v.* BECHARDAS DOONGERSEY, 24 BOM. L. R. 3 1 **936**

——— **s. 51,** application of. *See* HINDU WIDOW **314**

——— **s. 53**—*Transfer to defeat and delay creditors—Presumption.*

In a suit by an unsuccessful claimant, brought on the disallowance of his objections to attached property by a Court of Execution, the burden of proof to establish the ownership of the property lies

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necessarily on the plaintiff. **L** AI BAI *v.* KAHAN SINGH, 3 L. L. J. 198 **876**

——— **ss. 83, 84** - *Mortgagee impliedly admitting sufficiency of amount tendered, whether subsequently can plead insufficiency—Civil Procedure Code (Act V of 1908), s. 11, Exp. IV.*

Where a mortgagee refuses to accept payment of a sum deposited under section 84 of the Transfer of Property Act, on the sole ground that the amount does not include interest up to the date on which he is summoned to appear in Court, and there is no suggestion that the amount deposited was not the full amount due for principal and interest on the date on which the deposit was made, he cannot, under the principle embodied in Explanation IV of section 11 of the Civil Precedure Code, be subsequently heard to say that the amount deposited was less than the sum due to him on the mortgage on the date of the deposit. **N** KESHEORAM *v.* BHANGILAL **324**

——— **s. 100**—*Charge on immoveable property when created by document.*

For a document to create a charge on immoveable property under section 100, Transfer of Property Act, it must be a document that creates such charge immediately on its execution and not one that merely creates a charge that operates at some future time. **L** ABDUL SAMAD *v.* MUNICIPAL COMMITTEE, DELHI **939**

——— **ss. 122, 123, 130**—*Gift—Oral gift—Proof—Rent arrear and current due—Actionable claim, transfer of.*

The rent arrear and current due, being actionable claims, cannot be transferred by word of mouth, a transfer can only be effected by means of an instrument in writing in accordance with the provisions of section 130, Transfer of Property Act.

An oral gift must be proved by satisfactory oral evidence by the person who relies upon such a gift.

A mere intention to give does not operate as a gift, there must be (1) a transfer of property and (2) an acceptance by or on behalf of the donee in accordance with sections 122 and 123, Transfer of Property Act.

Under section 123, Transfer of Property Act, the delivery required in the case of gift of moveables is that described in section 90 of the Contract Act. **Pat** RAMESHWAR NARAIN SINGH *v.* RIKNATH KOERI, **451**

Trust, *breach of—Executor depositing legacy money with Bank—Subsequent withdrawal and misappropriation—Liability of Bank—Notice—Actual and constructive—Limitation Act (IX of 1908), Sch. I, Arts. 48, 62, application of.*

K. died in the year 1900 leaving a Will whereby one J. was appointed executor and trustee and among other legacies, Rs. 50,000 were to be invested in the name of one F. The income was to be accumulated for F.'s benefit and the principal and the income were to be made over to him on his attaining 21 years. J. who took out the Probate deposited with the Bank of Bombay G. P. Notes of the value of Rs. 52,000 which were credited to account No. 1. A corresponding current account was opened to which

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the interest was to be credited. A power-of-attorney was executed by J. in favour of the Bank and the Probate of the Will was duly registered with the Bank. In May 1911 J. asked for a loan of Rs. 45,000 on the security of Notes for Rs. 52,000. Accordingly a loan account to J. was opened while notes for Rs. 52,000 were debited to account No. 1 and credited to advance account to J. In August J. wrote to the Bank to sell the Notes for Rs. 52,000. The Notes were sold accordingly, the loan account was closed and the balance was transferred to No. 1 current account. F. attained majority on 25th October 1913, and filed this suit against the Bank on 18th October 1918, praying that the Bank might be ordered to make good to him the sale-proceeds of Government paper standing to the credit of account No. 1 together with interest. He submitted that the Bank had notice, actual or constructive, of the trust, that the loan account was commenced 9 years from the date of deposit, that the Bank must have known that the loan was required by J. for his own purposes, that from the lapse of time and other circumstances the Bank was put on enquiry which would have disclosed to them the fact that J. drew the money out of the trust fund for himself, that the Bank had either knowledge or reasonable suspicion that the said G P. Notes were applied by J. in breach of trust and that Bank derived benefit from the breach;

Held, (1) that on the face of it the Bank was entitled to advance money to J. as executor on securities deposited by him as executor and there would be nothing wrong in their acting on his instructions as executor to sell the securities and credit the loan account with a sum sufficient to square it;

(2) that if it were assumed that J. deposited the Rs 52,000 to meet the plaintiff's legacy and thereby became a trustee of it and pledged it to secure an advance to himself personally or as executor and the Bank sold the paper to re-pay the advance, only then the question would arise whether the Bank had notice of the trust. But there was nothing to support this view of the case;

(3) that even assuming this view of the case to be right the Bank had no actual notice of the trust;

(4) that the Bank had no constructive notice of the trust, for the mere fact of an account being continued and the investment account having a corresponding current account and this being continued for 9 years would not necessarily put the Bank on enquiry;

(5) that if there was merely a pledge of the securities, then if J. had no title to them as executor and the Bank in good faith delivered them back to him, or according to his instructions, under s. 66 of the Contract Act the Bank would not be responsible to the owners in respect of such delivery;

(6 that assuming everything against the Bank the suit was either one for conversion, or for money had and received to the plaintiff's use, to which Arts. 48 and 62 of the Limitation Act would apply. Consequently it was barred by three years' rule of limitation. **B** BANK OF BOMBAY *v.* FAZULBHOY EBRAHIM, 24 BOM. L. R. 513 **761**

Trustee, *claiming adversely—Burden of proof.*

The burden lies upon the trustee to establish when he became faithless to the trust imposed upon him and asserted a hostile title in himself to the knowledge of the rightful owner. **C** JAGANNATH MARWARI *v.* CHANDNI BIBI, 24 C. L. J. 432; 26 C. W. N. 65 **31**

Trusts Act (II of 1882), s. 77 (c)—*Land given for public purpose—Trust—Public purpose, failure of—Trust, extinction of—Land, whether recoverable by donor.*

Plaintiff gave a plot of land to a District Board for the purpose of being used as a connecting road to a public garden planted by the District Board; finding that the garden was not a success, the District Board sold the land on which it was planted to a third person, whereupon the plaintiff brought the present suit to recover the land given by him:

Held, that the land was held by the District Board as a trustee for the public and when the fulfilment of the purpose for which the land was given became impossible, the trust was then extinguished under section 77 *(c)* of the Trusts Act, and on the extinction of the trust the owner of the land was entitled to recover it. **L** GELA RAM *v.* DISTRICT BOARD, MUZAFFARGARH, 4 U. P. L. R. (L.) 79 **434**

U. P. Municipalities Act (II of 1916), s. 185—*Infringement of sanction—Alterations in size or number of doors.*

The mere raising of the plinth or making alterations in the size, position and number of the doors or windows of a house are not material alterations in the original plan, and consequently do not constitute an infringement of the sanction within the meaning of section 185 of the U. P. Municipalities Act. **O** EMPEROR *v.* BABU RAM, 25 O. C. 1; 43 CR. L. J. 476 **828**

Vatan—*Gudgudi village — Deshpande's lands—* Palkhi Inam *to* vatandar—*Appanage of* vatan—*Village grant—Presumption of occupancy right—* Inam *and other grants—Presumption—*Vatan Inam, *nature of, how determined.*

The lands in the village of Gudgudi held by the Deshpandes are *vatan* and not ordinary *inams.*

Per *Macleod, J.*—A village granted by a Native Ruler before the British Rule to a *vatandar* to pay his *palkhi* expenses is an appanage of the *vatan.*

A grant of a village by or on behalf of the Crown under the British rule is in law to be presumed to be subject to such rights of occupancy, if any, as the cultivators at the time of the grant may have had.

Per *Shah, J*—*Inam* and other grants imply a grant of the royal share of the revenue and not necessarily the soil unless words suitable to indicate a grant of the soil are used in the document evidencing the grant.

In determining the nature of the Vatan *Inam* regard should be had to the terms of the Sanad and the nature of the settlement under which the Sanad was issued.

A Palkhi allowance, which is made in favour of the original grantee by a Native Ruler might not necessarily be part o the remuneration of the office held by the grantee. But it is also possible that it

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might be an appanage of the office and as such would go with the office. **B** TUNGABAI GOPAL DESAI *v.* KRISHNAJI RAMCHANDRA DESHPANDE, 24 BOM. L. R. 252; 46 B. 741 **215**

Vendor and purchaser—*Agreement to re-convey property—Specific performance—Tender.*

A suit based on an agreement to re-convey on re-payment of consideration the property, which the defendant had purchased from the plaintiff, is really a suit for specific performance. To such a case the strict law of tender is not applicable, and, therefore, an unconditional tender of consideration is not necessary to support the claim. **B** TRIBHOVANDAS VARJIVANDAS *v.* BALMUKANDAS KISHOREDAS, 24 BOM. L. R. 434 **865**

——— *Default by purchaser—Deposit, retention of by vendor.*

Where a contract goes off by default of the purchaser, the vendor is entitled to retain the deposit.

In this case the vendor was allowed to retain a deposit which amounted to Rs. 240 out of the total price fixed of Rs. 300. **N** MANGULAL *v.* NANHI **806**

Will, *interpretation of—Construction of document—Absolute estate—Restraint on alienation—Hindu testator—Bequest opposed to Hindu Law.*

If in a Will there is an absolute bequest, a restriction as to alienation will fail to have effect.

Where an absolute interest in the entire property of the testator is given to the legatee before the testator starts in the Will to impose conditions, one of which is to the effect that none of the testator's successors will have a right to transfer the property and that the owner of the time who transfers any property will be liable to be removed from ownership by the next successor, the legatee takes an absolute estate under the Will.

Intention of a testator which contravenes any recognised rules of Hindu Law will not be given effect to by a Court of Law. **O** MANNI LAL *v.* RAJA PARTAB BAHADUR SINGH, 9 O. L. J. 19 **8**

Witness, *travelling expenses of—Unsuccessful party if liable.*

The successful party in a litigation is entitled as against the unsuccessful party, against whom costs are awarded, to recover all proper expenses, including travelling expenses, incurred by summons of witnesses. **C** HARA SUNDAR MAJUMDAR *v.* LAHARAR SINGH **277**

Witnesses, *credibility of—Shifty witnesses—Demeanour in witness-box—Trial Judge's impressions.*

The statement of a shifty witness that he was not at a given place, is not of itself proof that he was.

When a Trial Judge disbelieves witnesses on grounds connected with their demeanour in the witness-box and the impression they produced upon him, effect should, in the absence of anything to the contrary, be given to the view formed of the witnesses by the only Judge who saw and heard them. **P C** EAST INDIAN RY. CO. *v.* KIRKWOOD, 15 L. W. 248; 48 C. 757 **921**

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